Vol. I.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 295.

CHARLES D. NEWTON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND ALFRED M. BARRETT, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT, APPELLANTS,

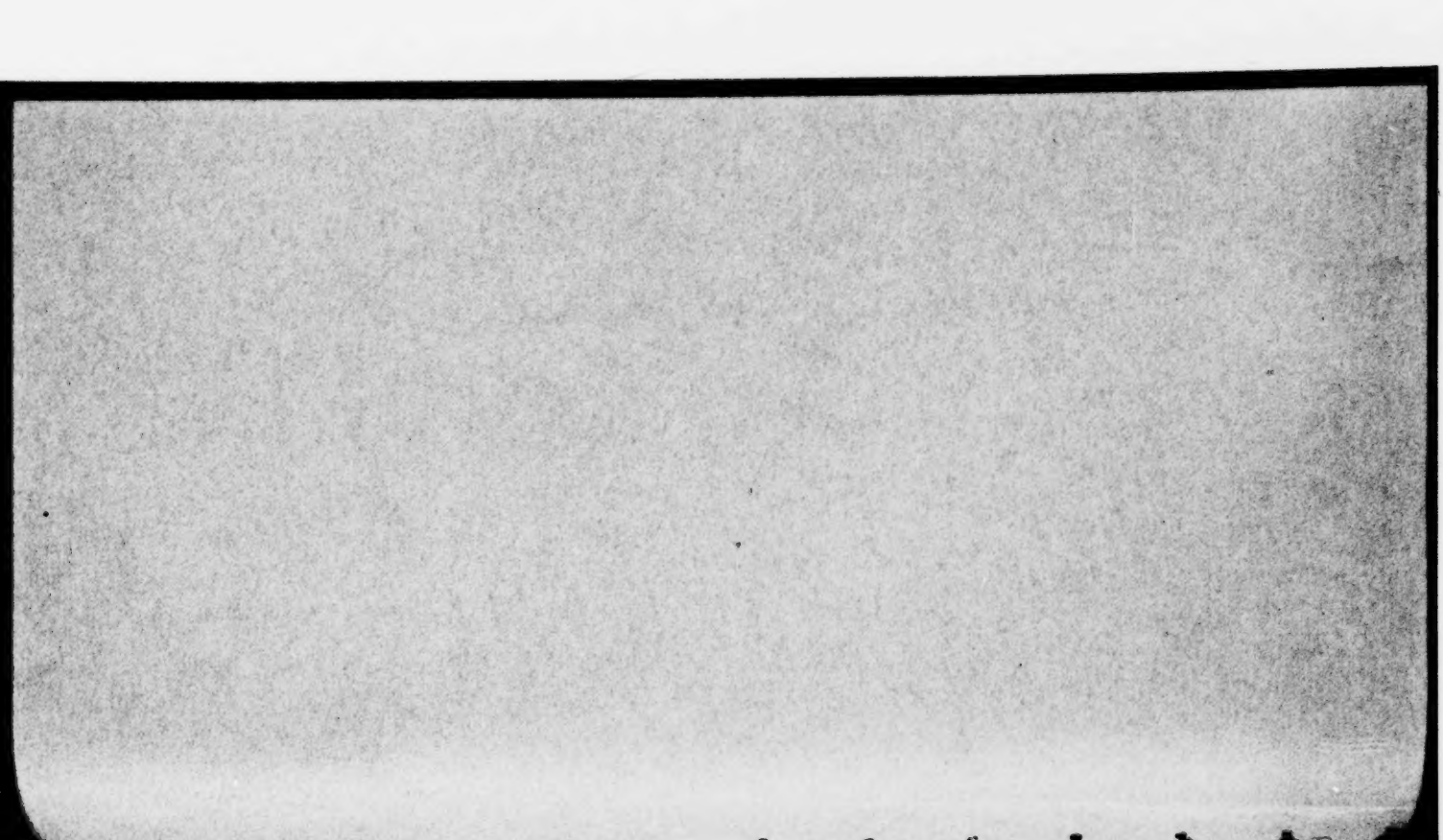
vs.

THE KINGS COUNTY LIGHTING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 11, 1921.

(28,224)



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Judgment roll in action of Kings County Lighting Company *vs.* Egbert E. Woodbury *et al.* in supreme court New York County. This exhibit was introduced by defendant and received in evidence, but not marked with an exhibit number..	2009	1105

1 In the District Court of the United States for the Southern District of New York.

In Equity.

No. E. 18-97.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

LEWIS NIXON, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, Defendants.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

Kings County Lighting Company, a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the Borough of Brooklyn, City and State of New York, brings this its complaint against Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, Charles D. Newton, as Attorney General of the State of New York and Harry E. Lewis, as District Attorney of the County of Kings, and thereupon plaintiff alleges:

I. Plaintiff was duly incorporated on the 26th day of May, 1904, under the Transportation Corporations Law of the State of New York, and since July 1st, 1904, has been and still is engaged in the business of manufacturing and distributing gas for public and private use in the territory now comprising the 30th Ward and a small part of the 31st Ward of the Borough of Brooklyn, City and State of New York.

II. The Kings County Gas and Illuminating Company was incorporated December 17th, 1889, under and pursuant to
2 Chapter 40 of the Laws of 1848 and the several acts amendatory thereof and supplementary thereto, and on or about December 26th, 1889, received the consent of the municipal authorities of the Town of New Utrecht, Kings County, to lay conductors for conducting gas through the streets, lanes, alleys and squares in said Town. Said Kings County Gas and Illuminating Company commenced supplying gas for public and private use in the Town of New Utrecht, Kings County, on or about September 1st, 1891, and continued to supply the same until its merger with the plaintiff as hereinafter shown. Pursuant to the provisions of Chapter 451 of the Laws of 1894 the territory comprising the Town of New Utrecht on July 1st, 1894, was added to the City of Brooklyn as the 30th Ward thereof, and now is, and since January 1st, 1898, has

been the 30th Ward of the Borough of Brooklyn in the City of New York. Upon such annexation, July 1st, 1894, the Kings County Gas and Illuminating Company became subject to the provisions of Section 70 of Chapter 566 of the Laws of 1890, fixing $1.25 per 1,000 cubic feet as the maximum price for gas in cities of the first class.

III. On July 1st, 1904, plaintiff then being the owner of all the issued and outstanding capital stock of the Kings County Gas and Illuminating Company, duly merged into and with itself said Kings County Gas and Illuminating Company in accordance with the provisions of the Stock Corporation Law of the State of New York, and thereupon acquired and became and since has been possessed of all the estate, property, rights, privileges and franchises thereof. Since July 1st, 1904, plaintiff has been engaged in the business of manufacturing and supplying gas in said territory for public and private use and for that purpose owns and maintains a plant for the manufacture and distribution of carburetted water gas.

3 IV. Plaintiff owns a valuable piece or parcel of land bounded on the east by First Avenue, on the north by the center line of 54th Street extended, on the west by New York Bay, and on the south by the center line of 55th Street extended, in the Borough of Brooklyn, on which is located its manufacturing works equipped for the manufacture of carburetted water gas and having a rated capacity of 9,600,000 cubic feet of gas per day and a maximum working capacity of 7,100,000 cubic feet per day. Plaintiff also is the owner of another valuable piece or parcel of land at 9th Avenue and 65th Street, in the Borough of Brooklyn, on which are located its shops and its gas holders having a storage capacity of 2,500,000 cubic feet of gas, which are connected with its manufacturing works by a 20-inch high pressure transmission main one and one-half miles in length. Plaintiff has approximately 200 miles of gas mains laid in the streets, avenues and public places of said 30th and 31st Wards, and has installed on the premises of consumers 38,543 meters, connected with its mains by 20,288 service pipes. Its said mains are also connected with 3,549 street lamps, maintained by the City of New York, through which it furnishes gas for street lighting.

V. The territory served by plaintiff is entirely a suburban community still in the process of development for residential purposes, with a present population of approximately 250,000. Due to the constant growth and development of said territory and the more extended use of gas for domestic purposes there has been an increase from year to year in the consumption of gas furnished by the plaintiff, which requires plaintiff to increase its manufacturing facilities, extend its mains for the distribution of gas and install additional services and meters each year. The annual consumption of gas by the private consumers of the plaintiff has increased over 60%

4 in the past five years. In the year 1915 plaintiff had 28,925 private consumers who used 765,691,400 cubic feet; in 1916, 31,182 private consumers who used 852,302,000 cubic feet; in 1917, 34,835 private consumers who used 977,119,372 cubic feet; in 1918,

36,308 private consumers who used 1,179,101,600 cubic feet, and in 1919, 37,881 private consumers who used 1,226,312,500 cubic feet.

VI. Prior to September 2nd, 1916, plaintiff furnished the gas and maintained the street lamps for lighting the streets of the 30th Ward under the provisions of two contracts dated respectively December 26th, 1889, and March 19th, 1891, made between the Kings County Gas and Illuminating Company and the Board of Improvement of the former Town of New Utrecht, which terminated September 2nd, 1916. Since September 2nd, 1916, plaintiff has supplied gas to the City of New York for street lighting at the price of 75 cents per 1,000 cubic feet, as fixed by Chapter 736 of the Laws of 1905. Plaintiff also supplies gas to the City of New York for use in municipal buildings at the rate of 75 cents per 1,000 cubic feet, likewise fixed by said statute. The amount of gas supplied to the City of New York is less than 5% of plaintiff's total sales. The sales to the City of New York for street lighting and municipal buildings in the year 1917 were 70,300,130 cubic feet; in 1918 53,743,336 cubic feet, and in 1919 53,532,611 cubic feet.

VII. On information and belief, the present fair value of plaintiff's plant and property used in the public service exceeds the sum of $5,000,000, exclusive of going value; that the going value of such plant with upwards of 38,000 consumers using annually upwards of 1,250,000,000 cubic feet of gas, is not less than $1,000,000. At the time of the merger by plaintiff of the Kings County Gas and Illuminating Company on July 1st, 1901, as aforesaid, the said Kings County Gas and Illuminating Company owned the real estate hereinbefore described, had a manufacturing works and distributing system supplying approximately 5,000 private consumers, and was lighting the streets and highways of the 30th Ward under the aforesaid contracts made between it and the Board of Improvement of the former Town of New Utrecht. Since July 1st, 1904, plaintiff has expended for additions, extensions and improvements to the said plant and property the sum of $1,847,322.66. The extensions and additions made in the year 1916 cost the plaintiff $78,160.71; in the year 1917 $663,849.65; in the year 1918 $144,944.56, and in the year 1919 $222,620.52. Plaintiff's said plant and property was assessed on the annual assessment rolls of the City of New York for the year 1919, at the sum of $3,729,500, and for the year 1920 at the sum of $3,711,500.

VIII. Plaintiff has issued and outstanding $2,000,000 of capital stock, divided into 20,000 shares of the par value of $100 each. It has issued and outstanding in the hands of the public $750,000 of first mortgage 5% bonds, due October 1, 1940, secured by a mortgage made by Kings County Gas and Illuminating Company to the Peoples Trust Company of Brooklyn, as Trustee, dated October 1, 1890, and $2,425,000 of first refunding mortgage 5% bonds, due July 1st, 1951, secured by its mortgage to the Central Union Trust Company of New York, as Trustee, dated July 1st, 1901. $1,095,000 of said first refunding mortgage bonds, which have been issued since July 1st, 1907, were so issued under the authority and consent of

the Public Service Commission of the State of New York for the First District, in accordance with Section 69 of the Public
6 Service Commission Law, being Chapter 48 of the Consolidated Laws. In addition to the aforesaid mortgage bonds the Public Service Commission has likewise authorized the issue of $675,000 of said first and refunding mortgage bonds to reimburse plaintiff for expenditures already made for additions and extensions to its said plant and property, but plaintiff has been unable to market said $675,000 of bonds or any part thereof.

IX. At all times since January 1st, 1918, it has cost the plaintiff more than 80 cents per 1,000 cubic feet to manufacture and distribute gas without any return upon the capital employed in the service. In the calendar year 1918 there were consumed by plaintiff's private consumers 1,179,104,600 cubic feet of gas, and by the City of New York in municipal buildings and street lamps 53,843,336 cubic feet. The revenue from such sales to private consumers at 80 cents per 1,000 cubic feet amounted to $942,623.11 and from the sales to the City for municipal and street lighting at 75 cents per 1,000 cubic feet amounted to $40,207.64, or a total revenue from sales of gas of $982,830.75. The actual cost to the plaintiff of manufacturing and distributing the gas sold as aforesaid to private consumers and the City of New York in the calendar year 1918 was $1,000,113, or a cost of $1.11 cents per 1,000 cubic feet, such cost not including any amount whatsoever for return upon capital either in the form of interest or dividends. In the said year plaintiff derived revenue from miscellaneous sources, including the profit from the sale of gas-consuming appliances, amounting to $18,044.16, making the total revenue from all sources $1,000,874.81 or $761.80 more than the cost of manufacturing and distributing the gas.

7 X. An act of the Legislature of the State of New York, approved by the Governor of said State April 3rd, 1906, and taking effect May 1st, 1906, being Chapter 125 of the Laws of 1906, entitled

"An Act in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers other than said City, and providing a penalty for violation,"

provided that a corporation engaged in the business of manufacturing, furnishing or selling illuminating gas in the territory served by the plaintiff, shall not charge or receive for gas manufactured, furnished or sold a sum per one thousand cubic feet in excess of one dollar, and further provided that any corporation violating the act shall forfeit the sum of one thousand dollars for each offense to the People of the State. Plaintiff on July 1st, 1911, reduced its charge for gas to private consumers from $1 to 95 cents per 1,000 cubic feet. An act of the Legislature of the State of New York, approved by the Governor of said State May 19, 1916, taking effect July 1st, 1916, being Chapter 601 of the Laws of 1916, amending said Chapter 125 of the Laws of 1906, entitled

"An Act to amend Chapter one hundred and twenty-five of the laws of nineteen hundred and six entitled 'An Act in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers other than said City, and providing a penalty for violation' in relation to the price of gas to consumers of such city."

provides that a corporation engaged in the business of manufacturing, furnishing or selling illuminating gas in the territory served by plaintiff, shall not charge or receive for gas manufactured, furnished or sold therein a sum per one thousand cubic feet in excess of eighty cents, and subjects a corporation violating any provision of the amended act to the penalty of $1,000 for each offense, to be recovered by the People of the State.

8 XI. The rate of 80 cents per 1,000 cubic feet prescribed by said Chapter 601 of the Laws of 1916 is unreasonable and confiscatory, and the enforcement of said statute against plaintiff would deprive it of its property without due process of law. The said Act is in violation of Section 10 of Article 1 of the Constitution of the United States, in that it impairs the obligation of plaintiff's contractual rights, and is also in violation of the Fourteenth Amendment to the Constitution of the United States, in that the enforcement thereof would deprive plaintiff of its property without due process of law and deny to it the equal protection of the law.

XII. In the calendar year 1919 there were consumed by plaintiff's private customers 1,226,312,600 cubic feet of gas, and by the City of New York, in municipal buildings and street lamps, 53,532,-611 cubic feet. The revenue from such sales to private consumers at 80 cents per 1,000 cubic feet amounted to $980,804.76, and from the sales to the City for municipal and street lighting, at 75 cents per 1,000 cubic feet, amounted to $40,146.95, or a total revenue from the sale of gas of $1,020,951.71. The actual cost to the plaintiff of manufacturing and distributing the gas sold as aforesaid to private consumers and the City of New York in the calendar year 1919, was $1,100,856.86, or a cost of 86 cents per 1,000 cubic feet, such cost not including any amount whatsoever for return upon capital, either in form of interest or dividends. The cost of manufacturing and distributing the gas sold in 1919 exceeded the revenue at the 80-cent rate to private consumers and the 75-cent rate to the City of New York by $79,905.15. In the said year plaintiff derived revenue from miscellaneous sources, including the profit from the sale of gas-consuming appliances, amounting to $22,871.39.

9 The result of plaintiff's operations in the year of 1919 was, therefore, a net deficit, at the rates aforesaid, of $57,033.76, or 4.45 cents for every 1,000 cubic feet of gas sold. The operating expenses aforesaid include the cost of materials, supplies, labor, and taxes. There is no charge therein for so-called depreciation. The only charge made for wear and tear, over and above the actual expenses for repairs, is one cent per 1,000 cubic feet of gas sold to provide for plant withdrawn from service, aggregating $12,872.46.

Such expenses include no item which is not a proper charge to operation.

XIII. In the three calendar months ended March 31, 1920, plaintiff's sales to private consumers were 108,126,000 cubic feet, and to the City of New York for municipal buildings and street lighting, 16,092,798 cubic feet. The revenue from such sales to private consumers at 80 cents, amounted to $326,350.52, and from the sales to the City of New York, amounted to $12,069.25, or a total revenue from gas sold at the 80 and 75 cent rates, respectively, of $338,429.77. The actual and necessary expenses of the plaintiff to manufacture and distribute the gas sold in said three calendar months ended March 31, 1920, was $387,159.36, or a cost of 91.26 cents per 1,000 cubic feet. In the same period plaintiff derived revenue from miscellaneous sources, including the profit from the sale of gas-consuming appliances, of $1,288.39. The result of plaintiff's operations for said three calendar months was a net deficit of $11,111.20 at the 80 cent rate to private consumers, and 75 cents to the City of New York. The operating expenses for said three calendar months, as aforesaid, include no charge for so-called depreciation. The only charge made for wear and tear over and above the actual expenses for repairs is one cent per 1,000 cubic feet of gas sold to provide for plant withdrawn from service, aggregating in said three calendar months the sum of $1,236.62.

XIV. On information and belief it will cost plaintiff not less than $1.00 per 1,000 cubic feet to manufacture and distribute gas in the calendar year 1920, without any return whatsoever upon capital employed in the service, either in the form of dividends on stock or interest on borrowed money. There has been an increase in the cost of gas oil, coal and all other materials over the amounts paid by the plaintiff therefor in the year 1919, as well as an increase in the cost of labor. In 1919, plaintiff used 5,375,887 gallons of gas oil at an average cost of 6.46 cents per gallon, amounting to $347,177.13. In the period from January 1, 1920 to April 14, 1920, it paid for its gas oil at the rate of 8.08 cents per gallon, and has contracted for gas oil for the balance of the year at the rate of 10 cents per gallon. In 1919, the generator coal used by the plaintiff cost on an average of $8.307 per ton, and its boiler coal $5.031 per ton. Its coal contracts expired April 1, 1920, and it is now purchasing coal at market prices which range more than 50 cents a ton in excess of prices paid for like coal in 1919. On information and belief prices of coal during the remainder of the year will be increased. The aforesaid prices paid and contracted to be paid by plaintiff for oil and coal as aforesaid are and were the best at which plaintiff could purchase said oil and coal at the several times above mentioned, and were the prevailing prices paid by other users similarly situated.

XV. By said Chapter 125 of the Laws of 1906, as amended by said Chapter 601 of the Laws of 1916, the rate of 80 cents per 1,000

cubic feet is prescribed for gas of 22-candle power, as defined
11 in said statute. The gas furnished by plaintiff is used almost exclusively for heating and fuel purposes, and not for illumination. Gas of a heating quality is more serviceable and economical for such purposes than candle power gas. It requires, approximately, 4.8 gallons of gas oil to produce gas of 22 candle power, while a gas of a heating quality containing not less than 585 British thermal units per cubic foot can be made with the use of approximately 3.8 gallons of oil per 1,000 cubic feet of gas sold, or a difference of, approximately, one gallon of oil per 1,000 cubic feet. The revenue from plaintiff's operations has not enabled it to manufacture 22-candle power gas. It has for some time past furnished its consumers gas of a heating quality averaging above 585 British thermal units per cubic foot. The expenses stated aforesaid for the calendar year 1919 and the three months ended March 31, 1920, are the expenses incurred by plaintiff in making a gas of a heating quality. Had it manufactured gas of 22-candle power its expenses in 1919 would have been increased by approximately 6 cents per 1,000 cubic feet, and for the three months ended March 31, 1920, by approximately 8 cents per 1,000 cubic feet. With gas oil at 10 cents per 1,000 cubic feet after April 14, 1920, the cost to plaintiff to manufacture and distribute gas of 22-candle power would be for the calendar year 1920 not less than $1.10 per 1,000 cubic feet without any return on capital.

XVI. In the winter of 1919-20 there was a marked increase in the maximum daily demand upon plaintiff's plant and facilities over that of the previous winter. The greatest quantity of gas sent-out from plaintiff's works in a single day in the winter of 1918-19 was 5,083,000 cubic feet, while in a single day in January 1920,
6,908,000 cubic feet were sent-out, or an increase of over
12 35%, over the maximum day's send-out of the previous winter. The total quantity sent-out from plaintiff's works in the month of January 1919 was 138,907,000 cubic feet, while the send-out for the month of January 1920 was 186,413,000 cubic feet, or an increase of over 34%. The average daily send-out in January 1919 was 4,480,700 cubic feet, and in January 1920, 6,014,000 cubic feet. This increased consumption was brought about in part by an increase in the number of consumers, but principally through the more extended use of gas for heating purposes on account of the high prices of coal and the difficulty of obtaining deliveries of coal for domestic purposes. Due to the increased consumption aforesaid it was necessary to operate plaintiff's plant to the limit of its capacity. The said manufacturing plant is not adequate to supply a like increase in another winter, and additions and extensions must be made to provide therefor, by the installation of additional generating capacity and auxiliary apparatus. Such additions and extensions will cost not less than $800,000 and should be made at once. In addition, the plaintiff should provide additional holder capacity and have the same ready for service by the winter of 1921-22. Such additional holder capacity will require an expenditure of not less than $800,000. Investors are now demanding, and receiving, re-

turns of from 7 to 9 per cent on money invested in public utilities and other enterprises, and plaintiff cannot secure the additional capital needed to make the aforesaid additions and extensions unless it can show earnings enabling it to pay a return of at least 8% on such new capital.

XVII. Through the natural increase in population in the territory served by plaintiff an average of 2,000 customers have been added annually for the last fifteen years. Owing to the present shortage in housing facilities a pronounced impetus has been given to building operations in the said territory. There are now under construction private houses costing many millions of dollars and plaintiff has now unfilled more than 1,300 applications for services at new locations. During the current year the plaintiff will be called upon to furnish gas to more than 3,000 consumers at new locations. Unless plaintiff can secure new capital it will be unable to make the necessary increases in its plant facilities to serve such new customers, and it cannot secure any new capital if it is compelled to supply gas at the rate of 80 cents per 1,000 cubic feet. Plaintiff is and will be unable to render the service demanded of it by the public unless it can charge a sufficient amount for its gas to pay the cost of operation and a return on the capital invested. Plaintiff has been reluctant to accept the applications of new consumers on account of its inability to secure new capital necessary to increase its plant facilities, and such applicants have made complaint to the Public Service Commission. On such complaint the Public Service Commission has issued an order directing the plaintiff to supply gas to all who may apply therefor. There is pending undetermined in the Supreme Court, Kings County, a proceeding instituted by the defendant Public Service Commission under Section 71 of the Public Service Commission Law for a writ of mandamus to compel obedience to its said order and directing the plaintiff to supply gas to all who may apply therefor. As a defense to such proceeding plaintiff has pleaded and will prove its inability to supply gas to or render the service demanded of it by additional customers. The new residences constructed and now in process of construction in the territory served by plaintiff are equipped for the use of gas for cooking, with no provision for the use of any other fuel, as in many of them no flue is installed, which is necessary with the use of any other fuel except gas. Plaintiff is the only corporation supplying gas in the territory and unless plaintiff is able to supply service to such premises they must remain unoccupied and the investment therein remain idle, to the great loss and injury of the owners and investors.

XVIII. Defendant Lewis Nixon constitutes the Public Service Commission of the State of New York for the First District, which includes the City of New York, and the territory served by plaintiff, and is now acting as such Commission, having been duly appointed under and by virtue of the provisions of Chapter 48 of the Consolidated Laws of the State of New York. Said defendant is a

citizen of the State of New York. The principal office and official residence of said defendant, as fixed by said statute, is in the Borough of Manhattan in the City of New York, and said defendant resides in said Borough and City.

XIX. Defendant Charles D. Newton is the Attorney General of the State of New York, and the principal office of said defendant is in the City of Albany, State of New York. Defendant Harry E. Lewis is the District Attorney of the County of Kings, State of New York, and resides in and is a resident of the Borough of Brooklyn, City and State of New York.

XX. Under the statutes of the State of New York the defendant Lewis Nixon may institute suits for mandamus or for injunction against the plaintiff, to prevent the violation of any provision of said Chapters 125 of the Laws of 1906 and 601 of the Laws of 1916, and the defendants Charles D. Newton as Attorney General of the State of New York and Harry E. Lewis as District Attorney of the County of Kings, under said statutes, may prosecute plaintiff for a
15 violation of such statutes, and endeavor to enforce and collect the penalties prescribed for their violation.

XXI. On information and belief, the said statute, Chapter 601 of the Laws of 1916, may not lawfully be enforced against plaintiff on account of the fact that the rate therein prescribed does not provide revenue sufficient to meet the cost of manufacturing and distributing 22-candle power gas or gas of any other useful quality and to pay a fair return upon the fair value of the property employed by plaintiff in the public service. The plaintiff is not under the duty of obedience to said statute.

XXII. Heretofore and in or about the month of July, 1916, plaintiff commenced in the Supreme Court of the State of New York for the County of New York an action to enjoin the enforcement of said Chapter 601 of the Laws of 1916, on the ground that the 80 cent rate prescribed was confiscatory. Said action was duly brought to trial and resulted in a judgment, entered March 29, 1920, dismissing plaintiff's complaint upon the merits without prejudice to the commencement of a new action, if, in the future, after an adequate experimentation under an 80 cent rate plaintiff believes and can prove that the rate is confiscatory as to it. The taking of testimony in said cause was concluded in April 1919, and showed the expense to plaintiff of manufacturing and distributing gas in the years 1916, 1917 and 1918. No finding was made in said cause with respect to the adequacy of the return to plaintiff at the 80 cent rate for the period July 1st, 1916, the effective date of said statute, to December 31st, 1916. The Court after disallowing many of the items in plaintiff's operating expenses for 1917 found that the rate of 80 cents was adequate for that year. The Court expressed
16 the opinion that for the year 1918 there was not an adequate return, but failed to make any finding as to the amount of such return or as to the cost of manufacturing and distributing gas, holding that confiscation could not be predicated upon a single

year's experience. The opinion of the Court was handed down January 27, 1920, and before the decision was signed or judgment entered plaintiff moved to reopen the cause to put in evidence the expense of manufacturing and distributing gas in the calendar year 1919, which was not available at the conclusion of the trial in April 1919. The Court denied the motion, saying in its opinion that "the denial of such motion does not preclude the plaintiff from bringing an action for the years not embraced within the decision of this case". The Court in the aforementioned action has limited its consideration of the effect of the statute to the years 1916, 1917 and 1918. During the pendency of said action an order was made therein under and pursuant to which the plaintiff collected from its private consumers at the rate of 95 cents per 1,000 cubic feet, the difference between such rate and the 80 cent rate being impounded to await the outcome of such action. Plaintiff has appealed from such judgment for the purpose of a determination of its liability to make a refund of the amounts so collected and impounded. The 95 cent rate charged by plaintiff has at no time since January 1st, 1918 furnished a fair return and said 95 cent rate is inadequate. The cost to plaintiff of manufacturing and distributing gas in 1918 averaged 80 cents per 1,000 cubic feet; in 1919 it averaged 86 cents per 1,000 cubic feet and it is now costing plaintiff upwards of $1. per 1,000 cubic feet to manufacture and distribute gas, without any return upon capital. One month's experimentation at an 80 cent rate would totally disable plaintiff from continuing its operations. The revenue at such rate would not pay for the oil, coal and labor necessary to produce and distribute the gas. With its experience at the 95 cent rate plaintiff believes it can establish that not only the 80 cent rate but the 95 cent rate as well are confiscatory, neither at the present time being sufficient to pay for the cost of the manufacture and distribution without any return upon capital. Plaintiff's plant facilities will not provide for a greater consumption of gas than it has supplied during the past year. At the present time its facilities are over-taxed, and since the supplying of gas at 80 cents, or even 95 cents per 1,000 cubic feet results, as appears from actual experience, in a positive loss, any extension of the service, even if possible, would result only in a larger loss and could not result in a profit.

17

XXIII. Plaintiff since July 1st, 1914, has charged and collected and is still charging and collecting from its private consumers at the rate of 95 cents per 1,000 cubic feet. Such rate of 95 cents has been inadequate at all times since January 1st, 1918, and plaintiff is obliged to increase its rate or charge in order to maintain and continue its service. On information and belief, the defendants or some of them will attempt to enforce or have enforced against the plaintiff the said statute if and when plaintiff increases its rate or charge above said 95 cents, unless they are enjoined from enforcing the said statute. Plaintiff has no adequate remedy at law against the enforcement of said Chapter 604 of the Laws of 1916 and the injury and damage to plaintiff from its enforcement is and will be irreparable. Unless the defendants be restrained from enforcing said

statute plaintiff will be subject to a multitude of actions and proceedings brought to secure the enforcement against plaintiff of said statute. The penalties prescribed for its violation are so op-
18 pressive and burdensome and will amount to such a sum in the aggregate as to result in the entire destruction and confiscation of plaintiff's property.

XXIV. The defendants aforenamed are the only officials charged under the statutes and rules of law with the enforcement of said statutes. The amount in controversy herein greatly exceeds the sum of $3,000., exclusive of interest and costs.

Wherefore, plaintiff prays that it be adjudged and decreed, (1) that said Chapter 125 of the Laws of 1906 as amended by said Chapter 604 of the Laws of 1916 is void and unconstitutional because in contravention of Section 10 of Article I and the Fourteenth Amendment to the Constitution of the United States; (2) that the enforcement of said statutes in respect to the rates to be charged for gas supplied by plaintiff be suspended and restrained; (3) that the defendants and each of them, their and each of their successors, assistants, deputies and employees be restrained and enjoined from enforcing the provisions of said Chapter 125 of the Laws of 1906 as amended by said Chapter 604 of the Laws of 1916, or any part thereof, and from instituting, or causing to be instituted any suit, action or proceeding to enforce the said statute or any provision thereof.

And further plaintiff prays that during the pendency of this suit an interlocutory injunction issue suspending and restraining the enforcement of said statute, and for such other, further or different relief as to the Court may seem just and equitable.

And may it please your Honors to grant unto plaintiff a writ of subpœna to issue out of and under the seal of this Court, directed to the said Lewis Nixon, constituting the Public Service Com-
19 mission of the State of New York for the First District, the said Charles D. Newton, as Attorney General of the State of New York and the said Harry E. Lewis as District Attorney of the County of Kings, commanding them and each of them, at a certain time therein to be named and under a certain penalty therein to be limited, to be and appear before this Court there and then to answer unto this complaint and perform and abide by such order and decree in the premises as to this Honorable Court shall seem meet and be required by the principles of equity and good conscience.

INGRAHAM, SHEEHAN & MORAN,
Solicitors for Plaintiff.

Office and Post Office Address: 11 Wall Street, Borough of Manhattan, New York City.

FRANCIS M. SCOTT,
GEO. L. INGRAHAM,
SAMUEL F. MORAN,
Counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Ralph Elsman, being duly sworn, deposes and says, that he is an officer of Kings County Lighting Company, the plaintiff above named, to wit, its Vice-President; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

RALPH ELSMAN.

Subscribed and sworn to before me this 20th day of May, 1920.

JAMES A. BYRNE,
Notary Public.

New York County Clerk's No. 530

20 [Endorsed:] County Clerk No. — Year —. In the District Court of the United States for the Southern District of New York. Kings County Lighting Company, Plaintiff, against Lewis Nixon et al., Defendants. Copy. Complaint. Ingraham, Sheehan & Moran, Solicitors for Plaintiff, 11 Wall Street, Borough of Manhattan, New York City. Service of the within — is admitted this — day of ——, 19—. Attorney for —. Entered in Docket, May 27, 1920. Served May 26, '20. C. A. E. Received Attorney General's Office, May 27, 1920. Refd to —. Ans'd —. File No. —.

21 *Equity Subpœna.*

Mr. Conklin.

The President of the United States of America to Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County Kings, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Kings County Lighting Company and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 24th day of May, in the year one thousand

nine hundred and twenty and of the Independence of the United States of America the one hundred and forty-fourth.

ALEX. GILCHRIST, Jr.,
Clerk.

INGRAHAM, SHEEHAN & MORAN,
Solrs.

The defendants are required to file their answers or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk.

22 I hereby certify, That on the 24th day of May, 1920, at the City of New York, in my district, I personally served the within Subpoena in Equity upon the within-named Defendant Lewis Nixon constituting the Public Service Commission of the State of New York for the First District by exhibiting to him at No. 49 Lafayette Street, New York City, the within original, and at the same time leaving with him a copy thereof.

Dated, May 25th, 1920.

THOMAS McCARTHY,
United States Marshal,
Southern District of New York.

I hereby certify that on the 24th day of May, 1920, at the City of New York, in my district, I served the within Subpoena in Equity upon the within-named Defendant Charles D. Newton as Attorney-General of the State of New York, by exhibiting to Alfred W. Jones as Managing Clerk for the Att'y General as per admission of service endorsed on original Subpoena, the within original, and at the same time leaving with him a copy thereof.

Dated, May 25th, 1920.

THOMAS McCARTHY,
United States Marshal,
Southern District of New York.

I hereby certify, That on the 25th day of May, 1920, at the City of Brooklyn, in my district, I personally served the within Subpoena & Complaint upon the within-named Harry E. Lewis, Dist. Attorney Kings Co., by exhibiting to J. Have, Clerk in Charge, the within original, and at the same time leaving within him a copy thereof.

JAMES M. POWERS,
United States Marshal,
Eastern District of New York.
Per JAMES E. FAY,
Deputy.

Dated May 25th, 1920.

23 District Court of the United States, Southern District of New York.

In Equity.

No. 1897.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

vs.

CHARLES D. NEWTON, as Attorney General of the State of New York; Lewis Nixon, constituting the Public Service Commission for the First District, and Harry E. Lewis, as District Attorney of Kings County, Defendants.

Charles D. Newton, as Attorney General of the State of New York, for an answer to the bill of complaint herein,

I. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "II" of the bill of complaint, except that part of it which alleges that pursuant to the provisions of chapter 151 of the laws of 1901, the territory comprising the Town of Utrecht on July 1, 1894, was added to the City of Brooklyn, as the 30th ward thereof, and now is and since January 1, 1898, has been the 30th ward of the Borough of Brooklyn, City of New York.

II. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "III", except that part which alleges that plaintiff has been engaged in the
24 business of manufacturing and supplying gas in the said territory for public and private use.

III. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "IV" of the bill of complaint.

IV. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "V" of the bill of complaint.

V. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "VI" of the bill of complaint except that part of it which alleges that plaintiff has supplied gas to the city of New York for street lighting at 75c per M cubic feet, as fixed by chapter 736 of the laws of 1905; that plaintiff also supplies gas to the city of New York for use in municipal buildings at the rate of 75c per M cubic feet likewise fixed by said statute.

VI. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "VII" of the bill of complaint.

VII. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "VIII" of the bill of complaint.

VIII. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "IX" of the bill of complaint.

25 IX. Denies upon information and belief the allegation set forth in paragraph "XI" of the bill of complaint.

X. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "XII" of the bill of complaint.

XI. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "XIII" of the bill of complaint.

XII. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "XIV" of the bill of complaint.

XIII. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "XV" of the bill of complaint, except that part which alleges that by chapter 125 of the laws of 1906, as amended by chapter 604 of the laws of 1916, the rate of 80c per M cubic feet for gas is prescribed of twenty-two candle power, as defined in said statute.

XIV. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "XVI" of the bill of complaint.

XV. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "XVII" of the bill of complaint.

XVI. Denies upon information and belief the allegation
26 set forth in paragraph "XXI" of the bill of complaint.

XVII. The said defendant does not admit the construction placed by plaintiff upon the proceedings had in the Supreme Court of the State of New York to enjoin the enforcement of said chapter 604 of the laws of 1916, and refers to the judgment roll in the action the same as if it were herein fully set forth, and as a complete answer to plaintiff's allegation in regard thereto contained in paragraph "XXII" of the bill of complaint, and said defendant denies upon information and belief so much of said allegation which alleges:

"The 95 cent rate charged by plaintiff has at no time since January 1st, 1918, furnished a fair return and said 95 cent rate is inadequate. The cost to plaintiff of manufacturing and distributing gas in 1918 averaged 80 cents per 1,000 cubic feet; in 1919 it averaged 86 cents per 1,000 cubic feet, and it is now costing plaintiff upwards of $1 per 1,000 cubic feet to manufacture and distribute gas, with-

out any return upon capital. One month's experimentation at an 80 cent rate would totally disable plaintiff from continuing its operations. The revenue at such rate would not pay for the oil, coal and labor necessary to produce and distribute the gas. With its experience at 95 cent rate plaintiff believes it can establish that not only the 80 cent rate but the 95 cent rate as well are confiscatory, neither at the present time being sufficient to pay for the cost of manufacture and distribution without any return upon capital. Plaintiff's plant facilities will not provide for a greater consumption of gas than it has supplied during the past year. At the present time its facilities are overtaxed, and since the supplying of gas at 80 cents, or even 95 cents per 1,000 cubic feet results, as appears from actual experience, in a positive loss, any extension of the service, even if possible, would result only in a larger loss and could not result in a profit."

27 And the said defendant alleges that the judgment filed in said action referred to in paragraph "XXII" of the bill of complaint is a bar to the present action and determined the matters in controversy here adversely to the complainant in that suit, and for that reason this court has no jurisdiction of the subject-matter or the parties.

XVIII. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "XXIII" of the bill of complaint.

XIX. Denies any knowledge or information thereof sufficient to form a belief as to the allegation set forth in paragraph "XXIV" of the bill of complaint, except said defendant admits that it is the duty of the defendants in this action to enforce the said chapter 125 of the laws of 1906 as amended by said chapter 604 of the laws of 1916.

XX. Upon information and belief defendant alleges that the rate provided for in said chapter 125 of the laws of 1906, as amended by said chapter 604 of the laws of 1916, is reasonable and not confiscatory, and does not deprive plaintiff of its property without due process of law, and does not deny it the equal protection of the
28 law, and said defendant denies that said act is in violation of section 10 of article I of the Constitution of the United States, and denies that said act impairs the obligation of plaintiff's contractual rights.

XXI. Upon information and belief said defendant denies that the rate fixed by said chapter 125 of the laws of 1906, as amended by chapter 604 of the laws of 1916, referred to in the bill of complaint is unreasonable and unjust and cannot be continued in effect without irreparable injury to plaintiff or the destruction or denial of its property rights.

XXII. Upon information and belief said defendant alleges that the provisions of chapter 125 of the laws of 1906, as amended by the

laws of 1916, chapter 601, gives a fair and reasonable return to plaintiff on the fair value of its property used in the public service.

XXIII. Upon information and belief that all and every of plaintiff's bill of complaint are matters which may be tried and determined at law or by petition directed to the legislature of the State of New York, and with respect to which said plaintiff is not entitled to relief in a court of equity.

XXIV. Upon information and belief that the city of New York is a necessary party in order to have a complete determination of the issues in this action and should be made a party-defendant for that reason, and that the bill of complaint is defective for
29 failure to make the city a party-defendant.

XXV. Upon information and belief that in order to properly determine whether the rate or rates fixed by said chapter 125 of the laws of 1906, as amended by chapter 601 of the laws of 1916, afford plaintiff a fair return upon the fair value of its property, it is necessary for the court to take an average return covering the period of time during which said statute has been in force and effect, and any other period short of that would be unfair, improper and not a proper basis for determining the issues in this case.

XXVI. Upon information and belief that the prices for labor and materials which go into the cost of making gas in the years 1918, 1919, and 1920 were abnormal and unusual and not a fair criterion of the cost of such labor and materials and not a fair basis upon which to determine whether the said statute afforded a fair return upon the fair value of its property used in the public service.

XXVII. Upon information and belief plaintiff has failed to comply with the provisions of said chapter 125 of the laws of 1906, as amended by chapter 601 of the laws of 1916, and, among other things, failed to furnish its consumers gas having an illuminating power of not less than twenty-two candles of six to a pound burning at the rate of 120 grains of spermaceti per hour, measuring one mile from the distributing holder by a burner consuming five cubic feet of gas per hour.

30 XXVIII. Upon information and belief that the judgment entered in an action brought in the Supreme Court of the State of New York by complainant against the Attorney-General of the State of New York, entitled:

"New York Supreme Court, Appellate Division, First Department.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

vs.

EGBERT E. WOODBURY, Attorney-General of the State of New York; Harry E. Lewis, District Attorney for the County of Kings; Oscar S. Straus, Harry W. Hodge, William Hayward, Travis H. Whit-

ney, Charles S. Hervey, Composing the Public Service Commission for the First District of the State of New York, and the City of New York, Defendants."

which action affected the same subject-matter and was between the same parties as here, with the exception of the City of New York, and which judgment was entered in the office of the clerk of the county of New York, on or about the 29th day of March, 1920, and the proceedings taken by plaintiff in said action subsequent to the entry of said judgment are a complete bar to this action, and all matters alleged by plaintiff in its bill of complaint are res adjudicata by reason thereof, and this court is without jurisdiction of the parties or the subject-matter of the action.

Wherefore, said defendant Newton as Attorney-General of the State of New York, prays that the bill of complaint be dis-
31 missed with costs

Dated, June 2, 1920.

CHARLES D. NEWTON,
Attorney-General of the State of New York.

Office & P. O. Address, Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
Solicitor for Defendant Newton.

Office & P. O. Address, Capitol, Albany, N. Y.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Wilber W. Chambers, being duly sworn, says: I am an attorney at law and admitted to practice in this court and am solicitor for the defendant Newton as Attorney-General of the State of New York. I have read the foregoing answer and know the contents thereof and the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters I believe it to be true.

The reason why this verification was not made by the defendant Newton is that he is not now within the Southern District of New York; that the grounds of my belief as to all matters not therein stated upon my knowledge are as follows: Information obtained from the Attorney-General's office, books and records of the Law Department of the City of New York, statements made by the Corporation Counsel of the city of New York and his assistants, and the records of the suit between plaintiff and the Attorney-General and
others referred to in the bill of complaint and in the fore-
32 going answer.

WILBER W. CHAMBERS.

Sworn to before me this 14th day of June, 1920.

ALFRED W. JONES,
Commissioner of Deeds, City of New York.

New York (Clk. 11—Reg. 21020), Kings (Clk. 46—Reg. 1015), Bronx (Clk. 4—Reg. 21004), Queens 3407 and Richmond. Commission expires June 10th, 1921.

33 [Endorsed:] District Court of the U. S., Southern District of N. Y. Kings County Lighting Co., Plaintiff, vs. Charles D. Newton, as Attorney-General, etc., et al., Defendants. E. 18-97. Copy. Answer of Defendant Charles D. Newton. Wilber W. Chambers, Solicitor for defendant Newton, Office & P. O. *Office*, Capitol, Albany, N. Y.

34 District Court of the United States, Southern District of New York.

E. 18-97.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

vs.

LEWIS NIXON, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, Defendants.

Answer of Defendant Nixon.

The above named defendant, Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, by Terence Farley, his solicitor, hereby answers the bill of complaint herein as follows:

I. Answering Paragraph IV of said bill of complaint this defendant admits that plaintiff has its manufacturing works located on land bounded as described in said paragraph, which works are equipped for the manufacture of carburetted water gas and have a rated capacity of 9,600,000 cubic feet of gas per day and a maximum working capacity of 7,400,000 cubic feet per day. This defendant also admits that plaintiff's shops and gas holders having a storage capacity of 2,500,000 cubic feet of gas, are located on land situated at Ninth Avenue and 65th Street in the Borough of Brooklyn. This defendant is without knowledge as to the truth of the other allegations set forth in said Paragraph IV and therefore denies said allegations.

II. Answering Paragraph V of said bill of complaint this defendant admits that there has been an increase from year to year in the consumption of gas furnished by plaintiff which requires the plaintiff to increase its manufacturing facilities, extend its mains for the distribution of gas and install additional services and meters each year. This defendant is without knowledge as to the truth of the other allegations set forth in said Paragraph V and therefore denies said allegations.

35 III. Answering Paragraph VI of the said bill of complaint this defendant is without knowledge as to the truth of the following allegations set forth therein and therefore denies the said allegations:

"The amount of gas supplied to the City of New York is less than 5% of plaintiff's total sales. The sales to the City of New York for street lighting and municipal buildings in the year 1917 were 70,300,130 cubic feet; in 1918, 53,743,336 cubic feet, and in 1919, 53,532,644 cubic feet."

IV. Answering Paragraph VII of the said bill of complaint this defendant denies, upon information and belief, the following allegations set forth in said paragraph:

"On information and belief, the present fair value of plaintiff's plant and property used in the public service exceeds the sum of $5,000,000, exclusive of going value; that the going value of such plant, with upwards of 38,000 consumers using annually upwards of 1,250,000,000 cubic feet of gas, is not less than $1,000,000."

This defendant is without knowledge as to the truth of the other allegations set forth in said Paragraph VII and therefore denies said allegations.

V. Answering Paragraph VIII of said bill of complaint this defendant denies, upon information and belief, that $1,095,000 of its first refunding mortgage bonds, described in said paragraph, which had been issued since July 1, 1907 were so issued under the authority and consent of the Public Service Commission of the State of New York for the First District in accordance with Section 69 of the Public Service Commission's Law, being Chapter 18 of the Consolidated Laws, and this defendant alleges that but $825,000 of said first refunding mortgage bonds have been so issued under the authority and the consent of said Commission. This defendant is without knowledge as to the truth of the allegations that plaintiff has been unable to market $875,000 of first refunding mortgage bonds, the issuance of which was authorized by the Commission to reimburse plaintiff for expenditures already made for additions and extensions to its said plant and property.

VI. Answering Paragraph IX of the said bill of complaint this defendant is without knowledge as to the truth of the allegations set forth in said Paragraph IX and therefore denies the said allegations.

VII. Answering Paragraph XI of the said bill of complaint this defendant denies, upon information and belief, the allega-
36 tions set forth in said paragraph.

VIII. Answering Paragraph XII of the said bill of complaint this defendant is without knowledge as to the truth of the allegations set forth in said Paragraph XII and therefore denies the said allegations.

IX. Answering Paragraph XIII of the said bill of complaint this defendant is without knowledge as to the truth of the allegations set

forth in said Paragraph XIII and therefore denies the said allegations.

X. Answering Paragraph XIV of the said bill of complaint this defendant is without knowledge as to the truth of the allegations set forth in said Paragraph XIV and therefore denies the said allegations.

XI. Answering Paragraph XV of the said bill of complaint this defendant admits the following allegations set forth therein:

"By said Chapter 125 of the Laws of 1906, as amended by said Chapter 601 of the Laws of 1916, the rate of 80 cents per 1,000 cubic feet is prescribed for gas of 22 candle power, as defined in said statute."

This defendant is without knowledge as to the truth of the other allegations set forth in said Paragraph XV and therefore denies the said allegations.

XII. Answering Paragraph XVI of the said bill of complaint this defendant admits that there was a marked increase in the maximum daily demand upon plaintiff's plant and facilities in the winter of 1919-1920 over that of the previous winter; that such increase was due in part to an increase in the number of consumers; that said manufacturing plant is not adequate to supply a like increase in another winter; that addition and extensions must be made to provide therefor by the installation of additional generating capacity and auxiliary apparatus and should be made at once; and that the plaintiff should provide additional holder capacity and have the same ready for service by the winter of 1921-1922. This defendant is without knowledge as to the truth of the other allegations set forth in said Paragraph XVI and therefore denies the said allegations.

XIII. Answering Paragraph XVII of said bill of complaint this defendant admits and alleges that plaintiff has now unfilled
37 applications for services at new locations; but is without knowledge as to the exact number of said applications; that applicants whose applications to plaintiff for service had not been accepted made complaint to the Public Service Commission for the First District; that the Commission made an order on March 13, 1920 directing plaintiff to extend its service to all applicants who have made or who will hereafter make application to the plaintiff for the supply of gas in accordance with Section 62 of the Transportation Corporations Law; and that a proceeding was instituted by said Commission under Section 71 of the Public Service Commission's Law to compel obedience to its said order and directing the plaintiff to extend its services to all applicants who have made or might thereafter make application for a supply of gas. This defendant also admits that in that proceeding plaintiff pleaded as a defense its inability to supply gas to or render the service demanded of it by additional consumers, and that plaintiff is the only corporation supplying gas in the territory served by it. This defendant alleges that in the proceeding, mentioned in said Paragraph XVII,

no order has yet been made therein, although Hon. Herbert T. Ketcham, Official Referee, to whom the matter was referred, stated, on or about June 12, 1920, that he would dismiss the application for a writ of mandamus. Further answering said Paragraph XVII of said bill of complaint, this defendant, except as hereinbefore admitted, is without knowledge as to the truth of the other allegations set forth therein, and therefore denies the said allegations.

XIV. Answering Paragraph XXI of the said bill of complaint, this defendant denies, upon information and belief, the allegations set forth in said paragraph.

XV. Answering the allegations of Paragraph XXII of the said bill of complaint which refer to the prior action of this plaintiff in the Supreme Court of the State of New York and the judgment and other proceedings in connection therewith, this defendant refers to the judgment roll in that action, the same as if it were herein fully set forth and as a complete answer to plaintiff's allegations in regard thereto, set forth in said Paragraph XXII.

38 Further answering the allegations of said Paragraph XXII this defendant denies, upon information and belief, the following allegations contained therein.

"The 95 cent rate charged by plaintiff has at no time since January 1st, 1918 furnished a fair return and said 95 cent rate is inadequate."

This defendant is without knowledge as to the truth of the following allegations set forth in said Paragraph XXII and therefore denies the said allegations:

"The cost to plaintiff of manufacturing and distributing gas in 1918 averaged 80 cents per 1,000 cubic feet; in 1919 it averaged 85 cents per 1,000 cubic feet and it is now costing plaintiff upwards of $1 per 1,000 cubic feet to manufacture and distribute gas, without any return upon capital. One month's experimentation at an 80 cent rate would totally disable plaintiff from continuing its operations. The revenue at such rate would not pay for the oil, coal and labor necessary to produce and distribute the gas. With its experience at the 95 cent rate plaintiff believes it can establish that not only the 80 cent but the 95 cent rate as well are confiscatory, neither at the present time being sufficient to pay for the cost of the manufacture and distribution without any return upon capital. * * * since the supplying of gas at 80 cents, or even 95 cents per 1,000 cubic feet results, as appears from actual experience, in a positive loss, any extension of the service, even if possible, would result only in a larger loss and could not result in a profit."

XVI. Answering Paragraph XXIII of the said bill of complaint this defendant denies, upon information and belief, that the rate of 95 cents per thousand cubic feet has been inadequate at all times since January 1, 1918 and that plaintiff is now obliged to increase its rate or charge in order to continue its service; that plaintiff has no adequate remedy at law against the enforcement of said Chapter

604 of the Laws of 1916 and that the injury and damage to plaintiff from its enforcement is and will be irreparable. This defendant is without knowledge as to the truth of the other allegations set forth in said Paragraph XXIII and therefore denies the same.

XVII. This defendant alleges, upon information and belief, that plaintiff has failed to comply with the provisions of the said Chapter 125 of the Laws of 1906 as amended by Chapter 604 of the Laws of 1916 in that among other things it has failed during the years in which the statutory rate is alleged to have been confiscatory, and to date and prior thereto to furnish its consumers gas having an illuminating power of not less than 22 sperm candles of six to a pound, burning at the rate of 120 grains of spermaceti per
39 hour, tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour.

Wherefore said defendant Nixon, constituting the Public Service Commission of the State of New York for the First District, prays that the bill of complaint herein be dismissed with costs.

TERENCE FARLEY,
Solicitor for Defendant Nixon,
Constituting the Public Service Commission of
the State of New York for the First District.

No. 49 Lafayette Street, Borough of Manhattan, New York City.

40 [Endorsed:] District Court of the United States Southern District of New York. Kings County Lighting Company, Plaintiff, vs. Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, Defendants. Answer of Defendant Nixon. Terence Farley, Solicitor for Defendant Nixon, No. 49 Lafayette Street, Borough of Manhattan, New York City.

41 SIRS:

Please take notice, that an order of which the annexed is a copy, will be submitted to the Hon. John C. Knox, at his Chambers in the Woolworth Building, Borough of Manhattan, New York City, on the 31st day of July, 1920, at 10 o'clock in the forenoon.

Dated, New York, July 29th, 1920.

Yours, etc.,

INGRAHAM, SHEEHAN & MORAN,
Solicitors for Plaintiff.

11 Wall Street, Borough of Manhattan, New York City.

To

Terence Farley, Esq.,
Solicitor for Defendant Nixon.

Hon. Charles D. Newton,
As Attorney General.

42 At a Stated Term of the District Court of the United States for the Southern District of New York Held at the Post Office Building, in the Borough of Manhattan, City, County, and State of New York, on the 31 Day of July, 1920.

Present—Hon. John C. Knox, United States District Judge.

In Equity.

18-97.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

LEWIS NIXON, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, Defendants.

Order Appointing Special Master.

Issue having been joined in this case upon the filing of the answers of the defendants Lewis Nixon, constituting the Public Service Commission and Charles D. Newton, as Attorney General of the State of New York, the defendant Harry E. Lewis, as District Attorney of the County of Kings, having defaulted in pleading to plaintiff's complaint, and the plaintiff having moved upon the affidavit of Samuel F. Moran, verified July 15th, 1920, and upon all of the pleadings and proceedings herein for the appointment of a Special Master, and it appearing that there is no objection thereto on the part of the defendants,

Now, on motion of Messrs. Ingraham, Sheehan & Moran, solicitors for the plaintiff, it is

Ordered,

1. That Gordon Auchincloss, Esq., be and he hereby is
43 appointed Special Master to take all of the testimony and evidence respecting the issues herein, make all needed computations and fully find the facts; but nothing herein contained shall be construed as meaning that the Special Master's findings of fact shall be final but only that he shall find the facts for the purpose of aiding the Court and make his recommendations. The said Master shall before submitting to the Court his final report, prepare and serve on the Solicitors for the respective parties hereto a draft of such report.

2. The said Master shall give due notice to all parties hereto and shall proceed promptly to the hearing of the testimony and evidence in this cause, and shall so far as practicable, continue the hearing of said cause from day to day; and whenever deemed by him to be necessary for the prompt completion of such hearings, he shall hold two session in each day until the completion of the taking of testimony and evidence. The Master shall, however have the power to

grant adjournments to either side whenever necessary in the interest of justice, and either side to have the right from time to time to apply necessary adjournment.

3. The Master shall report to this Court all the testimony and evidence received by him, together with his findings of fact and his recommendations as to the facts and the law with diligence, it being the intent of this order that the report of the Master and exceptions thereto shall come on for hearing at the earliest practicable date.

JOHN C. KNOX,
United States District Judge.

44 [Endorsed:] In Equity. 18-97. County Clerk No. —, Year —. District Court of the United States for the Southern District of New York. Kings County Lighting Company, Plaintiff, against Lewis Nixon, constituting the Public Service Commission, etc., et al., Defendants. Copy. Order with Notice. Ingraham, Sheehan & Moran, Solicitors for Plaintiff. C. D. Newton, Atty. Genl. Copy of within paper received July 29, 1920. Chas. D. Newton, Attorney General.

45 District Court of the United States for the Southern District of New York.

In Equity.

No. 18-97.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

LEWIS NIXON, Constituting the Public Service Commission for the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of Kings County, Defendants.

On the annexed consent of the solicitors for all parties, it is

Ordered that Alfred M. Barrett, now constituting the Public Service Commission of the State of New York for the First District, be and he hereby is substituted as party defendant herein in place and stead of Lewis Nixon, constituting the Public Service Commission of the State of New York, First District, and that this suit be continued against said Alfred M. Barrett as such party defendant herein without prejudice to the proceedings already had herein.

(Sgd.) J. M. MAYER,
U. S. D. J.

46 We hereby consent to the entry of the foregoing order. Dated New York, November 26, 1920.

INGRAHAM, SHEEHAN & MORAN,
Solicitors for Plaintiff.

CHARLES D. NEWTON,
C. R. C.,
Solicitor for Charles D. Newton, Attorney-General.

JOHN P. O'BRIEN,
Solicitor for Harry E. Lewis.

TERENCE FARLEY,
N.,
Solicitor for Alfred M. Barrett, Constituting the Public Service Commission of the State of New York for the First District.

47 [Enclosed] E. 18-97. Index No. —. Year 1920. District Court of the United States for the Southern District of New York. Kings County Lighting Company, Plaintiff, against Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, Charles D. Newton as Attorney-General of the State of New York, and Harry E. Lewis as District Attorney of Kings County, Defendants. Order of Substitution. Terence Farley, Solicitor for Public Service Commission for the First District, No. 49 Lafayette Street, Borough of Manhattan, City of New York. Copy of within paper received Nov. 31, 1920, ——— ———, Attorney General.

Please take notice that an order of which the within is a copy, was this day duly entered in the office of the Clerk of the United States District Court for the Southern District of New York.

Dated New York, November 29, 1920.

Yours, etc.,

TERENCE FARLEY,
Counsel to the Public Service Commission of the State of New York for the First District.

No. 49 Lafayette Street, Borough of Manhattan, City of New York.

To:
Ingraham, Sheehan & Moran,
Solicitors for Complainant.
John P. O'Brien,
Solicitor for Defendant Lewis.
Charles D. Newton,
Solicitor for Attorney-General Charles D. Newton.

18 District Court of the United States, Southern District of New York.

In Equity.

No. 18-97.

KINGS COUNTY LIGHTING COMPANY, Complainant,

against

LEWIS NIXON, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, Defendants.

Report and Opinion of the Special Master.

Gordon Auchincloss, Special Master.

19 District Court of the United States, Southern District of New York.

In Equity.

No. 18-97.

KINGS COUNTY LIGHTING COMPANY, Complainant,

against

LEWIS NIXON, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, Defendants.

Report of the Special Master.

To the Honorable Judges of the said Court:

I, the undersigned Special Master appointed by Honorable John C. Knox, District Judge, by order dated the 31st day of July, 1920, "to take all of the testimony and evidence with respect to the issues herein, make all needed computations and fully find the facts, and * * * report to this Court all the testimony and evidence received by him, together with his findings of fact and his recommendations as to the facts and the law," do hereby respectfully report: that having been attended by counsel as below stated, I proceeded to take the proofs submitted by the several parties and
50 to hear arguments thereon, the proofs so taken consisting of three volumes of typewritten testimony, pages 1 to 1752, which are herewith submitted and filed, together with a stipulation signed by the various solicitors of record waiving the signatures of

the various witnesses to their several depositions and further waiving the filing of the original exhibits marked in evidence. As many of the exhibits consist of large volumes of account books of the complainant, some of which are in daily use at the present time by the complainant, the question of filing copies of all of the original exhibits with the Court will require a further order.

There appeared before me as counsel the following:

For complainant: Messrs. Ingraham, Sheehan & Moran, Solicitors for Complainant, by Samuel F. Moran, Esq., of Counsel.

For the defendant Newton, Attorney General of the State of New York: Messrs. Wilbur W. Chambers, Deputy Attorney General of the State of New York, Clarence R. Cummings, and James P. Hill, of Counsel.

For the defendant Nixon, constituting the Public Service Commission of the State of New York for the First District: Terence Farley, Esq., Solicitor. Messrs. William S. Jackson, Ely Neuman, and Edward M. Deegan of Counsel.

The defendant Lewis defaulted in pleading to complainant's complaint and consequently was in no way represented at the hearings.

51 Upon the proofs so taken, I find and report as follows:

1. The complainant Kings County Lighting Company was incorporated on the 26th day of May, 1904, under the Transportation Corporations Law of the State of New York and since July 1, 1904 has been and still is engaged in the business of manufacturing and distributing gas for public and private use in the territory now comprising the 30th Ward and a small part of the 31st Ward of the Borough of Brooklyn, City and State of New York.

2. The Kings County Gas & Illuminating Company was incorporated December 17, 1889 under and pursuant to Chapter 40 of the Laws of 1848 and the several Acts amendatory thereof and supplementary thereto and on or about December 28, 1889 received the consent of the municipal authorities of the Town of New Utrecht, Kings County, to lay conductors for conducting gas through the streets, lanes, alleys, and squares of the said Town. Said Kings County Gas & Illuminating Company commenced supplying gas for public and private use in the Town of New Utrecht, Kings County, on or about September 1, 1891 and continued to supply the same until its merger with the complainant. Pursuant to the provisions of Chapter 451 of the Laws of 1894, the territory comprising the Town of New Utrecht on July 1, 1894 was added to the City of Brooklyn as the 30th Ward thereof, and now is and since January 1, 1898 has been the 30th Ward of the Borough of Brooklyn in the City of New York. Upon such annexation the Kings County Gas & Illuminating Company became subject to the provisions of Section 79 of Chapter 566 of the Laws of 1890, fixing $1.25
52 per 1,000 cubic feet as the maximum price for gas in cities of the first class.

3. Since July 1, 1904 complainant has been possessed of all the estate, property rights, privileges and franchises belonging to or

owned by the Kings County Gas & Illuminating Company, and since said date complainant has been engaged in the business of manufacturing and supplying gas in said territory for public and private use and for that purpose owns and maintains a plant for the manufacture and distribution of carburetted water gas.

4. Complainant owns the piece or parcel of land bounded on the east by First Avenue, on the north by the Center Line of Fifty-fourth Street extended, on the west by New York Bay, and on the south by the Center Line of Fifty-fifth Street extended, in the Borough of Brooklyn, on which is located its manufacturing works equipped for the manufacture of carburretted water gas, with five gas making machines whose rated capacity is 9,600,000 cubic feet of gas per day. It is customary in efficiently operated companies manufacturing the same kind of gas as that manufactured by the complainant to estimate actual working capacity as the rated capacity less the capacity of the largest machine. This is done because efficient management requires the constant repairing of machines, necessitating their withdrawal from use from time to time. That during the period of greatest stress, from the middle of December to the middle of February, the common practice of plants in this section is not to keep the largest machine down nor to keep any machine down, but to run the plant substantially at its rated capacity. Accord-
53 ingly, the actual working capacity under normal operating conditions of the machines of the complainant is about 7,100,000 cubic feet per day. During the winter of 1919-1920, the greatest send-out of gas during any 24 hours was not more than 6,900,000 cubic feet.

5. Complainant is the owner of a piece or parcel of land at Ninth Avenue and Sixty-fifth Street in the Borough of Brooklyn on which are located its shops and gas holders. Said holders have a storage capacity of 2,500,000 cubic feet of gas. They are connected with complainant's manufacturing works by a 20 inch high pressure transmission main one and a half miles in length.

6. Complainant has approximately 200 miles of gas mains laid in the streets, avenues and public places of said 30th and 31st Wards, Borough of Brooklyn, and had on July 1, 1920, installed on the premises of consumers 38,956 meters connected with its mains by approximately 20,200 service pipes. Complainant's mains are also connected with approximately 3,500 street lamps maintained by the City of New York through which complainant furnished gas for street lighting.

7. The territory served by complainant is a suburban community still in the process of development for residential purposes with a present population of approximately 250,000. Due to the constant growth and development of the said territory and the more extended use of gas, there has been a steady increase from 1915 to 1920 in the consumption of gas furnished by the complainant requiring complainant to increase its manufacturing and distribution facilities and

to install additional services and meters each year. The
54 increase in consumption of gas since 1915 and up to July, 1920, has been over 100%. In the year 1915 complainant had 28,925 consumers who used 765,691,100 cubic feet of gas; in 1916 complainant had 31,182 consumers who used 852,302,000 cubic feet of gas; in 1917 complainant had 34,835 consumers who used 977,119,372 cubic feet of gas; in 1918 complainant had 36,308 consumers who used 1,179,104,600 cubic feet of gas; in 1919 complainant had 37,884 consumers who used 1,226,312,600 cubic feet of gas, and in the six months ending June 30, 1920, complainant had approximately 38,956 consumers who used 778,181,200 cubic feet of gas.

8. Prior to September 2, 1916, complainant furnished the gas and maintained the street lamps for lighting the streets of the 30th Ward under the provisions of two contracts, dated respectively December 28, 1889, and March 19, 1891, made between the Kings County Gas & Illuminating Company and The Board of Improvement of the Town of New Utrecht, which contracts terminated September 2, 1916. Since September 2, 1916, complainant has supplied gas to the City of New York for street lighting at the price of 75 cents per 1,000 cubic feet as fixed by Chapter 736 of the Laws of 1905. Complainant also supplies gas to the City of New York for use in municipal buildings at the rate of 75 cents per 1,000 cubic feet, likewise fixed by said statute. The amount of gas supplied to the City of New York during the year 1919 and the first six months of 1920 is less than 5% of complainant's total sales during those periods. The sales to the City of New York for street lighting and municipal buildings in the year 1919 was 53,532,644 cubic feet and in the six months ended June 30, 1920, was 26,511,568 cubic feet.

55 9. An Act of the Legislature of the State of New York, approved by the Governor of said State April 3, 1906, and taking effect May 1, 1906, being Chapter 125 of the Laws of 1906, entitled:

"An Act in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers other than said City, and providing a penalty for violation"

provides that a corporation engaged in the business of manufacturing, furnishing, or selling illuminating gas in the territory served by the complainant shall not charge or receive for gas manufactured, furnished or sold, a sum per 1,000 cubic feet in excess of one dollar, and further provides:

"The illuminating gas furnished by any such corporation, association, copartnership or person shall have an illuminating power of not less than twenty-two sperm candles of six to a pound burning at the rate of one hundred and twenty grains of spermaceti per hour

tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of illuminating gas in any service mains in the said City at any distance from the place of manufacture shall not be less than one inch nor more than two and one-half inches.

Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to the people of the state."

56 Plaintiff on July 1st, 1914, reduced its charge for gas to private consumers from $1.00 to 95 cents per 1,000 cubic feet. An Act of the Legislature of the State of New York, approved by the Governor of said State May 19th, 1916, taking effect July 1st, 1916, being Chapter 604 of the Laws of 1916, entitled:

"An Act to amend Chapter one hundred and twenty-five of the laws of nineteen hundred and six entitled 'An Act in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers other than said City, and providing a penalty for violation' in relation to the price of gas to consumers of such City."

provides that a corporation engaged in the business of manufacturing, furnishing or selling illuminating gas in the territory served by complainant, shall not charge or receive for gas manufactured, furnished or sold therein a sum per 1,000 cubic feet in excess of eighty cents.

10. The gas supplied by the complainant is used principally for fuel, cooking, water heating, and for illumination by means of the incandescent burner. A small percentage (the exact percentage not appearing in the record) is utilized in the open flame burner. The heating quality of gas is determined by the content of heat units per cubic foot of gas, measured by the British Thermal Unit standard. The illuminating quality of gas is determined by the candle power standard. A high candle power is not essential for illumination by means of the incandescent burner, but it is essential for illumination by means of the open flame burner.

57 11. Since January 1, 1919, the gas manufactured by complainant averaged monthly in British Thermal Units and candle power as follows:

		British thermal units.	Candle power. Tests by city.	Candle power. Tests by company.
1919,	January	581.42	14.96	18.09
	February	589.75	15.16	20.80
	March	591.63	15.14	16.77
	April	587.83	14.11	16.41
	May	590.85	16.97	20.07
	June	592.08	17.96	20.44
	July	584.33	18.05	18.96
	August	588.21	16.29	20.57
	September	594.14	16.34	20.13
	October	596.32	16.57	20.62
	November	591.69	15.57	20.69
	December	600.66	16.12	19.30
Monthly average		590.74	16.10	19.40
1920,	January	595.15	17.72	19.86
	February	591.57	14.81	19.01
	March	595.16	16.06	18.92
	April	593.42	15.66	18.24
	May	559.83	11.64	14.47
	June	524.07	8.04	11.29
Monthly average		576.36	13.99	16.97

Gas of a 22 candle power quality contains 620 British Thermal Units or more per cubic foot of gas.

12. On various days in June, 1920, the candle power of the gas produced by the complainant as tested by the City was as follows:

June 2nd	3.59	June 8th	3.83
" 3rd	4.16	" 16th	7.92
" 4th	4.11	" 17th	6.99
" 5th	3.99	" 18th	6.70
" 7th	3.08	" 19th	5.85

58 Complainant received written notice from the City of New York of the test of its gas made by said City the day after the same was made.

13. The tests above mentioned made by the complainant of the gas for candle power were made at the plant and the above mentioned tests made by the City of the gas for candle power were made about 3¼ miles from the plant and at least one mile from the distributing holder. Candle power tests of gas at the works will vary according to the temperature from tests of the same gas more than one mile from the works. The average of the tests at the works will be higher than the average of the tests made more than a mile from the works.

14. The manufacture of a 22-candle power gas requires approximately a gallon more oil per 1,000 cubic feet than the manufacture of a heating quality gas containing 585 b. t. u. per cubic foot. The candle power of a gas is not for all purposes a true measure of its usefulness. The heating value of a gas is more nearly a direct measure of its quality and usefulness particularly as respects the community served by the complainant. The heating value standard tends to increase efficiency in consumption by insuring uniformity of quality. The gas supplied by the complainant between January 1, 1919, and May 1, 1920, was of a uniform heating quality and calculated to render to the consumers of the complainant a service efficient and well adapted to their requirements. Since May 1, 1920, complainant has not supplied a uniform quality of gas to its consumers and there have been large variations of the gas supplied from the basic standard of 585 British Thermal Units per cubic foot.

59 15. Since May 1, 1920, complainant has not received, under its contracts for oil, gas oil of as good a quality as it had formerly been able to secure. There are a number of reasons for this, but the principal one is the enormous increase in demand for gasoline. Gasoline is taken off the crude oil by a process which is known as "cracking". As the demand for gasoline increases and the price rises, the oil is subjected to a more intense "cracking" so that the maximum of gasoline can be obtained thereby. This "cracking" process increases the carbon remaining in the oil and makes the oil much more difficult to handle for gas making purposes and much less efficient. A good gas oil contains about 1½% of free carbon. The oil furnished the complainant since May 1, 1920, runs up to something like 14% carbon.

16. For the purpose of facilitating and hastening the report of the Special Master to the District Court and solely for the purpose of this litigation the parties hereto have consented to stipulate that the valuation of complainant's plant and facilities used in the public service at all times since January 1, 1919, was and is the sum of $3,300,000. It is understood and agreed that this amount is not to be taken as the valuation of complainant's property in any other action or proceeding by any party to this litigation.

In instructions to the Special Master upon the submission of said stipulation of valuation, Honorable John C. Knox, District Judge, stated that if any party in this proceeding shall be dissatisfied with the determination of the District Court of the issues herein presented, such party shall have the right to apply at the foot of the decree to be entered herein to go before the Special Master and prove the actual value of complainant's property and such application
60 will be granted without more.

17. In the manufacture and sale of gas a percentage of the gas made is lost due to condensation, differences in temperature at the consumers' meters, slow meters, leaks, and the like. The difference

in the quantity of gas made as measured by the meters at complainant's plant, less the quantity used by complainant and the quantity sold, as measured by consumers' meters, plus the estimated quantity used in street lighting, is termed "unaccounted for" gas. I find that "unaccounted for" gas reasonably represents approximately 11% of the gas made and that in calculating the expenses of the complainant company that figure should be used as a basis for computation. The "unaccounted for" during this period was figured by the company at 279,274,156 cubic feet of gas or 17.83% of the total gas produced. I find that this percentage of "unaccounted for" is questionable and that the "unaccounted for" allowed to the complainant should be estimated at 11% of the total gas produced during said period.

18. In the calendar year 1919, complainant manufactured 1,566,628,000 cubic feet of gas and sold to consumers 1,279,815,241 cubic feet of gas.

19. In the six months ending June 30, 1920, complainant manufactured 948,810,000 cubic feet of gas. Its total gas sales during the same period were 804,692,768 cubic feet. The "unaccounted for" during this period was figured by the company at 140,722,932 cubic feet of gas or 14.83% of the total gas produced. I find that this percentage of "unaccounted for" is questionable and that the "unaccounted for" allowed to the complainant should be esti-
61 mated at 11% of the total gas produced during this period.

20. The expenses in the production and distribution of gas by the complainant during the calendar year 1919 may be grouped under the following heads:

A. Fuel. This includes generator coal, boiler fuel coal, boiler fuel water gas tar, and boiler fuel gas oil.

B. Material. This includes gas oil, water, iron oxide, and sundry supplies. A credit to this account is the residual called "water gas tar" which is used as fuel.

C. Gas making labor.

D. Distribution and other expenses. This includes among other items, repairs not chargeable to capital account, the salaries and expenses of the general offices of the company, the commercial expenses and a number of other items.

E. Plant withdrawn from service.

F. Taxes.

21. Since January 1, 1909, the books of account of the complainant company and of all other gas companies in the City of New York have been required to be kept in accordance with the rules and regulations of the Public Service Commission of the State of New York for the First District, which Commission has had jurisdiction over said companies pursuant to the provisions of the Public Service

Commissions Law of the State of New York. I find that the books of the complainant company have been kept in conformity with said rules and regulations with one exception and accurately set forth the facts therein contained. Complainant company does not keep
62 an account entitled "General Amortization—Gas" which is an account required by the Public Service Commission in its uniform system of accounts. It does, however, keep an account not specifically required by the Public Service Commission entitled "Plant Withdrawal From Service". Each year complainant credits to this account one cent per 1,000 cubic feet of gas sold, and charges to this account all expenses of the replacing of capital withdrawn from service during the year.

22. In the calendar year 1919 complainant used in its generators 32.3 pounds of generator coal per 1,000 cubic feet of gas made, and for the six months ending June 30, 1920, complainant used 33.7 pounds of generator coal per 1,000 cubic feet of gas made. In the calendar year 1919, complainant used per 1,000 cubic feet of gas made, 18.8 pounds of coal and .18 gallons of water gas tar for boiler fuel. In the six months ending June 30, 1920, complainant used per 1,000 cubic feet of gas made, 24.37 pounds of coal and .26 gallons of water gas tar for boiler fuel. In the calendar year 1919, complainant used 3.13 gallons of gas oil per 1,000 cubic feet of gas made, and in the six months ending June 30, 1920, complainant used 3.6 gallons of gas oil per 1,000 cubic feet of gas made. I find that these amounts of material used during the periods in question in the manufacture of gas by complainant are reasonable and were necessarily used by complainant.

23. The average price reasonably and necessarily paid by the complainant for generator coal during the year 1919 was $8.407 per ton and the average price reasonably and necessarily paid by the
63 complainant for generator coal during the six months ending June 30, 1920, was $8.77 per ton.

24. The average price reasonably and necessarily paid by the complainant for boiler fuel coal during the calendar year 1919 and for the six months ending June 30, 1920, was respectively $5.034 per ton and $4.84 per ton.

25. The average price reasonably and necessarily paid by the complainant for boiler fuel water gas tar during the calendar year 1919 and for the six months ending June 30, 1920, respectively, was $.064 and $.0731 per gallon and the average price reasonably and necessarily paid by the complainant for boiler fuel gas oil during the same periods was $.073 and $.0978 per gallon respectively.

26. The total fuel cost per 1,000 cubic feet of gas made by the complainant during the calendar year 1919 and for the six months ending June 30, 1920, was $.1945 and $.2038 respectively. I find that these amounts are reasonable and were necessarily incurred by the complainant during the periods in question in the production of gas.

27. The average price reasonably and necessarily paid by the complainant for gas oil used in the production of gas during the calendar year 1919 and for the six months ending June 30, 1920, respectively was $.0646 per gallon and $.0797 per gallon.

28. The cost of the material used by complainant in the calendar year 1919 and for the six months ending June 30, 1920, including gas, oil, water, iron oxide, and sundry supplies, amounting
64 during the calendar year of 1919 to $.2292 per 1,000 cubic feet of gas made, and for the six months ending June 30, 1920, to $.3031, I find to be reasonable and necessarily incurred by the complainant during the periods in question.

29. The present prices for which contracts may be made for the delivery to the complainant of generator coal and gas oil at its plant are materially in excess of the average prices paid by complainant for these materials during the calendar year 1919 and during the six months ending June 30, 1920. Present prices are so far as can be judged abnormal and are results of the World War.

30. In the manufacture of water gas there is realized as a residual credit, water gas tar, and this material so realized during the calendar year 1919 and for the six months ending June 30, 1920, was used by complainant as boiler fuel, the amounts so used being charged at a fair and reasonable price as a part of the cost of production and the total amount produced being credited at the same price in the material account for the periods in question. The value of the water gas tar per 1,000 cubic feet of gas made, credited during the calendar year 1919 was $.0315, and during the six months ending June 30, 1920, the value of the water gas tar, per 1,000 cubic feet of gas made, was $.0245, thereby reducing the cost of material for the periods in question $.1977 and $.2786 respectively.

31. The total amount paid by the complainant for gas making labor, which includes "works superintendence, boiler house labor, generator house labor, purifier house labor, miscellaneous
65 labor at works," during the calendar year 1919 and for the six months ending June 30, 1920, was $84,755.98 and $67,265.54 respectively or a cost per $1,000 cubic feet of gas made of $.0542 and $.0710 respectively. I find that these amounts so paid during the periods in question were reasonable and necessarily paid by the complainant.

32. The total amount paid per 1,000 cubic feet of gas made by the complainant during the calendar year 1919 and for the six months ending June 30, 1920, for Repair Labor and Material, Miscellaneous Works Expense, and Gas Storage, *viz.* $.0371 and $.0594, respectively, and I find these amounts were reasonable and necessarily incurred by complainant.

33. In addition to the items heretofore referred to there must be added to the cost of gas to the consumer various items entering into the cost of distribution, including Transmission Pumping, Distri-

bution Superintendence, Distribution Supplies and Expenses, Meter and Installation Work, Work on Consumers' Premises, Repairs of Mains, Services, Meters, Appliances, General Structures and Distribution Tools, Street Lighting Expense, Commercial Expense, Expenses of General Office, General Law Expense (excluding rate litigation), Miscellaneous General Expense, Insurance, Accidents and Damages, General Stationery, and Printing, Uncollectible Bills. To these items there are credits in the nature of Undistributed Adjustments and Duplicate Charge Credits. I find that the net amount reasonably and necessarily expended per 1,000 cubic feet of gas sold for these Distribution and other expenses by complainant during the calendar year 1919 was $.1868 and that the net
66 amount expended per 1,000 cubic feet of gas sold for the six months ending June 30, 1920, was $.1918.

34. I find that during the calendar year 1919 and the six months ending June 30, 1920, complainant credited to an account called, "Plant Withdrawn From Service", referred to above, an arbitrary amount of one cent per 1,000 cubic feet of gas sold during said periods. I find that this amount is a reasonable and proper credit and not in excess of the cost of replacing "Plant Withdrawn From Service" during the periods in question.

35. I find that for the calendar year 1919 taxes were assessed against the property of complainant used in the public service amounting to the sum of $87,362.98, which sum represents a cost item of $.0682 per 1,000 cubic feet of gas sold by complainant during said period. These taxes have not been paid.

36. I find that for the six months ending June 30, 1920, taxes were assessed against the property of complainant used in the public service amounting to the sum of $47,657.63, which sum represents a cost item of $.0592 per 1,000 cubic feet of gas sold by complainant during said period. These taxes have not been paid.

37. Included in the cost of distribution are various items, such as Work on Consumers' Premises and Promotion Expense (this is included in Commercial Expense) having to do with the sale and rental of appliances and the like, resulting in miscellaneous operating revenue to the complainant company. In the calendar year 1919 the Miscellaneous Operating Revenue plus the interest
67 on bank balances represented $.0179 per 1,000 cubic feet of gas sold. For the six months ending June 30, 1920, the Miscellaneous Operating Revenue plus interest from bank balances and interest from other sources represented $.0194 per 1,000 cubic feet. I, therefore, find that $.0179 per 1,000 cubic feet and $.0194 per 1,000 cubic feet of gas sold should be credited against the cost of making and distributing gas on account of Miscellaneous Revenue during the calendar year 1919 and for the six months ending June 30, 1920, respectively.

38. The evidence adduced before me affords no reasonable grounds for expecting that the price of materials or the wages paid

to labor in connection with the production and distribution of gas will be reduced during the last few months of 1920 or during the year 1921. On the contrary, the evidence shows that the complainant during at least the second half of the calendar year 1920 will be required to pay substantially higher prices for the materials used in the production and distribution of gas than during the calendar year 1919 or the six months ending June 30, 1920, and that its labor costs for the second half of the calendar year 1920 will be somewhat higher than they were during the calendar year 1919 and the six months ending June 30, 1920.

39. In or about the month of July, 1916, complainant commenced in the Supreme Court of the State of New York, for the County of New York, an action to enjoin the enforcement of said Chapter 604 of the Laws of 1916 on the ground that the 80 cent rate prescribed thereby was confiscatory. Said action was brought to trial and resulted in a judgment entered March 29, 1920,
68 dismissing complainant's complaint upon the merits without prejudice to the commencement of a new action if in the future after an adequate experimentation under an 80 cent rate, complainant believed it could prove that the rate was confiscatory as to it. The taking of testimony in said case was concluded in April, 1919. The opinion of the Court was handed down January 27, 1920, and before the decision was signed or judgment entered complainant moved to re-open the cause to put in evidence the expense of manufacturing and distributing gas in the year 1919, which was not available at the conclusion of the trial in April, 1919. The Court denied the motion to re-open, holding in its opinion filed that "a denial of such motion does not preclude the plaintiff from bringing an action for the years not embraced within the decision of this case." At the commencement of said action an order was made therein permitting the plaintiff during the pendency thereof to collect from its private consumers at the rate of 95 cents per 1,000 cubic feet, the difference between such rate and the statutory rate of 80 cents being impounded to await the outcome of such action. The plaintiff has appealed from the judgment of the New York Supreme Court and said appeal is still pending undetermined in the Appellate Division of the Supreme Court for the First Judicial Department. The interlocutory order in said action in the New York Supreme Court terminated upon the entry of judgment therein March 29, 1920, but the plaintiff has since charged and is still charging its consumers other than the City of New York 95 cents per 1,000 cubic feet of gas, and has not impounded any part of such charge since March 29, 1920.

69 40. The Court found that "Plaintiff has come into equity with unclean hands in that it is conceded that the candle power of the gas furnished to its consumers in 1918 was 13.57 candle power instead of 22 candle power as prescribed by Chapter 604 of the Laws of 1916." The Court further found that "A substantial observance of the requirements of the Statute as to candle power

should have been shown by the plaintiff and its failure to do so does not entitle it to the favorable consideration of a Court of Equity."

41. It appears from the evidence adduced before me that additional plant is necessary if complainant is to meet the demands which will be made upon it in the reasonable future. The Public Service Commission for the First District by order dated June 11, 1920, recognized the inadequacy of the present equipment and facilities of complainant and directed complainant, in order that it might safely and adequately meet the increasing demands made upon it by consumers, to make certain changes, alterations, additions, improvements and repairs and to complete same not later than December 1, 1920. At the time of the hearings there were approximately 2,000 applications on file with complainant for service which could not be filled. The testimony adduced before me tended to prove that unless additional holder capacity and additional gas making machinery was in the very near future added to the plant of complainant, it would not be possible for complainant to continue supplying the requirements of its present consumers or to meet the demands which might reasonably be expected would be made upon it. I find and hold that the additional facilities necessary properly to equip complainant with gas making machinery reasonably adequate to meet present and future demands
70 made upon complainant, will, at present prices, cost $840,000. The testimony adduced before me and reinforced by the order above referred to of the Public Service Commission tends to prove that additional holder capacity amounting to 6,000,000 cubic feet should within the next year be provided by complainant, and that the cost of such installation would be at present prices in excess of $900,000.

42. In order to finance the additions and extensions to its plant and facilities which I have found to be reasonable and necessary to be made, some at once, and others within a year from the present date, complainant must secure sums aggregating at least $1,600,000. At the current rate of interest complainant, in order to secure such funds, will have to pay not less than 9% thereon.

43. The reasonable and proper rate of return upon the stipulated valuation of the complainant company, I find to be not less than 8% per annum, amounting to $264,000 per annum.

44. I find that the cost of production, being the cost of gas at the complainant's storage holders, for gas manufactured during the calendar year 1919, was $757,641.72 or $.4835 per 1,000 cubic feet of gas made. This computation includes allowance of 17.83% of "unaccounted for" gas. I find that this percentage of "unaccounted for" is excessive and unreasonable and that it should be reduced to 11% of the gas actually made during the calendar year 1919. Accordingly, I find that complainant produced 120,163,007 cubic feet of gas during the calendar year 1919 in excess of the amount neces-

sary to take care of the sales during said year. Accordingly,
71 I find that the cost of production of gas by complainant during the calendar year 1919 was $699,542.91. I find that the cost of production per 1,000 cubic feet of gas sold by complainant for all purposes during the calendar year 1919 was $.5465. I find that the cost of distribution of said gas with allowance for "Plant Withdrawn From Service" and allowance for complainant's taxes chargeable to the expense of manufacturing and distributing gas during the calendar year 1919 amounts to a total sum of $.2650 per 1,000 cubic feet of gas sold. I find that the total cost to complainant of the gas sold during the calendar year 1919 was $1,038,899.82 or $.8115 per 1,000 cubic feet of gas sold. I find that the total amount of revenue during the said calendar year from complainant's sales, including sales for municipal street lighting, municipal buildings, and commercial sales, was $1,020,251.71 or $.7977 per 1,000 cubic feet of gas sold. During said year complainant derived revenue from miscellaneous sources amounting to $.0179 per 1,000 cubic feet of gas sold. I find that the result of complainant's operations in the year 1919, after charging 75 cents per 1,000 cubic feet of gas sold for municipal street lighting and municipal buildings and at the rate of 80 cents per 1,000 cubic feet for gas sold for commercial purposes, was a net profit of $.0041 for each 1,000 cubic feet of gas sold, without any return upon the property of complainant used in the public service.

45. I find that the cost of production, being the cost of gas at the complainant's storage holders, for the gas manufactured during the six months ending June 30, 1920, was $571,945.87 or $.6028 per 1,000 cubic feet of gas made. This computation includes allowance of 14.83% for "unaccounted for" gas. I find that this per-
72 centage of "unaccounted for" is excessive and unreasonable and that it should be reduced to 11% of the gas actually made during the six months ending June 30, 1920. Accordingly, I find that complainant produced 40,847,003 cubic feet of gas during the six months ending June 30, 1920, in excess of the amount necessary to take care of the sales during said period. Accordingly, I find that the cost of production of gas by complainant during the six months ending June 30, 1920, was $547,323.30. I find that the cost of production per 1,000 cubic feet of gas sold by complainant for all purposes during the six months ending June 30, 1920, was $.6801. I find that the cost of distribution of said gas with allowance for "Plant Withdrawn From Service" and allowance for complainant's taxes chargeable to the expense of manufacturing and distributing gas during the six months ending June 30, 1920, amounts to a total sum of $.2610 per 1,000 cubic feet of gas sold. I find that the total cost to complainant of the gas sold during the six months ending June 30, 1920, was $757,554.35 or $.9411 per 1,000 cubic feet of gas sold. I find that the total amount of revenue during said six months from complainant's sales, including sales for municipal street lighting, municipal buildings, and commercial sales, was $642,428.66 or $.7978 per 1,000 cubic feet of gas sold. During the said period com-

plainant derived revenue from miscellaneous sources amounting to $.0194 per 1,000 cubic feet of gas sold. I find that the result of complainant's operations in the six months ending June 30, 1920, after charging 75 cents per 1,000 cubic feet of gas sold for municipal street lighting and municipal buildings and at the rate of 80 cents per 1,000 cubic feet of gas sold for commercial purposes, was
73 a net deficit of $.1239 for each 1,000 cubic feet of gas sold, without any return upon the property of complainant used in the public service.

46. I find that the complainant company has not complied with provisions of Chapter 125 of the Laws of 1906 with reference to candle power.

47. Various matters comprised within the issues referred to me by the Order of July 31, 1920, I have discussed in greater detail in a separate Opinion which is herewith submitted and made a part of this Report. It is my intention that the facts and the conclusions regarding the law set forth for reasons of convenience in that separate document shall be deemed a part hereof and of the same force and effect as though they had been physically incorporated in this report.

48. I find and hold that the judgment or decree of the Supreme Court of the State of New York, for the County of New York, entered March 29, 1920, in the action wherein this complainant was plaintiff and the Public Service Commission for the State of New York for the First District and others were defendants, is not a bar to the maintenance of this action.

49. I recommend that it be adjudged and decreed that Chapter 125 of the Laws of 1906 as amended by Chapter 604 of the Laws of 1916 insofar as the said statutes provide that the complainant, Kings County Lighting Company, shall not charge or receive for gas manufactured, furnished or sold by it, a sum per 1,000 cubic feet in excess of a rate of 80 cents per 1,000 cubic feet, is illegal and void and is in contravention of Section 10, Article I of the Constitution of
74 the United States and of the 14th Amendment to the said Constitution. And that the complainant, Kings County Lighting Company, have the other and further relief against the defendants in this suit which is asked for in the complaint herein.

All of which is respectfully submitted.

GORDON AUCHINCLOSS,
Special Master.

Dated, New York, September 22, 1920.

75 District Court of the United States, Southern District of New York.

In Equity.

No. 18-97.

KINGS COUNTY LIGHTING COMPANY, Complainant,

against

LEWIS NIXON, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, Defendants.

Opinion of the Special Master.

This is a suit in equity brought by a gas company in the Borough of Brooklyn, City of New York, to enjoin the execution by the defendants of Chapter 125 of the Laws of 1906 of the State of New York as amended by Chapter 604 of the Laws of 1916, which imposed on the complainant, among others, a limitation of 80 cents in the rate which it might charge to consumers. The suit was begun in May, 1920, and in due course issue was joined by the filing of answers by the defendants Nixon and Newton. The defendant Harry E. Lewis, as District Attorney of the County of Kings, defaulted in pleading to the complainant's complaint.

On July 31, 1920, Honorable John C. Knox, District Judge, appointed me Special Master to take testimony and make computations and report back to the Court with all convenient speed.

76 A preliminary hearing was held on August 3, 1920, and the first hearing for the taking of testimony was held on August 10, 1920. The testimony was completed and the hearings closed on September 3, 1920. Over 1,700 typewritten pages of testimony were taken excluding exhibits.

Pursuant to the requirements of the Order of July 31, 1920, and the accustomed practice in the trial of similar suits in equity in this District, I submitted to the Solicitors for all of the parties on September 15, 1920, a preliminary draft of my report and of this opinion. On September 17th, 1920, I received from the Solicitors written statements embodying their suggestions regarding the matters covered by the preliminary draft. My final report and opinion were prepared and filed after due consideration of these suggestions.

I was specially instructed by Honorable John C. Knox, District Judge, that in his opinion the public interest demanded that the trial of this suit be proceeded with promptly and that a determination upon the issues herein should be delayed as little as possible. In order to expedite the trial, complainant and the defendants stated at the commencement of the hearings that they were prepared to stipulate a rate base, thereby removing from the issues to be tried all

question of the value of complainant's property used in the public service.

I.

The Litigation Before Br. Justice Greenbaum and the Steps Taken in This Litigation Prior to the Hearings Before the Special Master.

In July, 1916, the complainant herein commenced, in
77 the Supreme Court of the State of New York for the County of New York, an action to enjoin the enforcement of the statutes inquestion in this suit. The trial in this action before Mr. Justice Greenbaum consumed the greater part of a period of six months and was concluded by a judgment entered March 29, 1920, dismissing the complaint upon the merits without prejudice to the commencement of a new action if in the future, after an adequate experimentation under an 80 cent rate, the plaintiff believed it could prove that the rate was confiscatory as applied to it. The years involved in this litigation were those of 1916, 1917 and 1918.

An order was entered in that action on August 2, 1916, permitting the plaintiff therein to charge 95 cents per 1,000 cubic feet of gas, the amount in excess of the statutory rate to be deposited with the Empire Trust Company of New York City, and upon August 7, 1918, a further order was entered permitting plaintiff to withdraw said deposit and to substitute for it and for the excess thereafter collected, its refunding bonds, the moneys collected and so withdrawn to be applied only to extensions or additions to plant. Since the dismissal of the bill in that action, complainant has continued to charge its consumers other than the city at the rate of 95 cents per 1,000 cubic feet of gas sold. Thereafter the present suit was brought in the District Court of the United States for the Southern District of New York. An application for a preliminary injunction made herein was heard before the Statutory Court constituted in accordance with the requirements of Section 266 of the Judicial Code and composed of Circuit Judge Ward and District Judges Mayer and Knox, and on June 28, 1920, said Statutory Court granted said motion for a preliminary injunction pending final hearing
78 upon the conditions that the complainant charge not more than one dollar per 1,000 cubic feet of gas sold and pay the excess over the statutory rate monthly to a Special Master, to be deposited by said Master and applied in accordance with the final decree entered in this cause.

Complainant has not availed itself of the relief granted by said Statutory Court.

In its opinion, dated June 28, 1920, said Statutory Court held that the judgment of the Supreme Court of the State of New York entered on March 29, 1920, was not an adjudication affecting the company's rights in 1919 and 1920, and that the experience during the calendar year 1919 and the first three months of 1920 (in the moving affidavits the experience for three months was set forth though at the hearings the experience for six months was available and produced) was a sufficient experimentation to enable the Court

to determine whether the Statutory rate of 80 cents was confiscatory.

The said Statutory Court further held that the failure of complainant to furnish gas of the statutory candle power or its failure to conform to the requirements of the judgment in the said Court were not reasons for denying it relief against a present rate which is confiscatory, and that the equitable doctrine of "clean hands" has no application in a case of this sort.

I have no doubt that I, sitting as Special Master appointed by a District Judge in this suit, am bound by the decision of the Statutory Court above referred to, and accordingly, I ruled throughout the hearings and reaffirm such ruling in this opinion that the failure of complainant to furnish gas of the candle power standard required by statute during the calendar year 1919, and the six months
79 period ending June 30, 1920, is not a bar to its obtaining equitable relief declaring the statutes in question unconstitutional provided the statutory rate as applied to complainant is proved to be confiscatory.

I further affirm the rulings upon the hearings to the effect that the judgment entered in the Supreme Court of the State of New York on March 29, 1920, is not an adjudication affecting the company's rights in 1919 and 1920, or in any way a bar to this present suit.

I further hold in conformity with the ruling of said Statutory Court that the experimentation of complainant during the calendar year 1919 and the six months' period enable a determination to be made as to whether the statutory rate of 80 cents per 1,000 cubic feet of gas is at the present time confiscatory.

II.

The Rate Base.

The hearings were very much shortened by the stipulation entered into by complainant and the defendants Nixon and Newton that the valuation of complainant's plant and facilities used in the public service at all times since January 1, 1919, was and now is the sum of $3,300,000.

This stipulation was entered into exclusively for the purposes of this suit. Complainant claims that it could show a valuation considerable in excess of this amount upon a full and complete valuation of its plant. All parties to the litigation, in order to protect their interests as they might be advised after a decree was entered by the District Court on the report of the Special Master, were given the absolute right by Honorable John C. Knox, District Judge,
80 to have the case sent back to the Special Master with instructions to find and report on the valuation of complainant's plant used in the public service.

The rate base having been stipulated, I excluded such testimony as was offered relating to the capital account of complainant except such as was directed to prove that items charged to expense should have been charged to capital.

III.

Rate of Profit.

The current rate of interest at the present time for all uses of capital is notoriously high.

In Wilcox v. Consolidated Gas Company, 212 U. S. 19, the rate of 6% was accepted as a proper return.

To-day, the United States Government, the most solvent debtor in the world, is required to pay 6% on its short term borrowings.

In Lincoln v. Lincoln Gas Etc. Company, 250 U. S. 256, the Court indicated that changed conditions of investment might change the rate.

The evidence adduced before me indicates that 8% is the going rate at the present time and it further indicates that gas companies almost universally at the present time find it necessary to pay not less than 9% on new money. It is impossible to state at the present time with any degree of accuracy how long the present high rates of interest will continue in operation. From all the circumstances I have concluded that the rate of 8% is a fair and reasonable return to be allowed complainant on the stipulated valuation of its property used in the public service and that a rate of 9% is a fair and
81 reasonable return to be allowed complainant on such additional investment as I have found it should reasonably and necessarily make in order to meet the demands for service which are being made upon it at the present time and which will be made in the near future.

IV.

The Admissibility of the Books of Account.

The defendants objected to the reception in evidence of the books of account of all descriptions containing the records of the complainant on the ground that they were not the best evidence concerning the operations of the complainant of which they were offered as proof. These books of account together with summaries extracted from them, some of which summaries were offered in evidence by the defendants themselves, I received in evidence, relying on the decision of District Judge Learned Hand in the case recently decided brought by the Consolidated Gas Company of New York against Newton, et al. In explanation of the theory under which these books were received in evidence, I cannot do better than to quote from Judge Hand's opinion:

"The defendants objected to the reception of all these books on the ground that they were not properly proved. Probably the proof was inadequate, even under the present-day laxer rules, had they been used in an ordinary case, as for example, to prove transactions recorded in them on which obligations of a third person depended. The case is not such. This is a suit between the authorities
82 of a State and a company long since recognized as perform-

ing a public service and under the regulation of the State. Article Four of the Public Service Commissions Law of New York puts the entire conduct of such companies as the plaintiff minutely within the regulation of the Public Service Commission. Section sixty-six gives the Commission general supervision over all such, power to investigate the quality of their services and to fix its character, to prescribe the form of the records and books it shall keep, to examine its officers and those records, to keep informed as to its doings and its property, to require a detailed annual report including its receipts and expenses and any other important facts it may wish, to enter upon its property and examine its books and vouchers, to compel the production of any such, to subpœna its officers, and to compel it to keep its accounts of separate businesses separately. Books kept in accordance with orders lawfully promulgated by the commission under such powers are on a different footing in a suit based upon the action of the State and against its officers, from even the same books if attempted to be used elsewhere. They have a public character derived from the supervision which can be and is exercised over them. The authorities are not of course bound by them in any event, but, prepared as they are, under their direct and constant supervision, they can scarcely be put in the category of the usual ex parte entries about whose admission the cases are concerned. The State having had so much hand in their creation and such continuous power of examining them, should not be entitled to demand a verification first-hand of every item by common-law proof, before they become prima facie competent. The guaranty of their
83 truth is sufficiently established by the scrutiny to which they are always subject, and the penalties which follow upon a disregard of the Commission's orders (Section seventy-three). It would indeed be an incredible burden to require every item to be separately established and even these defendants have not gone so far as that. But if the books are not prima facie competent they might call for such proof, nor can I reject them without putting the company upon their mercy.

Documents prepared in analogous fashion came before the court in Rowland v. St. Louis, etc., Co. 244 U. S. 106, 108, and Northern Pac. Ry. v. Keys, 91 Fed. R. 47, 58. In each the court received them, though prepared in disregard of the strict rules of the common law, because of the opportunity afforded the authorities to check their accuracy by a recourse to the original records and if necessary to the entrants who actually made them. In neither case did it appear that the company was under such stringent supervision as has been established in New York. Here, as in Rowland v. St. Louis, etc. Co. supra, it may be said that the company 'exhibited its work-sheets and data to the (defendants), that the returns were made by the employees in the course of their business, and that if the (defendants) had desired to question any of the data they could have called for further verification.'"

I have found that these books with one exception conform with the orders of the Public Service Commission and that this exception

pertaining to the account "Plant Withdrawn From Service" was a variation made in good faith and represents a reasonable substitute for the account required by the Public Service Commission entitled "General Amortization-Gas."

84 V.

Complainant's Failure to Supply Candle Power.

There is no question but that during the calendar year 1919 and the six months ending June 30, 1920, complainant did not comply with the statute requiring it to furnish gas of a standard of 22-candle power. The monthly average of the candle power of the gas produced by the complainant during the calendar year 1919 was as tested by the company 19.40 and as tested by the city 16.10. During the six months ending June 30, 1920, the monthly average as tested by the company was 16.97 and as tested by the city 13.99. The reasons for this substantial variation from the statutory requirement were two fold; (1) The desire of the complainant to save money by using the smallest possible quantity of gas oil in the manufacture of gas; (2) The honest belief of complainant that a gas containing approximately 585 British Thermal Units per cubic foot was as well, if not better, adapted to the use made by its consumers of the gas purchased from it.

The relative merits of 22-candle power gas and gas containing approximately 585 British Thermal Units per cubic foot were gone into at some length by the witnesses produced before me. The territory served by complainant is principally a suburban residential section of Brooklyn. For the most part, gas is used for cooking and heating purposes, only a very small fraction of the gas consumed is used through an open flame burner. There seems to be but little doubt that for heating and cooking purposes and for all purposes in fact, other than use through an open flame burner, gas containing approximately 585 b. t. u. per cubic foot is as good, if not
85 better, than a 22-candle power gas. At all events, there is no evidence in the record to show that the failure of complainant to supply 22-candle power gas resulted in increased dissatisfaction with the service rendered, by the consumers. In fact, the contrary seems to have been the case.

Further, during the periods in question, gas oil of a good quality was very scarce and hard to get, and no matter what the quality was, it was expensive. Complainant found its cost of production and distribution mounting higher and higher and one of its efforts to reduce this cost was through effecting a saving in the use of oil. The manufacture of 22-candle power gas necessitates the use of approximately one gallon more of oil per 1,000 cubic feet than is necessary in the manufacture of gas containing approximately 585 b. t. u. If complainant had manufactured 22-candle power gas during the periods in question, it would have necessitated the expenditure of considerable more for oil than it did expend.

Relying on the opinion of the Statutory Court which considered

this matter I have held that the failure of complainant to furnish 22-candle power gas as required by statute does not bar it from relief from a statute imposing a confiscatory rate

VI.

Gas "Unaccounted For."

From the evidence adduced before me I have become convinced that the percentages of "unaccounted for" shown by complainant during the periods in question are questionable and for the purposes of this case, which it must be borne in mind is a case attack-
86 ing the constitutionality of a statute, I have concluded that not exceeding 11% of the total gas made should be allowed complainant as "unaccounted for." I appreciate that this is a drastic cut, but I have in mind that some of complainant's witnesses in testifying on this subject gave it as their opinion that an "unaccounted for" exceeding 10% was cause for searching examination and that evidence adduced by the defendants tended to prove that an allowance of not more than 12% should be made complainant for "unaccounted for." Furthermore, I have followed Judge Learned Hand's position in the Consolidated Gas case and have not hesitated to cut "more ruthlessly in this case than if the result had been closer."

VII.

Price Paid by the Company for Oil, Coal, and Labor.

A. Oil. The largest item of expense incurred by complainant during the periods in question in the production and distribution of gas was that paid for gas oil. During the calendar year 1919, 5,375,887 gallons of gas oil were consumed at a total cost of $347,-171.13, or an average price per gallon of $.0646. For each 1,000 cubic feet of gas made 3.43 gallons of oil were used.

During the six months ending June 30, 1920, 3,423,681 gallons of gas oil were consumed at a total cost of $273,668.40, or an average price of $.0797 per gallon. For each 1,000 cubic feet of gas made, 3.60 gallons of gas oil were used.

Complainant endeavored in every reasonable way by canvassing the market during these periods to obtain oil for its use at the lowest possible price. The oil it obtained was secured from
87 the Standard Oil Company of New York by contracts which are in evidence. The average price of this oil per gallon used during the year 1919 was not in excess of the current market price of oil during that period, and the average price per gallon of oil used during the six months ending June 30, 1920, was remarkably reasonable and was less than the price that will have to be paid for such oil during the last half of the year 1920.

The amount of oil used per 1,000 cubic feet of gas made during the periods in question was reasonable and indicated efficient management. The defendants were unable to produce testimony to the

contrary. The present oil contracts, which were the best that could be made under the circumstances, will require the company to pay ten cents a gallon during the balance of the year 1920. Gas oil is scarce and the price thereof has recently risen rapidly, and from all indications such prices will not be reduced in the immediate future.

B. Coal. The second largest item of expense incurred by complainant during the periods in question was for generator coal and boiler fuel coal. The prices paid during the periods in question for such coal, and the amounts used per 1,000 cubic feet of gas made, are not seriously questioned by defendants. So far as the amounts used per 1,000 cubic feet of gas made are concerned, the proof of the defendants does not contradict the testimony of the witnesses produced by the complainant to the effect that these amounts are reasonable.

Coal at the present time also is scarce, though it is not as hard to get as gas oil. The price of $8.407 per ton for generator coal delivered at complainant's plant during the year 1919, was distinctly a reasonable price, and the price paid for the same kind of coal during the six months ending June 30, 1920, of $8.77 per ton
88 is less than the price complainant will necessarily pay for coal during the balance of the year 1920.

The price of $5.034 per ton for boiler fuel coal paid during the calendar year 1919, and the price of $4.84 per ton paid for the same kind of coal delivered at complainant's plant during the first six months of 1920, were reasonable and I am convinced they were the best complainant could secure.

The recent rise in freight rates granted by the Interstate Commerce Commission will necessarily increase the price of coal to complainant during the balance of the year 1920, and will offset any reduction in the price of coal at the mine, which can be expected to take place within any reasonable time.

The defendants' claim that complainant paid, during the periods in question, for a slight amount of coal it did not receive and they assert that these so-called "shortages" should be taken into account. I am not at all satisfied with the correctness of the defendants' position in this respect, but in any event the amounts involved are so small and would affect the cost per 1,000 cubic feet of gas made by such a small fraction of a cent, that I have disregarded them under the maxim de minimis non curat lex. I reach the same conclusion respecting defendants' claim as regards the so-called "shortage" of oil.

C. Labor. Labor costs during the calendar year 1919 and the six months ending June 30, 1920, were higher than they were during the two preceding years and were substantially higher than they were before the war. There is no evidence in the record proving that complainant's labor costs during the periods in question, in
89 this suit were unreasonable. It is true that the number of employees in the commercial department of the company shows a very marked increase during the periods in question, but at the

same time the complainant's sales increased substantially and women were substituted for men to a very large extent in the clerical force of the complainant. These women are apparently not as efficient as the men employed for the same work prior to the war, and due to lack of training more women were necessarily employed than men. The expense of these additional employees, when calculated per 1,000 cubic feet of gas sold, shows a reduction during the periods in question from 1918 and only a slight increase from 1917. All in all, I regard the labor costs of complainant as reasonable.

Attended by counsel, I visited the plant and the commercial offices of the complainant. The main commercial office is situated at 4802 New Utrecht Avenue, Brooklyn, in a building which was formerly an apartment house and which has been to some extent made over. It has been used by the company for a number of years and is entirely inadequate to handle in a proper manner complainant's business, which has increased enormously during the past ten years. The available space for clerks and bookkeepers is far too small and results in a crowded, congested, and I should imagine, unsanitary office.

VIII.

Cost of Production in 1919 and for the Six Months Ending June 30, 1920.

I have referred in my Findings to the the various elements which make up the cost of production and have found that the prices
90 paid for material and labor were reasonable and that the amount of material used per 1,000 cubic feet of gas made was reasonable.

During the calendar year 1919 complainant produced 1,566,628,000 cubic feet of gas at a total cost of $757,641.72. The total sales to consumers was 1,279,845,241 cubic feet of gas. After making allowance for gas used by the company and "increased gas on hand" there is 279,274,156 cubic feet of gas which is "unaccounted for." I have found that this amount was excessive and that a reasonable amount to be allowed for "unaccounted for" gas was 11% of the total production. Accordingly, I have calculated that complainant produced during the calendar year 1919, 120,163,007 cubic feet of gas in excess of its requirements, at a cost of $58,098.81, which sum should be deducted from the total cost of the gas produced, leaving as the true cost of gas produced during this period $699,542.91.

During the six months ending June 30, 1920, complainant produced 948,810,000 cubic feet of gas at a total cost of $571,945.87. The total sales to consumers was 804,692,768 cubic feet of gas. After making allowance for gas used by the company and "decreased gas on hand" there is 104,722,932 cubic feet of gas which is "unaccounted for." I have found that this amount was excessive and that a reasonable amount to be allowed for "unaccounted for" gas is 11% of the total production. Accordingly, I have calculated that complainant produced during the six months ending June 30, 1920,

40,847,003 cubic feet of gas in excess of its requirements, at a cost of $24,622.57, which sum should be deducted from the total cost of the gas produced, leaving as the true cost of gas produced during this period, $547,323.30.

91

IX.

Distribution Expense.

These expenses are made up from the books of the company, which have been held to be good prima-facie. Various items have been challenged, and I will deal with those.

A. Repairs to Meters.

It is contended by defendants that the item of $22,900.98, which was paid for repairs to meters during the calendar year 1919, and the item of $11,222.79, expended during the six months ending June 30, 1920 for repairs to meters are excessive and larger than normal conditions would warrant.

During 1919, 6,340 meters were repaired and during the first six months ending June 30, 1920, 2,880 meters were repaired. In 1917, 2,424 meters were repaired at a cost of $8,162.62; in 1918, 5,187 meters were repaired at a cost of $11,595.55.

I am inclined to believe complainant has not sustained the burden of proof in respect to the amounts expended during the periods in question for meter repairs, and accordingly I shall take the average of meters owned per year during 1917, 1918, and 1919 as the best test available, though I recognize that this is a rough test due to the increased number of meters in operation from 1917 to 1919. I find that the average number of meters owned during 1917, 1918, and 1919 was 36,926. Accordingly, complainant should be allowed for repairs to meters on a basis of repairing one-seventh every year, during the year 1919 the sum of $19,042.75 and for the six months ending June 30, 1920, the sum of $10,259.87.

B. Street Lighting Expenses.

92 This item for 1919 and the six months ending June 30, 1920, is so small that it may be disregarded without in any way changing the decision of this case. The reasonableness of the amount is not questioned by the defendants, but the propriety of the charge is questioned. I am of the opinion that the charge is a necessary and reasonable expense of the complainant and that complainant should be credited with it in estimating its distribution expense.

X.

Present Capacity—Additional Facilities Required.

Judge Hand in the case recently decided brought by the Consolidated Gas Company of New York against Newton, et al., said, under the above heading:

"If it should appear that any plant is necessary for the reasonable future, that plant must be included, as it is to-day, at least at its value in modern cost of reproduction. If, on the other hand, it appears that there is a reasonable doubt about the necessity, it should be excluded."

From the testimony adduced at the hearings on behalf of complainant, it reasonably appears that the present capacity of complainant's plant is inadequate at the present time and will become more inadequate in the near future to meet the demands reasonably made upon it. By formal order referred to in the Findings, the Public Service Commission of the First District has directed complainant to enlarge its facilities to a considerable extent,
93 both as respects production facilities and as respects holder facilities. The estimate submitted to complainant by the United Gas Improvement Company for the furnishing of the additional production facilities calls for the expenditure of $840,000 within the next six months. The evidence shows that in order to enlarge the holder capacity of complainant's plant by 6,000,000 cubic feet, an additional expenditure of approximately $1,000,000 would have to be made within the next twelve months.

The territory served by complainant is a growing residential district and if it had not been for the difficulties lately present in the building trades the demands on complainant for services might reasonably be expected to have been even greater than they are at present. At the present time some 2,000 applications are on file for additional services but complainant has been unable, on account of its capacity, to fill these applications.

I have found that complainant, in order to enlarge its capacity, must necessarily expend during the next twelve months at least $1,500,000. This is, of course, less than the estimated cost of the extensions above referred to, and my deduction from said estimated cost is really an arbitrary one and made in order that the amount upon which I estimate complainant should be entitled to receive a fair rate of return should be calculated in the most conservative manner possible. I should assume that this amount should be added to the stipulated value of complainant's plant used in the public service for the purpose of this case.

94 XI.

Recapitulation.

It may be of assistance to the Court to have a recapitulation setting forth my conclusions which compel the finding that the statutory rate has become unfair and that it violates the 14th Amendment to the Constitution of the United States.

35	Calendar year 1919.		6 mos. ending 6/30/20.	
	Amount.	Cost per M cu. ft. sold.	Amount.	Cost per M cu. ft. sold.
Total Cost of Production allowed by Master....	$639,542.91	$.5165	$547,323.30	$.6801
Total Cost of Distribution with Allowance for "Plant Withdrawn from Service" and Taxes	$339,356.91	$.2650	$210,231.05	$.2610
Total Cost of Gas Sold..	$1,038,899.82	$.8115	$757,554.35	$.9411
Total Amount of Revenue from Sales at 80c to private consumers and 75c to City of New York	$1,020,951.71	$.7977	$612,428.66	$.7978
Additional Revenue.....	$22,871.39	$.0179	$15,659.04	$.0194
Net Result from Operations without any return on valuation of property used in public service	.....	$.0011	.....	$.1239*
Cost of 9% Investment for Extensions, improvements, and necessary facilities on $1,600,000 Allowed.....	$144,000.00	.....	$72,000.00	.....
Cost of 8% Return on Stipulated Valuation of Plant at $3,300,000....	$264,000.00	.....	$132,000.00	.....
Estimated Revenue per 1,000 cu. ft. of gas sold allowing for return on stipulated valuation and investment for Extensions, Etc.....	.....	$1.1304	.....	$1.1949

Respectfully submitted,

GORDON AUCHINCLOSS,
Special Master.

Dated New York, September 22, 1920.

*Deficit.

96 District Court of the United States, Southern District of New York.

In Equity.

No. 18-97.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

LEWIS NIXON, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney for the County of Kings, Defendants.

Exceptions to Special Master's Report.

Now come the defendants, Charles D. Newton, as Attorney General of the State of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, and except to the findings of fact and conclusions of law filed herein by Gordon Auchincloss, Esq., Special Master herein, in the following particulars, to wit:

1. The defendants except to that portion of finding marked "4" which finds that:

"It is customary in efficiently operated companies manufacturing the same kind of gas as that manufactured by the complainant to estimate actual working capacity as the rated capacity less the capacity of the largest machine. This is done because efficient management requires the constant repairing of machines, necessitating their withdrawal from use from time to time * * * Accordingly, the actual working capacity under normal operating conditions of the machines of the complainant is about 7,400,000 cubic feet per day."

The Master should have found in connection therewith that efficient operation would cause the management to so time their cleaning of machines that at times of stress when the greatest amount of gas would be called for, all of their machines would be in operations a major portion of the time, and this practice was not followed by complainant.

2. The defendants except to that portion of finding marked "8" which finds that:

97 "Since September 2, 1916 complainant has supplied gas to the City of New York for street lighting at the price of 75 cents per 1,000 cubic feet as fixed by Chapter 736 of the Laws of 1905. Complainant also supplies gas to the City of New York for use in municipal buildings at the rate of 75 cents per 1,000 cubic feet,

likewise fixed by said statute. The amount of gas supplied to the City of New York during the year 1919 and the first six months of 1920 is less than 5% of complainant's total sales during those periods. The sales to the City of New York for street lighting and municipal buildings in the year 1919 was 53,532,644 cubic feet and in the six months ended June 30, 1920, was 26,611,568 cubic feet."

on the grounds that no issue was litigated in the present suit which makes such findings germane; that the City of New York was not made a party in this suit and the statute of 1905 fixing the price of gas sold to the city is not attacked; and that loss to the complainant on account of sales to the City under a statute not attacked may not be considered in arriving at a determination as to the confiscatory nature of the statute attacked, to wit, Chapter 125 of the Laws of 1906 as amended by Chapter 604 of the Laws of 1916.

3. The defendants except to finding marked "9" in so far as it finds:

"Plaintiff on July 1, 1914, reduced its charge for gas to private consumers from $1.00 to 95 cents per 1,000 cubic feet."

on the grounds that such finding is not involved in the issues of this suit, and that historical fact, if it be a fact, tending to show a liberal attitude on the part of the complainant is improperly considered when defendants were denied the rights to introduce testimony showing the early financial history of the complainant as bearing upon the equities of the case.

4. The defendants except to finding marked "10" wherein it states:

"The gas supplied by the complainant is used principally for fuel, cooking, water heating, and for illumination by means of the incandescent burner. A small percentage (the exact percentage not appearing in the record) is utilized in the open flame burner * * * A high candle power is not essential for illumination by means of the incandescent burner."

on the grounds that it is incompetent, immaterial and irrelevant; that it is not supported by the evidence, and is contrary to the evidence and weight thereof; that the complainant did not show the number of open flame burners, nor any evidence of an estimate upon which a reasonable conclusion could be based; that the said findings are contrary to the statutory requirements.

98 5. The defendants except to finding marked "11" in so far as it finds:

"The candle power of a gas is not for all purposes a true measure of its usefulness. The heating value of a gas is more nearly a direct measure of its quality and usefulness particularly as respects the community served by the complainant. The heating value standard tends to increase efficiency in consumption by insuring uniformity

of quality. The gas supplied by the complainant between January 1, 1919 and May 1, 1920 was of a uniform heating quality and calculated to render to the consumers of the complainant a service efficient and well adapted to their requirements."

on the grounds that such finding is not within the issues, is contrary to the evidence and weight thereof, and contrary to the statutory requirements, and is incompetent, immaterial and irrelevant.

6. The defendants except to finding marked "15" on the grounds that same is not supported by the evidence, and is immaterial and irrelevant.

7. The defendants except to the following portion of finding marked "17":

"I find that "unaccounted for" gas reasonably represents approximately 11% of the gas made and that in calculating the expenses of the complainant company that figure should be used as a basis for computation * * * and that the "unaccounted for" allowed to the complainant should be estimated at 11% of the total gas produced during said period."

on the grounds that same is not supported by the evidence and is contrary to the evidence and weight thereof.

8. The defendants except to the following portion of finding marked "19":

"I find * * * that the "unaccounted for" allowed to the complainant should be estimated at 11% of the total gas produced during this period."

on the grounds that same is not supported by the evidence and is contrary to the evidence and weight thereof.

9. The defendants except to finding marked "21" on the grounds that same is immaterial and irrelevant or is not supported by the evidence and weight thereof.

10. The defendants except to finding marked "22" on the grounds that same is not supported by the [illegible]* idence. The amounts of material used by the complainant were excessive, as a result of the inefficient manner in which the plant was operated, among other things by not having the generators properly cleaned and equipped.

199 11. The defendants except to finding marked "25" on the ground that same is not supported by any competent evidence.

12. The defendants except to finding marked "26" on the grounds that same is not supported by the evidence and is contrary to the evidence and weight thereof.

13. The defendants except to finding marked "27" on the grounds that the same is not supported by the evidence and is contrary to the evidence.

14. The defendants except to finding marked "28" on the ground that same is not supported by competent evidence.

15. The defendants except to the following part of finding marked "29":

"The present prices for which contracts may be made for the delivery to the complainant of generator coal and gas oil at its plant are materially in excess of the average prices paid by complainant for these materials during the calendar year 1919 and during the six months ending June 30, 1920."

on the grounds that same is contrary to the evidence and weight thereof, and because the prices of materials and the present prices are artificial, fictitious, abnormal and not a proper criterion of cost of materials used in making gas.

16. The defendants except to finding marked "30" on the ground that same is not supported by competent evidence.

17. The defendants except to finding marked "31" on the grounds that same is not supported by the evidence and is contrary to the evidence and weight thereof.

18. The defendants except to finding marked "32" on the grounds that same is not supported by the evidence and is contrary to the evidence and weight thereof.

19. The defendants except to finding marked "33" on the grounds that same is not supported by the evidence and is contrary to the evidence and weight thereof.

20. The defendants except to the finding marked "35" except that portion which finds that the taxes have not been paid, on the grounds that same is not supported by the evidence and is contrary to the evidence and weight thereof.

21. The defendants except to the finding marked "36" except that portion which finds that the taxes have not been paid, on the grounds that same is not supported by the evidence and is contrary to the evidence and weight thereof.

100 22. The defendants except to finding marked "37" except that part which finds that there should be certain credits against the cost of making and distributing gas, on the grounds that same is not supported by the evidence, and is contrary to the evidence and weight thereof.

23. The defendants except to finding marked "38" on the grounds that same is not sustained by the evidence, and is immaterial, irrelevant and incompetent and not within the issues in the suit. The unconstitutionality of a statute can not be determined by speculation or conjecture as to what may happen in the future.

24. The defendants except to finding marked "41" on the grounds that same is contrary to the evidence and weight thereof; and that

it is not supported by the evidence. The fair value of complainant's property was stipulated at $3,300,000 for the purposes of this suit, and, as the Master ruled during the hearings, he was and is without authority to add or detract therefrom. This finding would tend to violate the stipulation and to increase the fair value of complainant's property used and useful in the making and distribution of gas upon which value is computed the rate base. Moreover, the present consumers may not be charged with a return on property which is not now in being and which is not now used in making and distributing gas. If complainant's plant should be enlarged and thus its fair value increased, it is apparent the consumers would necessarily be greater than now and the new consumers together with the old ones would have to pay a rate sufficient to take care of any increased capital investment. Such increased facilities and increased number of consumers would tend to decrease the unit cost of complainant's gas. The question of complainant's additional plant was not litigated upon the trial by the defendants for the reason that they deemed it entirely immaterial and incompetent. The statement of complainant's counsel (8. M. 437 and 438) warranted their taking that attitude. Furthermore the evidence shows the failure of complainant in the past to carry out a continued progress of increase in the capacity of its plant, to keep pace with the normal growth of the district it is entrusted to serve, as good gas practice requires, accounts for the present inability of its plant to meet the present and future demands, and complainant has not taken care in the past of its natural and normal growth of business.

101 KINGS COUNTY LTG. CO.

v.

NIXON.

Additional Exception to Master's Report Submitted to Judge Hough Upon Argument.

Defendants except to the period 1919 and six months of 1920 considered by the Master, upon the ground that such period is manifestly unfair, for prices during such period are unnatural, abnormal and unusual. The case should be determined on financial results of the period 1909 to 1920.

102 25. The defendants except to finding marked "42" on the grounds that the same is immaterial and irrelevant to the issue herein and not supported by any competent proof.

26. The defendants except to finding marked "43" on the grounds that same is immaterial and irrelevant to the issues herein, and contrary to the evidence, and this question is not involved in the suit. The question litigated was, what rate of return would make the statute confiscatory, and not what was a reasonable and proper rate of return for a public utility.

27. The defendants except to findings marked "44" and "45" (except in so far as the Master finds that the percentage of "unaccounted for" gas is excessive and unreasonable, and that it should be reduced) on the grounds that same is contrary to the evidence and weight thereof.

28. The defendants except to finding marked "47" wherein the master includes as a portion of his findings his opinion herein and such opinion is excepted to in detail in separate exceptions hereto annexed.

29. The defendants except to findings marked "48" and "49" on the grounds that same is contrary to the evidence and weight thereof.

Dated September 28, 1920.

CHARLES D. NEWTON,
Attorney General of the State of New York.

Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
Solicitor for Defendant Newton.

Capitol, Albany, N. Y.

TERENCE FARLEY,
Solicitor for Defendant Nixon.

49 Lafayette Street, Borough of Manhattan, City of New York.

WILBER W. CHAMBERS,
JAMES P. HILL,
WM. S. JACKSON,
EDWARD M. DEEGAN,
Of Counsel.

103 [Endorsed:] In Equity. No. 18-97. District Court of the United States, Southern District of New York. Kings County Lighting Company, Complainant, vs. Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney for the County of Kings, Defendants. Exceptions to Special Master's Report. Charles D. Newton, Attorney General of the State of New York; Wilber W. Chambers, Solicitor for defendant Charles D. Newton, Office & P. O. Address, Capitol, Albany, N. Y.; Terence Farley, Solicitor for defendant Lewis Nixon, Office & P. O. Address, No. 49 Lafayette Street, New York City.

101 District Court of United States, Southern District of New York.

E. 18-97.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, as Attorney-General of the State of New York; Lewis Nixon, Constituting the Public Service Commission for the First District, and Harry E. Lewis, as District Attorney of Kings County, Defendants.

Exceptions to Special Master's Opinion, Which Opinion is Made a Part of His Findings by Finding No. 47.

1. The defendants except to subdivision "I", pages 3, 4, 5 and 6, in so far as it may be a finding of fact that the judgment of the Supreme Court of the State of New York of March 29, 1920, is not a bar to the present suit, on the ground that it is contrary to the evidence.

2. The defendants except to subdivision "I", page 6, of the master's opinion which finds that:

105 "I further hold in conformity with the ruling of said statutory court that the experimentation of complainant during the calendar year 1919, and the six months period ending June 30, 1920, is a sufficient experimentation to enable a determination to be made as to whether the statutory rate of 80 cents per 1,000 cubic feet of gas is at the present time confiscatory."

in so far as it is a finding of fact, on the ground that the evidence shows that the complainant has not experimented in any way with the 80 cent rate and has never charged such rate to the public, and that the operations by the complainant during 1919 and 1920 were inefficient.

3. The defendants except to subdivision "H", page 6 of the master's opinion which finds or states that

"Complainant claims that it could show a valuation considerable in excess of this amount upon a full and complete valuation of its plant."

on the ground that the value is stipulated by complainant, and his claims or assertions are all absorbed and included in his stipulation and such finding is immaterial and unwarranted.

106 4. The defendants except to subdivision "III", pages 7 and 8, of the master's opinion, on the ground that such finding is immaterial and no issue of that kind is involved in the suit.

That the rate to be paid for new capital for improvements is not involved. The question to be determined is: What rate is confiscatory and not what rate of return complainant should receive.

5. The defendants except to subdivision "IV", pages 8, 9 and 16 of the master's opinion, in so far as it is finding that the books of the complainant have been properly received in evidence and authenticated as required by law, on the ground that it is contrary to the evidence.

6. The defendants except to that portion of sudivision "V", page 11, of the master's opinion which finds that

"The reasons for this substantial variation from the statutory requirement were two-fold: (1) The desire of the complainant to save money by using the smallest possible quantity of gas oil in the manufacture of gas; (2) the honest belief of complainant that a gas containing approximately 585 British Thermal Units per cubic foot was as well, if not better, adapted to the use made by its consumers of the gas purchased from it,"

on the ground that no issue exists in the suit upon which the foregoing finding is relevant. The standard of gas is fixed by
107 statute and the belief, if one was held by the complainant, that something other than the law was better, is not material.

7. The defendants except to that portion of subdivision "V", pages 11 and 12, of the master's opinion which finds that:

"For the most part, gas is used for cooking and heating purposes, only a very small fraction of the gas consumed is used through an open flame burner. There seems to be but little doubt that for heating and cooking purposes and for all purposes in fact other than used through an open flame burner, gas containing approximately 585 b. t. u. per cubic foot is as good, if not better, than a 22 candle power gas. At all events there is no evidence in the record to show that the failure of complainant to supply 22 candle power gas resulted in increased dissatisfaction in the services rendered, by the consumers. In fact, the contrary seems to have been the case,"

on the ground that this is immaterial and that the burden was upon the complainant to show the number of open flame burners if such issue was involved, and they did not show the number and did not show facts from which an estimate could be made, and upon the further ground that the statute fixes the standard of the gas and a means was provided to have it modified by law, and as the complainant did not have same modified and did not comply with the standard, excuses are irrelevant.

108 8. The defendants except to that portion of subdivision "V", page 12, of the master's opinion which follows the portion quoted in the last exception on the ground that it is not proven and the evidence does not sustain it and it is immaterial.

9. The defendants except to that portion of subdivision "VII", page 14, of the master's opinion which finds that:

"The amount of oil used per 1,000 cubic feet of gas made during the periods in question was reasonable and indicates efficient management. The defendants were unable to produce testimony to the contrary."

on the ground that the evidence does not support such finding, and that evidence would warrant that on account of the inefficient management the amount of oil used was required.

10. The defendants except to that portion of subdivision "VII", page 14, of the master's opinion in so far as it finds that the present oil contracts of complainant are the best that could be made under the circumstances, and gas oil is scarce, and from all indications will not be reduced in price in the immediate future, on the ground that it is not sustained by the evidence and is contrary to the evidence.

109 11. The defendants except to that portion of subdivision "VII", pages 15 and 16, of the master's opinion commencing with the paragraph headed "B. Coal", and all of the remainder of such point "VII".

12. The defendants except to that portion of subdivision "VIII," pages 17 and 18, of the master's opinion which finds that:

"I have referred in my findings to the various elements which make up the cost of production and have found that the prices paid for material and labor were reasonable and that the amount of material used per 1,000 cubic feet of gas made was reasonable,"

on the ground that same is not supported by the evidence; is contrary to the evidence.

13. The defendants except to subdivision "VIII," pages 17 and 18, of the master's opinion, with the exception of wherein the master states that the unaccounted for gas is excessive as claimed by the complainant; and wherein the master finds to the effect that the allowance for such unaccounted for gas should not be below 11% of the total production, on the ground that it is not supported by the evidence and is contrary to the evidence.

110 14. The defendants except to that portion of subdivision "IX" of the master's opinion which finds that:

"B. Street Lighting Expenses. This item for 1919 and the six months ending June 30, 1920, is so small that it may be disregarded without in an way changing the decision of this case. The reasonableness of the amount is not questioned by the defendants, but the propriety of the charge is questioned. I am of the opinion that the charge is a necessary and reasonable expense of the complainant and that complainant should be credited with it in estimating its distri-

on the ground that same is not supported by the evidence, is contrary to the evidence and has no evidence tending to support it. The bill of complaint in this suit does not attack the statute fixing the rate at which gas may be sold to the city. Expense connected with the sale to the city should not be included and made a charge against private consumers.

15. The defendants except to that portion of subdivision "X", of the master's opinion which finds that:

"From the testimony adduced at the hearing on behalf of complainant, it reasonably appears that the present capacity of complainant's plant is inadequate at the present time and will become more inadequate in the near future to meet the demands reasonably made upon it."

on the grounds that the same is not supported by the evidence, is contrary to the evidence and is immaterial, and speculation
111 and conjecture as to sales in the future may not be considered in determining the confiscatory nature of a statute.

16. The defendants except to that portion of subdivision "X" of the master's opinion which finds that:

"The estimate submitted to complainant by the United States Gas & Improvement Company for the furnishing of the additional production facilities calls for the expenditure of $840,000 within the next six months. The evidence shows that in order to enlarge the holder capacity of complainant's plant by 6,000,000 cubic feet, an additional expenditure of approximately $1,000,000 would have to be made within the next twelve months."

on the ground that the value of complainant's property used and useful has been stipulated, and upon the stipulated value the rate base is to be fixed. That the master was without power as he ruled during the trial, to add to or deduct from this amount, and this finding would violate the stipulation. Moreover, the present consumers may not be charged with a return on any property which is not now in being and which is not now used in making and distributing gas. If complainant's plant should be enlarged and thus its fair value increased, the number of consumers would necessarily be greater than now and the new consumers, together with the old ones, would have to pay a rate sufficient to take care of any increased capital investment. Such increased facili-
112 ties and increased number of consumers would tend to decrease the unit cost of complainant's gas. This question was not litigated upon the trial for the reason that defendants deemed it immaterial and that statements by complainant's counsel warranted the belief that the same view was held by the complainant. (S. M. 437-438.)

17. The defendants except to that portion of subdivision "X" of the master's opinion which finds that:

"I have found that complainant, in order to enlarge its capacity, must necessarily expend during the next twelve months at least $1,600,000. This is, of course, less than the estimated cost of the extensions above referred to and my deduction from said estimated cost is really an arbitrary one and made in order that the amount upon which I estimate complainant should be entitled to receive a fair rate of return should be calculated in the most conservative manner possible. I should assume that this amount should be added to the stipulated value of complainant's plant used in the public service for the purposes of this case."

on the ground that same is not supported by the evidence and is contrary to the evidence; and upon all the grounds set forth at length in the last previous exception hereto.

18. The defendants except to subdivision "XI" marked "Recapitulation" of the master's opinion, and to each and every item thereof, on the ground that they are not supported by the evidence,
113 contrary to the evidence and such items are supported by no proof other than the books of the company and such books were not sufficiently proven, and that the costs of production and distribution set forth are excessive, resulting from the inefficient management and operation by the complainant.

Dated, September 28th, 1920.

CHARLES D. NEWTON,
Attorney-General of the State of New York.
WILBER W. CHAMBERS,
Solicitor for Defendant Newton, as Attorney-General, State of New York.
TERENCE FARLEY,
Solicitor for Defendant Nixon, Constituting the Public Service Commission of State of New York, for the First District.

WILBER W. CHAMBERS,
JAMES P. HILL,
WILLIAMS JACKSON,
EDWARD M. DEEGAN,
Of Counsel.

111 [Endorsed:] District Court of U. S., Southern District of N. Y. Kings County Lighting Company, Complainant, vs. Charles D. Newton, as Attorney-General of State of New York et al., Defendants. E. 18-97. Defendants' exceptions to special master's opinion, which opinion is made part of his findings by Finding No. 47. Wilber W. Chambers, Solicitor for deft. Newton, Office & P. O. address, Capitol, Albany, N. Y. Terence Farley, Solicitor for deft. Nixon, constituting Public Serv. Com., 1st Dist., 49 Lafayette St., N. Y. City. Charles D. Newton, Attorney-General of the State of N. Y., Capitol, Albany, N. Y.

115 District Court of the United States for the Southern District of New York.

In Equity.

No. 18-97.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

LEWIS NIXON, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, Defendants.

Plaintiff's Exceptions to Report of Special Master.

For plaintiff it is urged for exceptions to the report of the Special Master filed herein September 22nd, 1920:

1. That the evidence does not sustain the finding in paragraph 11 of the Special Master's report, that 22-candle power gas contains 620 British thermal units or more per cubic foot. The evidence shows that there is no relation between the heat unit content of gas and its candle power, and 22-candle power gas may contain fewer than 620 British thermal units per cubic foot.

2. That the agreement between the parties with respect
116 to the valuation of plaintiff's plant and facilities and the ruling of the Court with respect thereto, does not sustain the finding of the Master in paragraph 16 of his report, to the effect that the parties have stipulated that the valuation of such plant and facilities since January 1st, 1919, was and is the sum of $3,300,000, or that if any party shall be dissatisfied with the determination of the issues herein, he shall have the right to have the issues remitted to the Special Master for a determination of the actual value. The record (pages 1028 to 1045*a*, inclusive), shows that the defendants conceded that plaintiff's plant and facilities used in the public service at all times since January 1st, 1919, were of the value of $3,300,000, and the plaintiff, without agreeing or stipulating that said amount was the value, accepted the concession for the purposes of a determination of the validity of Chapter 604 of the Laws of 1916, such concession and acceptance was made in reliance upon the ruling of the District Court that if any party was dissatisfied with any condition, predicated upon the value of the plant and facilities of plaintiff, that might be imposed by the Court in granting an injunction, such party would have the right to have the matter remitted for the purpose of a determination of the actual value of the plant and facilities.

3. That the evidence does not sustain the finding of the Master that plaintiff produced 120,163,007 cubic feet of gas dur-
117 ing the calendar year 1919, and 40,847,003 cubic feet of gas during the six months ended June 30th, 1920, in excess of the amount necessary to take care of the sales during said periods; nor does the evidence sustain the findings of the Master that the amount of "unaccounted for" gas of the plaintiff in 1919 and the six months ended June 30th, 1920, is questionable, or excessive, or unreasonable; such evidence does not sustain the finding of the Master that the "unaccounted for" gas in these periods reasonably represents only approximately 11 per cent of the gas made, or that in calculating the expenses of plaintiff only 11 per cent of the gas made should be allowed for "unaccounted for" gas. The evidence is conclusive that the "unaccounted for" gas of plaintiff was unavoidable and not due to negligence or inefficiency in management; that there is no standard percentage by which to measure the unavoidable amount of "unaccounted for" gas of plaintiff or any other gas company.

4. That the evidence does not sustain the finding of the Master that the plaintiff should be allowed for repairs to meters the sum of $19,042.75 instead of the sum of $22,998, the amount actually expended in 1919, or the sum of $10,259.87 instead of the sum of $11,222.79, the amount actually expended in the six months ended June 30th, 1920. The evidence conclusively shows that the plaintiff is entitled to take in its meters for repairs after they have been in service five years and the amount allowed by the Master for
118 meter repairs does not enable plaintiff to do so, or even to take them in for repairs after they have been in service seven years, which is the maximum period allowed by the orders of the Public Service Commission.

5. In determining the cost of manufacturing and distributing gas in the year 1919 and the six months ended June 30th, 1920, the Master should not have deducted any amounts whatsoever from the expenses of plaintiff actually incurred in such manufacture and distribution, either for "unaccounted for" gas or for repairs to meters or otherwise. The evidence shows that plaintiff's plant was operated economically and efficiently, and in determining the validity of the statute fixing the rate the actual expenses of operation of the plaintiff should be allowed there being no evidence of extravagance, waste or inefficiency in the management or operation of plaintiff's plant and facilities.

INGRAHAM, SHEEHAN & MORAN,
Solicitors for Plaintiff.

14 Wall Street, Borough of Manhattan, New York City.

119 [Endorsed:] District Court of the United States for the Southern District of New York. Kings County Lighting Company, Plaintiff, against Lewis Nixon, constituting the Public Service Commission, etc., et al., Defendants. Plaintiff's Exceptions

to Report of Special Master. Ingraham, Sheehan & Moran, Solicitors for Plaintiff, 14 Wall Street, Borough of Manhattan, New York City.

120 District Court of the United States, Southern District of New York.

In Equity.

No. 18-97.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

LEWIS NIXON, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, Defendants.

Opinion of Charles M. Hough, C. J., on Final Hearing. Final Decree, Entered October 20, 1920. *Memorandum on Settlement of Final Decree.*

121 District Court of the United States, Southern District of New York.

In Equity.

No. 18-97.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

LEWIS NIXON, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, Defendants.

On Exceptions by Plaintiff, by the Public Service Commission, and by the Attorney General of New York to the Report of Gordon Auchincloss, Esq., Special Master, said Report Being Dated September 22, 1920.

A brief was filed on behalf of the District Attorney of the County of Kings, who, however, did not answer the bill herein and was not represented at the hearings before the Master.

Francis M. Scott and Samuel F. Moran for plaintiff;
Wilbur W. Chambers and James T. Hill of counsel for the Attorney General of the State of New York;

William S. Jackson, Ely Neumann and Edward M. Deegan, of counsel for the Public Service Commission:

122 Brief on behalf of the District Attorney of the County of Kings was filed by Messrs. John P. O'Brien, James A. Donnelly and A. Judson Hyatt.

Hogan, *C. J.*:

In view of the nature of this case, all the evidence submitted to the Master has been read and considered, to the end that the exceptions filed might be disposed of after an independent review of the record, even as to matters of fact.

It does not, however, appear necessary to make new findings, as the exceptions argued refer to those made by the Master.

Defendants' Exceptions.

These exceptions extend substantially to every proposition found either in the Master's report or opinion. Yet they may be grouped with sufficient accuracy under the following heads:

(1). Plaintiff has sought to support its case almost wholly by incompetent evidence, viz: its own books.

(2) The period from January 1, 1919, to June 30, 1920, is too short a time upon which to base any finding of the nature of a statutory gas rate.

(3) Plaintiff is prevented by the accepted rules of equity from advancing the contention here made, because it has during all or most of the year and a half above referred to persistently and deliberately disregarded the statutory rule that the gas produced by it must be of "twenty-two candle-power."

(4) Plaintiff is barred from prosecuting this action by a judgment entered March 29, 1920, in the Supreme Court of New York wherein relief similar to that now demanded was sought.

123 (5) The City of New York is a necessary party defendant herein, without which no legal determination of the matters involved can be had.

(6) The Master erred, after finding that plaintiff must necessarily enlarge its capacity at an expense of not less than One million six hundred thousand dollars, in assuming "that this amount should be added to the stipulated value of complainant's plant used in the public service,—for the purposes of this case."

(7) The Master erred in holding that "gas unaccounted" for should be estimated at as much as eleven per cent of the total gas produced, and in not holding that no more than eight per cent should be so allowed.

(8) The Master erred in that he allowed as operating costs to the plaintiff excessive sums for coal, oil, repairs, clerical expenses (auditing) and uncollectibles.

(9) The Master erred in holding that eight per cent on the investment was a fair return.

No exception not assignable to one of the foregoing heads, seems to me worthy of mention.

I.

This fundamental exception is necessarily disposed of by the ruling of Learned Hand, J. in Consolidated Gas Co. vs. Newton (Opinion filed in this Court August 4, 1920) unless I should feel obliged in conscience to disagree with my colleague. Under all ordinary rules of procedure, Judge Hand's opinion is now the law of this Court.

But I am not in the least inclined so to disagree. The object of the statute has been well pointed out in People ex rel. New York Railways Co. vs. Public Service Commission, 223 N. Y., at
124 378. It is to make the method of accounting by regulated corporations uniform "so that the accounts could be readily comprehended by those required to examine the same." The object is "not to regulate the management of their finances, but to show what the management was." While the Public Service Commissions in this State are not in any full sense rate-making bodies, they may be described as the eyes of the commonwealth to keep watch on the public utilities of the State. It is for this purpose that they are authorized, and indeed directed to regulate account keeping to the end that the act of seeing what has been done may be easily performed.

The system is now almost nation-wide, and the most prominent example of its application is the system of railway accounting promulgated and enforced by the Interstate Commerce Commission.

Yet it is said that books so kept are not even prima facie evidence of the facts related therein. Definitions sometimes advance argument, and it is to me material to observe what evidence means. Dean Wigmore in his well known treatise (Vol. 1, page 3) has collated the historic definitions, and in commenting upon them points out that evidence is always a relative term. Yet there is a constant contained in it, viz: the relation between the proposition to be established and the material evidencing the proposition.

In the matter before the Court the proposition to be established is what it costs to make gas, and the logical inquiry is, How would any person interested in that question and acquainted with business go about to ascertain the correct answer. If he found that all gas-making companies were in the business for profit, and all were required by public authority to keep accounts showing their expenses and charges, would he not first investigate and prima facie accept the results shown by such books? There is but one answer to this inquiry. And when he further learned that such accounts
125 were used by the Public Service Commission (and properly used) whenever complaint was made by the public that the consumer's price for gas was too high, I do not think he could doubt that the books were of the same evidential value as always when the

question propounded was whether the rate compelled the maker to manufacture gas,—by means of impairment of capital.

The use of entries kept in the regular course of business and of abstracts of such entries, when the practical inconvenience of producing the entrants on the witness stand plainly outweighs the probable utility of so doing, has greatly increased of late years, and properly so. Otherwise modern business could not be investigated in court. Confining reference to the Appellate Court of this Circuit, instances may be found of using the train sheet of a train despatcher (Chesapeake, etc. vs. Stojanowski, 191 F. R., 720;) books kept even by assistant weighers and in a criminal cause (Heike vs. United States, 192 F. R., 83); the books of banks and abstracts from them as evidence against the bank official under indictment (Parker vs. United States, 203 F. R., 950); similar books as against the surety of a dishonest employee in a civil suit (American Surety Co. vs. Pauly, 72 F. R., 470; affirmed 170 U. S., 133); any maritime papers commonly kept under international maritime customs (Grace vs. Browne, 86 F. R., 155; Bacon vs. Conroy, 172 F. R., 532); and the books of controlled and controlling corporations in Barber, etc. Co. vs. Forty-second Street Co., 180 F. R., 648.

The exceptions referred to under this head are overruled.

II.

Relying upon the rule of Willcox v. Consolidated Gas Co., 212 U. S., 19, it is asserted in various forms that a year and a half of such a time of trouble as has afflicted the world during and since the World War,—is too short a period to enable any court (and
126 presumably any other tribunal) to measure and pass judgment upon a statutory public utility rate. This case is singular in that the question presented is not whether eighty cents for gas affords a fair return for the making, but what shall be done when it appears that it costs more than eighty cents to make and distribute the gas, before there is or can be any question of profit or return at all. The point is that the eighty cent rate is confiscatory not because it does not yield a sufficient percentage on capital, but because to produce it at that price consumes capital.

Neither the Willcox case nor any other decision can be cited to show that any definite or fixed period of experimentation is a necessary prerequisite to a suit of that kind. If plaintiff were getting any return at all another question might be presented, but it is to me a matter of no doubt whatever that a year and a half is a long enough time to experiment with proved capital losses before applying for relief.

The argument is also made (as a variant of this point) that the times are abnormal and that corporations like plaintiff are only carrying their share of the public burden in gratuitously distributing gas for a reasonable time.

Whether this Court has power to consider that argument may be doubtful, but assuming that it may be considered, I am of the opinion that the eleemosynary practice has lasted a reasonable time, and the exceptions under this head are overruled.

III.

The contention that plaintiff comes into Court with "unclean hands" because it has failed to furnish gas of the statutory candle power, cannot prevail in this district after the action of the court which granted the temporary injunction in ruling upon this very point.

127 It may be said that the decision of a court of three Judges is after all but a district court decision and not binding upon the Judge who hears the case at final presentation.

In a sense this is true, for the court hearing the application for injunction pendente lite necessarily acts upon affidavits, the potency of which may largely disappear after consideration of the evidence of witnesses subject to cross-examination.

But in this instance no cross-examination or additional evidence has changed the situation presented when the motion for temporary injunction was argued.

This plaintiff has (in the language of Judge Learned Hand's recent decision) persistently and deliberately disregarded the candle-power requirement. I think it is proven that it has done so of necessity and has not thereby injured anyone; but that is, after all, beside the point if there be anything in the argument.

But I think there is nothing in the argument unless a plaintiff manufacturer who cannot pay the bills incurred in making his regulated article (without speaking of profit or return) is obliged to cease operations rather than to give the public something, even though that something be not statutory.

This manufacturer might have based its suit on the allegation that the 22 candle-power requirement was in itself confiscatory;—having regard to the admittedly greater expense of complying with the standard of illumination. Both upon reason and authority the exceptions based upon the foregoing argument are averruled.

IV.

The judgment entered in the Supreme Court of the State on March 29, 1920, concluded nothing except matters which became history with the end of 1918. By its specific terms it left further

128 occurrences open for future litigation, and this is the future litigation.

The matter may be summed up thus: It has been held by a final judgment as yet unreversed and therefore controlling, that an 80 cent rate for this plaintiff was if not fairly compensatory, at any rate non-confiscatory during 1916, 1917 and 1918. Non-constat that the same rate is not confiscatory in 1919 and 1920. The Supreme Court of New York did not lay down any proposition opposed to this statement; and had no power so to do,—if it had tried. The exceptions under this head are overruled.

V.

It having been decided by the court in which I am now sitting and by the Circuit Court of Appeals for this circuit that the City of New York is not a necessary party defendant to an action of this kind, the exceptions relating to that question are overruled upon authority.

VI.

The Master's finding here complained of is regarded as immaterial; yet for the sake of form the exception is sustained in so far as the Master held that the sum of $1,600,000 "should be added to the stipulated value of complainant's plant used in the public service,—for the purposes of this case." The stipulation was that the existing plant was worth at least a certain amount of money, and it went no further. I do not think that it was necessary or proper for the Master to add anything to or take anything from this valuation which, however, seems to me to have no other function under the whole evidence than to put it beyond the bounds of present argument that plaintiff has an actually existing investment of at least $3,300,000, now worth that sum, and all engaged in making gas.

129 VII.

The matter of gas unaccounted for will be considered under plaintiff's exceptions.

VIII.

I agree with the Master that the variation in measurement between the vendor's and vendee's quantities of coal and oil are trifling, and indeed I go further and hold it as matter of common knowledge that variations no greater in extent than are here shown, do occur and must occur as the result of the handling and re-handling of materials of this kind. The exceptions with respect to coal and oil are overruled.

The matter of repairs will be treated of under plaintiff's exceptions.

The item of clerical expenses cannot justly be complained of. In my opinion it has increased less than might be expected by reason of the substitution of women for men in the accounting departments and the territorial expansion of plaintiff's business. The exceptions under this heading are overruled.

The uncollectibles are reasonable in amount,—indeed unusually so having regard to the nature of plaintiff's business, i. e. it has no large customers, and supplies small tenant householders. This subject was gone into at great length on the trial in the lower court in Willcox vs. Consolidated Co., supra, and the result there reached is confirmatory of the Master's finding on this annoying item. All defendants' exceptions under this head are overruled.

IX.

I do not find it necessary to express either agreement or disagreement with the Master in respect of his holding and finding that eight per cent on the investment is a fair return.

130 It would be necessary to express opinion as to what was a fair return if this case presented the inquiry whether the return actually received was compensatory or confiscatory.

There is no return at all; and the question being whether it is confiscatory to make gas for nothing,—it is not necessary to go beyond that fact in deciding this particular case; it being elementary that courts cannot make rates; they only pass upon rates after they are made. The defendants' exception to the Master's holding that eight per cent is a fair return is sustained without prejudice, and solely on the ground that such finding is immaterial to the present cause at the present time.

It follows that except as above indicated under VI and IX, all defendants' exceptions will stand as overruled.

Plaintiff's Exceptions.

1st. The evidence adduced does show that there is no relation between the heat unit content of gas and its candle power, and that it is true that 22 candle-power gas may contain fewer (or more) than 620 B. T. U. per cubic foot.

Consequently plaintiff's first exception is sustained as filed, though the materiality and importance of the finding if not perceived.

2d. The substance and effect of the stipulation between the parties referred to in this exception was that for the purposes of this litigation and not otherwise the plaintiff had an actual investment devoted to gas-making whereof the value was at least $3,300,000.

The report is modified so as to set forth this first fact; but it is further the fact that if for any purpose after decree, e. g. on application made at the foot of the decree when drawn in usual form,—

131 either party is dissatisfied with this stipulation or the legal effect thereof or the legal inferences to be drawn therefrom,—

then either party may seek and obtain opportunity to adduce evidence in respect of value.

3d. The question of "unaccounted for" gas is both important and perplexing.

I am convinced that plaintiff has the kind of plant operating in the kind of territory which is sure to produce a large quantity of unaccounted for gas. I mean that large customers are conspicuously absent; the service pipes run long distances through sandy soil and the consumers are of a class that require an excessive amount of metering.

Although legally and nominally in a great city, this particular gas-maker is in reality operating in a country town.

I think the testimony as to such a concern is plain that up to 12 per cent, loss by "unaccounted for" gas, is habitually taken by ex-

perienced men as matter of course. After that such men begin to look for the source of trouble, and are by no means sure of being able to find it.

This is one of those contingencies of business that courts must accept on the basis of experience, and in my opinion the most valuable evidence produced are the tabulations.—Defendants' Exhibit D6 and Exhibit D1. The fair way to consider such item of expense (for that is what it really is) is to permit to this corporation (for the years 1919 and 1920) such average loss as has fallen upon suburban or small town companies during the period of observation shown by the exhibits above stated. The matter must rest largely in opinion, yet it cannot be that any percentage actually observed must be allowed because it occurred; there must be a limitation, arbitrary to be sure, but fair because based upon observed experience.

In my judgment 15% is the limit according to the evi-
132 dence in this case, and to that extent the plaintiff's third exception is sustained.

4th. This exception relates to the item of repairs; it is not large but it does contain a principle. I agree with the plaintiff that the evidence shows that it or any other gas-making company is entitled to take in its meters for repair after they have been in service five years. Therefore since the item of repair actually proven does not exceed the expenditure implied in the foregoing finding, the fourth exception of plaintiff is sustained.

5th. I do not find it necessary to pass upon this exception, which in substance is covered by the findings already made in this opinion.

It follows that the Master's report with the unimportant modifications above indicated, is satisfactory to the court.

The sum of the matter is this: it cost plaintiff, and would have cost any other well operated maker of gas-oil gas at least 84 cents to furnish 1,000 cubic feet of gas in the year 1919, and at least 96 cents to do the same thing in 1920.

The fundamental reason for this is that the oil best fitted for the gas-maker is also richest in gasoline;—therefore plaintiff and other similarly situated manufacturers, are and have been competing with (especially) the automobile. This difficulty is not temporary, so far as human foresight goes. It may well be, that gas-makers will be driven back to coking-coal,—but that does not affect the rights of a concern lawfully organized to make oil-gas and possessing no plant for coal gas.

A final decree may be submitted, which will after appropriate recitals respecting the exceptions to Master's Report, confirm the report as modified, declare the unconstitutionality of the Acts of 1906 and
1916 in respect of rate, award to plaintiff injunction as
133 & 134 prayed for, and costs against the appearing defendants. It will also contain the usual provision for applying at the foot of decree for further relief, or for modification or vacation of injunction.

One meaning or implication in this last provision is this:—this Court will not directly or indirectly announce, fix or suggest a rate

for gas, but if plaintiff endeavors to charge and collect an inequitable rate, it can vacate its own injunction.

Oct. 13, 1920.

135 District Court of the United States for the Southern District of New York.

In Equity.

No. 18-97.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

LEWIS NIXON, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, Defendants.

This cause came on to be heard upon the report, dated September 22nd, 1920, of Gordon Auchincloss, Esq., Special Master, the exceptions thereto and the evidence and proofs in the cause, and was argued by counsel, and the Court, being fully advised in the premises, doth order and decree (*a*) that plaintiff's exceptions numbered respectively 1 and 4 be, and each of them hereby is, in all respects sustained, (*b*) that plaintiff's exception numbered 2 be, and the same hereby is, sustained to the extent that the report of the Special Master be, and the same hereby is, modified so as to set forth that the substance and effect of the stipulation between the parties referred to in the Master's finding numbered 16 was that, for the purpose of this litigation and not otherwise, the plaintiff had an actual investment devoted to gas making whereof the value was at least $3,300,000, and that if for any purpose after decree, e. g. on application made at the foot of the decree either party is dissatisfied with said stipulation or the legal effect thereof, or the legal infer-
136 ences to be drawn therefrom, then either party may seek and obtain opportunity to produce evidence in respect of value, (*c*) that plaintiff's exception numbered 3 be, and the same hereby is, sustained to the extent that in calculating plaintiff's expenses of operation in the years 1919 and 1920 fifteen per centum of the registered make of gas should be allowed for gas unaccounted for, (*d*) that defendants' exception to the Master's holding that $1,600,000 (the expenditure necessary to enlarge plaintiff's plant capacity) should be added to the stipulated value of plaintiff's plant used in the public service, for the purposes of this case be, and the same hereby is, sustained, on the ground that the finding is immaterial, (*e*) that defendants' exception to the Master's holding that 8% is a fair return, be and the same hereby is, sustained without prejudice, and solely on the ground that such finding is immaterial to the present cause at the present time, (*f*) that the other exceptions of the defendants to the report of the Special Master and to his opinion

as incorporated in his report, be and each of them hereby is, overruled, (2) that the report of the Special Master be, and the same hereby is, modified in conformity with the foregoing rulings upon the exceptions filed thereto, and as so modified confirmed, and on the report of said Special Master as so modified and the evidence in the cause, it is

(1) Ordered, adjudged and decreed that Chapter 125 of the Laws of 1906 and Chapter 604 of the Laws of 1916 of the State of New York, in so far as such statutes, or either of them, limit the rate to be charged for gas supplied by plaintiff in the territory served by it, are, and each of them is, confiscatory and deprives plaintiff of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States; and it is

137 (2) Further ordered, adjudged and decreed that the enforcement of said statutes, and each of them, in so far as they, or either of them, prescribe a rate or price to be charged for gas supplied by plaintiff, be, and the same hereby is in all respects suspended and restrained; and it is

(3) Further ordered, adjudged and decreed that defendants, Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, Charles D. Newton, as Attorney-General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, and each of them, their, and each of their, successors, attorneys, agents, assistants, deputies, servants and employees, be, and each of them hereby is restrained and enjoined from enforcing the provisions of said Chapter 125 of the Laws of 1906 and said Chapter 604 of the Laws of 1916 with respect to the rates or price to be charged by plaintiff for gas supplied by it, and from instituting, or causing to be instituted, any suit, action or proceeding to enforce the said statutes, or either of them, or any provision thereof, or from taking any action under the Public Service Commission Law of the State of New York, or any other statue or law of said State, to compel or enforce obedience to the said statutes in so far as they, or either of them, fix or prescribe a rate or price for gas supplied by plaintiff, and from interfering with plaintiff, forthwith, and while this decree is in force, charging, billing and collecting a rate or charge in excess of that fixed by said statutes or either of them for gas supplied to its consumers other than the City of New York; and it is

(4) Further ordered, adjudged and decreed that any of the parties defendant to this cause, or their successors in office, may
138 apply, upon notice, at the foot hereof, to vacate or modify the foregoing injunction, if it can be shown that by change in conditions the statutory rate is no longer confiscatory in its effect under such new conditions; and it is

(5) Further ordered, adjudged and decreed that plaintiff recover its costs and disbursements, when duly taxed of the defendants, Lewis Nixon, constituting the Public Service Commission of the

State of New York for the First District, and Charles D. Newton, as Attorney-General of the State of New York, to be borne equally by them, and that the allowance and expenses of Gordon Auchincloss, Esq., Special Master, appointed to hear and report herein, shall be fixed by the Court upon motion made by any party hereto, or by the Special Master, and shall be paid by said defendants, in accordance with the Rule of the Supreme Court of the United States on this subject.

CHAS M. HOUGH,
U. S. J.

October 19, 1920.

139 District Court of the United States, Southern District of New York.

In Equity.

No. 18-97.

KINGS COUNTY LIGHTING COMPANY,

against

LEWIS NIXON et al.

Memorandum on Settlement of Final Decree.

I have examined the forms of decree submitted by both plaintiff and defendants.

Taking up the suggestion of defendants:

1 & 2. The language of the opinion was not drawn without reflection. I thought it was agreed as a fact that the actual investment of plaintiff devoted to gas making during the time inquired into was of the value of at least $83,300,000 and those words I prefer to let stand.

3. The declaration that both the acts of 1906 and of 1916 are unconstitutional in respect of rate was inserted in the opinion of a purpose, viz: to make it clear that the act of 1906 is not revived by the unconstitutionality of the act of 1916. This in my opinion is only a clearer way of saying (as suggested by defendants) that the "act of 1906 as amended in 1916 is unconstitutional."

4. The decree as drawn by plaintiff's counsel specifically limits the injunction against the Public Service Commission et al. to compelling "obedience to the said statutes in so far as they or either of them fix or prescribe a rate for gas". This decree interferes with the public authorities in no wise except in respect of the rate
140 or charge for gas. It is the intent of the decree to make it as plain as possible that so far as the two enumerated statutes are concerned there is no statutory rate for gas left in operative existence.

5. The language of the decree in respect of applications at the foot thereof has been changed by me to a form of words which I prefer to any suggested by either party.

6. The provision regarding costs and taxable disbursements contained in plaintiff's form is usual and cannot properly be objected to.

The fees of the Special Master are not usually carried into costs and disbursements because the appointment and compensation of Masters is regulated by Rule 68 in Equity of the Supreme Court. I have added to the decree as drawn by the plaintiff some words indicative of this fact; and, with the changes above adverted to I have signed and filed plaintiff's form.

C. M. HOUGH, *C. J.*

Oct. 19, 1920.

141 District Court of the United States, Southern District of New York.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

vs.

CHARLES D. NEWTON, as Attorney-General of the State of New York; Alfred M. Barrett, Constituting the Public Service Commission of the State of New York for the First District, and Harry E. Lewis, District Attorney of Kings County, Defendants.

The petition of Charles D. Newton, as Attorney-General of the State of New York, and Alfred M. Barrett, constituting the Public Service Commission of the State of New York, shows to this court:

First. That Charles D. Newton, is the Attorney-General of the State of New York, and Alfred M. Barrett is the Commissioner of the Public Service Commission of the State of New York for the First District.

Second. That this is an action in equity to have declared unconstitutional chapter 125 of the laws of 1906 and chapter 604 of the laws of 1916 of the State of New York, on the ground that the rate fixed by that set for gas sold to private consumers in the city of New York is now confiscatory.

142 Third. The case was tried before a Special Master. The trial began on or about August 3rd, 1920, and continued to on or about September 2nd, 1920. The record before the Special Master consists of approximately 1452 pages of testimony and approximately 40 exhibits.

Fourth. The Special Master's report was filed in the office of the Clerk of the United States District Court on or about September 22d, 1920. The defendants filed exceptions to the Special Master's report in the office of the Clerk of the United States District Court on or about September 28th, 1920.

Fifth. The exceptions to the Special Master's report filed by the defendants came on for hearing before the District Court (Judge Charles M. Hough sitting) on the 4th day of October, 1920. The opinion and decree of the District Court were filed in the office of the Clerk of the United States District Court for the Southern District of New York on the 20th day of October, 1920.

Sixth. That the said decree restrained the defendants from enforcing in any way chapter 125 of the laws of 1906 and chapter 601 of the laws of 1916, of the State of New York, and declares that the said statute violates the Fourteenth Amendment of the Constitution of the United States.

143 Seventh. The above named defendants, Charles D. Newton, as Attorney-General of the State of New York, and Alfred M. Barrett, constituting the Public Service Commission of the State of New York, for the First District, feeling themselves aggrieved by the decree entered in the above entitled court on the 20th day of October, 1920, do hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors herewith filed, and pray that their appeal be allowed and citation be issued as provided by law, and that a transcript of the record of the proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Supreme Court situated at Washington, D. C. under the rules and regulations of such court made and provided, on the 14 day of February, 1921, and your petitioners pray that an order be made dispensing with security.

Dated, New York, January 13, 1921.

CHARLES D. NEWTON,
Attorney-General of the State of New York.
WILBUR W. CHAMBERS,
Solicitor for Defendant Newton,
As Attorney-General of the State of New York.

144 TERENCE FARLEY,
Solicitor for Defendant Barrett, Constituting the Public Service Commission for the State of New York, First District.
JOHN P. O'BRIEN,
Solicitor for Defendant Lewis,
District Attorney of Kings County.

145 United States District Court, District of New York.

STATE OF NEW YORK,
Southern District of New York,
City and County of New York, ss:

Alfred M. Barrett, constituting the Public Service Commission of the State of New York for the First District, being duly sworn, says:

I am one of the defendants in the above entitled action. I have read the foregoing petition and the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters I believe it to be true.

ALFRED M. BARRETT.

Sworn to before me this 13 day of January, 1921.
WILLIAM FULLAN,
Notary Public, N. Y. County.

146 Appeal allowed and bond to cover cost of appeal is dispensed with. Return of record on appeal to be filed on or before February 14, 1921, unless time further extended.
Dated, New York, January 14, 1921.
JOHN C. KNOX,
U. S. D. J.

147 [Endorsed] District Court of U. S. Southern District of N. Y. Kings County Lighting Co., Complainant, vs. Charles D. Newton, as Attorney-General of State of N. Y., et al., Defendants. Petition. Wilber W. Chambers, Solicitor for deft. Newton. Office & P. O. address, Capitol, Albany, N. Y. Terence Farley, Solicitor for deft. Barrett. Office & P. O. address, #49 Lafayette St., New York City.

148 District Court of the United States, Southern District of New York.

E. 18-97.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

ALFRED M. BARRETT, Constituting the Public Service Commission of the State of New York for the First District; Charles D. Newton, as Attorney General of the State of New York, and Harry E. Lewis, as District Attorney for the County of Kings, Defendants.

Assignment of Errors.

And now come the defendants Charles D. Newton, as Attorney General of the State of New York, Alfred M. Barrett, constituting the Public Service Commission of the State of New York for the First District and Harry E. Lewis, as District Attorney of the County of Kings, and file the following assignment of errors upon which they and each of them will rely upon their prosecution of the appeal from the decree made in this cause by the District Court of the United States, Southern District of New York, on the 20th day of October, 1920; and each said defendant says that in the record and proceed-

ings in the above entitled cause, there is manifest error in each and every one of the following particulars, to wit:

1. In not granting defendants' motion to dismiss the bill of complaint upon the ground that it failed to state facts sufficient to constitute a cause of action; because, among other things, the bill of complaint lacked an allegation that plaintiff theretofore had completely or substantially complied with the requirements of Chapter 125 of the Laws of 1906, as amended by Chapter 604 of the Laws of 1916, the act which the plaintiff assails in this action.

2. In sustaining the report of the Special Master denying the motion of the defendants, at the end of plaintiff's case, to dis-
149 miss the bill of the complaint, and overruling the exceptions of the defendants to such denial.

3. In sustaining the report of the Special Master denying the motion made by defendants, at the end of the whole case, to dismiss the bill of complaint, and overruling the exceptions of the defendants to such denial.

4. In sustaining the ruling of the Special Master admitting the plaintiff's books of account in evidence; the admission of the said books in evidence being erroneous and calling for a new trial because the said books were not books of original entry, and those persons who made the original entries or data underlying the said books and those persons who transcribed such entries or data into the said books were not produced as witnesses, and the death or unavoidable absence of such persons was not shown, and the truth and accuracy of the entries in the said books were not proven.

5. In not holding that the plaintiff's books of account admitted in evidence were inadmissable in evidence upon the ground that they were not kept in conformity with law, to wit: the Uniform System of Accounts for Gas Corporations prescribed by the defendant Public Service Commission; the said books not having been kept in conformity with the said Uniform System of Accounts.

6. In not holding that proof that the plaintiff's books of account admitted in evidence were kept in conformity with the said Uniform System of Accounts was no proof of the truth or accuracy of the entries in the said books; the said Uniform System of Accounts being merely a form or classification system prescribed for facility of comparison and statistics, and having no force nor effect as to the truth or accuracy of book entries made in conformity therewith.

7. In not holding that the plaintiff's books of account admitted in evidence were inadmissable in evidence, even though proven to have been kept in conformity with the said Uniform System of Accounts; the truth or accuracy of the said books not having been proven otherwise as stated in paragraph 4 hereof.

8. In not holding that there was an absence of competent proof by the plaintiff as to the amounts of gas made or sold by it;
150 the only evidence on the subject being the plaintiff's books of account which were improperly admitted in evidence.

9. In not holding that there was an absence of competent proof by the plaintiff as to the cost of the manufacture and distribution of gas; the only evidence on the subject being the plaintiff's books of account which were improperly admitted in evidence.

10. In not holding that the plaintiff failed to prove that its business was conducted with ordinary and due efficiency, honesty, economy and prudence; such failure of proof being apparent, and the lack of ordinary and due efficiency, honesty, economy and prudence in such conduct having been proven.

11. In not holding that the plaintiff operated its business during the year 1919 and the first six months of 1920 in a manner lacking ordinary and due business efficiency, honesty, economy and prudence, and thereby greatly and unnecessarily increased the cost of its manufacture and distribution of gas; the evidence of the plaintiff's gross lack and failure in the said respects being clear and convincing.

12. In not holding that the statutes in question should not be declared confiscatory merely upon financial results obtained by the plaintiff in the abnormal period of the year 1919 and one half of the year 1920; because in this case the said abnormal period was not a reasonable or fair basis for such a declaration.

13. In holding that the said period of one and one half years was enough to be considered by the Court in this case and that an average over several years would be meaningless and that the present price levels are not merely transitory; for the reasons that it appeared that the said period of one and one half years was and is abnormal, and the price levels of said period were and are merely temporary and transitory, and, therefore, the profitable returns enjoyed by the plaintiff during a time prior to such abnormal period should be considered, and the present or future rate should not be determined solely upon such an abnormal, temporary and transitory basis but should be determined from a basis obtained by averaging returns during a reasonable number of years prior to such abnormal period, and the statutes in question should not be declared con-
151 fiscatory unless it be shown that the average return thereunder during such a reasonable number of years has not been a fair return upon the fair value of plaintiff's property used in the public service.

14. In holding that this case is singular in that the question presented is not whether 80c for gas affords a fair return for the making but what shall be done when it appears that it costs more than 80c to make and distribute the gas, before there is or can be any question of profit or return at all; for the reason that the said conclusion is not supported by the evidence, is contrary to the evidence

and there is no evidence tending to support it; and for the further reason that, even if the Court were right in its finding of fact, that there is no return to plaintiff upon its investment at the statutory rate, that condition would not necessarily cause the Court to grant relief where the condition has existed for only a short period and by reason of peculiar, abnormal and transitory conditions, and where it has been judicially determined that up to the close of the year 1918 the statutory rate was not confiscatory.

15. In holding that the 80¢ rate is confiscatory not because it does not yield a sufficient percentage on capital, but because to produce gas at that price consumes capital; for the reason that the said finding is not supported by the evidence and is contrary to the weight thereof; and for the further reason that there has been no actual trial or test of the 80¢ rate which would demonstrate whether or not that rate would be confiscatory; and for the further reason that the cost to the plaintiff of producing and distributing its gas during the year 1919 and half of the year 1920 was greatly excessive because of the plaintiff's failure to operate its business with ordinary and due business efficiency, honesty, economy and prudence.

16. In holding that neither the Wilcox case nor any other decision can be cited to show that any definite or fixed period of experimentation is a necessary pre-requisite to a suit such as the present cause; for the reason that the said conclusion is contrary to the weight of the judicial decisions and is a fundamental and vital error of law.

152 17. In holding that a year and a half is a long enough time to experiment with proved capital losses before applying for relief; for the reason that said conclusion is contrary to the weight of judicial authority; and for the further reason that there is no proof in this record that there have been capital losses for one year and a half, nor is there any proof or indication that the plaintiff herein waited one year and a half before applying for relief from the statutory rate. As a matter of fact, the record shows clearly that the plaintiff has been a consistent and willful violator of the statute in question, and never has complied therewith, but has been applying for relief therefrom, notwithstanding its said non-compliance, ever since the said statutes went into effect. And it further appears that within less than two months after the plaintiff failed to obtain relief in the Supreme Court of the State of New York, in which court its complaint was dismissed on March 29th, 1920, the said complainant commenced this new action for the purpose of evading the said statutes, and that since March 29, 1920 and until the entry of the decree herein, complainant continued to charge 95 cents per M cubic feet of gas sold without any warrant or authority and in utter defiance of the statute fixing the 80 cent rate.

18. In holding that the so called eleemosynary practice of plaintiff has lasted a reasonable time; for the reason that there is no evidence to sustain a finding that the plaintiff herein has indulged in any eleemosynary practices in the time covered by the issue in this case.

19. In not sustaining defendants' exception to the Special Master's refusal to hold that plaintiff came into this court of equity with unclean hands; for the reason that the facts established against plaintiff showed that it has wilfully and persistently violated chapter 125 of the laws of 1906, in that it had not supplied to its consumers 22 candle power gas—the gas specified in the act in question—and that defendants' motion to dismiss the bill of complaint upon this ground should have been granted.

153 20. In not holding that plaintiff was required to show a substantial observance of the requirements of the statute as to candle power and that its willful failure to do so should deprive it of the favorable consideration of a court of equity.

21. In failing to hold that the testimony in this case shows conclusively that plaintiff constantly, flagrantly, persistently and deliberately violated the statute in question from the winter of 1917-1918 down to the time of and during the trial, and that said violation of the statute should deprive it of relief at the hands of a court of equity.

22. In holding that the plaintiff has violated the statute of necessity and has not thereby injured anyone; for the reason that the said finding is contrary to the evidence and there is no evidence tending to support it, and on the further ground that the said finding is immaterial and unnecessary and is erroneous in law.

23. In holding that the judgment entered in the Supreme Court of the State of New York on March 29th, 1920, in the action entitled Kings County Lighting Company, plaintiff, against Charles D. Newton, as Attorney General of the State of New York, Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, and the City of New York, defendants, was not binding and controlling upon the court in this action, and that the said judgment which directed the plaintiff herein to experiment with the statutory rate before coming to the courts again for relief, did not preclude this court from granting relief to the plaintiff herein when it had not experimented with the statutory rate as directed by the Supreme Court of the State of New York; for the reason that the said judgment was res-adjudicata.

24. In holding that the variation of measurements between the vendor's and the vendee's quantities of coal and oil are trifling; because the evidence shows that these variations were substantial and sufficiently large to throw doubt upon the entire proof of the plaintiff as to the quantities of materials used in the manufacture of gas.

25. In holding that the item of clerical expenses cannot be complained of for the purposes of this case; because it appeared
154 that there was such a large increase in clerical expenses as to throw doubt upon the entire good faith of the plaintiff and the accuracy of their operating and distributing expenses, and as to show inefficiency, extravagance and imprudence in operation.

26. In holding that the uncollectibles are reasonable in amount; because it appears that the said uncollectibles are extraordinarily and unusually large, and it further appears that plaintiff, vested as it is by law with the utmost powers of coercion to enforce the payments of its bills by reason of the fact that it may shut off service from any person not promptly paying, is in a more favorable position in this respect than any private corporation, and its uncollectibles should be strictly examined and held to the lowest reasonable figure, and it further appears that the plaintiff is authorized by law to demand and obtain advance deposits and prepayments to secure it against loss in this respect.

27. In holding that there is no return at all in this case, and that the question here is whether it is confiscatory to make gas for nothing; for the reason that the proof shows that averaged over any reasonable period the plaintiff would have received more than a fair return upon its property if it had complied with the law and the statutory rate.

28. In holding that the evidence showed that there is no relation between the heat unit content of gas and its candle power; for the reason that the proof showed, on the contrary, higher candle power gas is invariably of a higher heating value, and gas of 22 candle power contains 620 or more British Thermal Units.

29. In holding that 15% should be allowed for unaccounted for gas, and that the evidence supported such a conclusion; for the reason that the evidence showed that unaccounted for gas to a greater extent than 8% is unusual and extraordinary for like locality and services as plaintiff's, and should not be allowed in a case of this kind.

30. In holding that it cost plaintiff, and would cost any other well operated maker of gas at least 84 cents to furnish 1,000 cubic
155 feet of gas in the year 1919, and at least 96 cents in 1920; for the reason that the said finding is contrary to the evidence and to the weight thereof and entirely disregards the proof that plaintiff's plant was operated in an inefficient, imprudent, extravagant and wasteful manner, the proof upon which such finding is based was incompetent and irrelevant and full of discrediting inaccuracies.

31. In holding that the fundamental reason for the high price of gas oil is competition with the automobile; for the reason that there is no evidence to sustain such findings; for the further reason that the tremendous increase in the production of crude oil will undoubtedly soon cause a decided drop in the price of gas oil, notwithstanding whatever other uses such crude oil may be put to, and the situation upon which the court based its judgment is purely abnormal, temporary and transitory.

32. In failing to hold that the Special Master committed error in finding that the gas supplied by the plaintiff is used principally for fuel, cooking, water heating and for illumination by means of the

incandescent burner; for the reason that there is no competent nor relevant proof in the record justifying such a finding, nor is there any proof in the record as to the actual amount of gas used in open flame burners, and without such proof there can be no deduction made as to the proportion used in any one of the various ways of use.

33. In failing to hold that the Special Master committed reversable error in finding that the candle power of a gas is not for all purposes a true measure of its usefulness, and that the heating value of a gas is more nearly a direct measure of its quality and usefulness, particularly as respects the community served by the complainant; for the reason that the finding is immaterial and irrelevant, and is apparently an endeavor to find an excuse for the flagrant violations of the law by plaintiff, and it is unsupported by the evidence which shows that 22 candle power gas such as prescribed by the statute gives a higher heating and lighting value than any of the gas furnished by plaintiff within the period covered by the issues in this case.

34. In failing to hold that the Special Master committed error in finding that the gas supplied by the plaintiff between January 1st, 1919 and May 1st, 1920, was of a uniform heating quality
156 and calculated to render the consumers of the plaintiff a service efficient and well adapted to their requirements; for the reason that the proof shows that the gas furnished by the plaintiff within this period shows variations of at least 100 British Thermal Units; that the finding moreover is immaterial and irrelevant, and apparently is an attempted excuse for the violation of the statute by the plaintiff herein.

35. In failing to hold that the Special Master committed error in finding that the amounts of material set out in finding number 22, were reasonable and were necessarily used by plaintiff; for the reason that the amounts stated were excessive, in a measure, due to the inefficient manner in which its plant was operated; that the amount of boiler fuel was particularly excessive as the proofs show that not more than the equivalent of 14 pounds of boiler fuel should be necessary in an efficiently operated plant, instead of 25 pounds as found by the Special Master; and that the amount of gas oil used per M cubic feet of gas made was also excessive considering the very low candle power of gas furnished by plaintiff.

36. In not holding that the Special Master committed error in finding that the average prices reasonably and necessarily paid by the plaintiff for generator coal, boiler fuel coal, and oil, water gas tar, and gas oil are as stated in his findings 23, 24, 25 and 27; for the reason that there is no competent proof as to the actual prices paid, nor were the prices paid during the period taken by the Court and the Special Master at all conclusive upon the reasonable average prices of the materials mentioned and used in the production of water gas.

37. In failing to hold that the Special Master committed error in finding that the total fuel cost per M cubic feet during the calendar

year 1919 was $.1945 and for the six months ending June 30th, 1920 was $.2038, and that the cost of material used by plaintiff in the calendar year 1919 was $.2292, and for the six months ending June 30th, 1920 was $.3031, and that such amounts were reasonably and necessarily incurred; for the reason that the figures found by the Special Master are excessive and not founded upon competent proof.

157 38. In failing to hold that the Special Master committed error in finding that the present prices, for which contracts may be made for the delivery to the plaintiff of generator coal and gas oil, are materially in excess of the average price paid by plaintiff for these materials during the calendar year 1919 and during the six months ending June 30, 1920; for the reason that there is no competent proof in the record as to the prices at which generator coal or gas oil may be obtained, particularly as there is no market price for gas oil which must be purchased by individual contract, and the price is dependent upon the bargaining power of the buyer and seller thereof.

39. In failing to hold that the Special Master committed error in not finding that the plaintiff failed to produce a reasonably large quantity of water gas tar from its water gas manufacture, and failed to account for the disposition of the water gas tar produced; for the reason that the evidence shows failure in both said respects.

40. In failing to hold that the Special Master committed error in finding that the gas making labor amounted for the year 1919 to $.0542 per M cubic feet, and to $.0710 for the first six months of 1920, and that such amounts were reasonable and necessarily paid; for the reason that there is no competent proof as to the labor cost, no proper allocation of the labor to different accounts, whether capital or operating expense, and no reasonable basis for the finding.

41. In failing to hold that the Special Master committed error in finding that repair labor and material, miscellaneous works expense and gas storage, amounted to $.0371 for the calendar year 1919, and to $.0495 for the first six months of the year 1920, per M cubic feet of gas made, and that such amounts were reasonably and necessarily incurred, for the reason that there was no competent proof as to these expenditures nor any proof as to their proper allocation.

42. In failing to hold that the Special Master committed error in finding that the various items included under distribution expense in finding number 33, amounting to the sum of $.1868 per M cubic feet for the calendar year 1919, and $.1918 for the first six months of 1920, were reasonably and necessarily expended; for the
158 reason that many of these items, such as repairs of meters, miscellaneous general expense, insurance, auditing, commercial expense and uncollectible bills, were proven to be excessive and unjustified.

43. In failing to hold that the Special Master committed error in finding that the evidence adduced affords no reasonable grounds for expecting that the price of material or wages paid to labor in connec-

tion with the production or distribution of gas, will be reduced during the last few months of 1920, or during the year 1921; for the reason that, on the contrary, the evidence shows, and the Court may take judicial notice, that prices are being constantly depressed, are rapidly falling and soon will assume a normal position.

44. In failing to hold that the Special Master committed error in finding that the result of plaintiff's operations in the year 1919, after charging 75c. per M cubic feet of gas sold to the municipality, and at the rate of 80c. per M cubic feet of gas sold for commercial purposes, was a net profit of $.0041 for each M cubic feet of gas sold, without any return upon the property of the plaintiff used in the public service; for the reason that the finding is inconsistent in itself as inasmuch as the profit of $.0041 amounts to over $5,000 available for return upon the property of the plaintiff used in the public service; the Special Master's finding moreover is inaccurate in that the actual cost of gas per M cubic feet sold according to the proof in this case during the year 1919, was not more than $.7659, leaving available for return $.0341, which leaves available for return upon the property used in the public service over $42,000 which amounts to 1½% upon the stipulated value of such property.

45. In failing to hold that the Special Master committed error in finding that in the first six months of 1920, there was a net deficit of $.1239 for each M cubic feet of gas sold, without any return upon the property of plaintiff used in the public service, assuming said gas to have been sold to the city at 75c. per M cubic feet, and to commercial customers at 80c. per M cubic feet; for the reason that
159 the proof in this case will not justify a finding that there was a net deficit of more than $.0229 per M cubic feet of gas sold.

46. In failing to hold that the Special Master committed error in making his separately filed opinion a part of his report, and in finding that said opinion, and the facts and conclusions therein set forth, are a part of his report; for the reason that said procedure is unauthorized by law, is unnecessarily burdensome upon the court and the parties litigant, and tends to uncertainty and confusion in the findings.

47. In holding that the stipulation was that the existing plant was worth at least a certain amount of money and it went no further; for the reason that the stipulation was that the plant was worth a certain amount of money, and not that it was worth at least a certain amount of money.

48. In holding that plaintiff has an actually existing investment of at least $3,300,000 now worth that sum, and all engaged in making gas; for the reason that it was stipulated that the valuation of plaintiff's property was $3,300,000, neither more nor less and it was not stipulated that such valuation was at least that amount; for the further reason that the said valuation was stipulated as the fair value of plaintiff's property used in the public service at all times since January 1, 1919, and was not stipulated as plaintiff's actually exist-

ing investment; and for the further reason that there is no evidence nor stipulation that plaintiff has an actually existing investment of at least $3,300,000, or of any amount whatever.

160 49. In not holding that the Special Master committed reversible error in the exclusion of the following evidence, each and all of which was competent and material:

(*a*). Defendants' Exhibit D23-*b* for Identification showing disposition of gross corporate income of plaintiff for the years ended December 31, 1917, 1918, 1919 and six months ended June 30, 1920.

(*b*). Defendants' Exhibit D24 for Identification showing plaintiff's (1) comparative general balance sheet for the years ending December 31, 1901 to 1916 inclusive, (2) comparative statement of operating revenues and expenses, income and surplus for years ending December 31, 1901 to 1916 inclusive, (3) disposition of gross corporate income for the years ending December 31, 1909 to 1916 inclusive, (4) detail of operating expenses for the years 1909 to 1916 inclusive, (5) tax charges and payments for the years ended December 31, 1912 to 1916 inclusive, and (6) significant operating data for the years ended December 31, 1907 to 1916 inclusive.

(*c*). Defendants' Exhibits 25 to 34 inclusive, for Identification showing plaintiff's correspondence with oil companies offered by the defendants to rebut plaintiff's claim that it was making every endeavor to get oil at the cheapest possible price and was operating in an efficient manner.

(*d*). The proofs sustaining findings 1 to 25 inclusive, 31 and 52 of the decision of Mr. Justice Greenbaum in the case brought by plaintiff in the Supreme Court of the State of New York, wherein judgment was entered on March 29, 1920 dismissing the complaint.

(*e*). Testimony offered by defendants through the witness Howard and the witness Mitchell that defendants had not been able properly to examine the accounts and records of plaintiff for the purposes of the trial.

By the exclusion of the above offered evidence it was impossible for the Special Master and the Court to obtain a proper understanding of the case, especially by the exclusion of Defendants' Ex-
161 hibits for Identification D 23-*b*, D 24 and the proofs sustaining the findings of Mr. Justice Greenbaum above specified, which were based upon plaintiff's books and annual reports to the Public Service Commission, and showed the financial history of plaintiff, its large profits in former years and the like.

50. In ordering, adjudging and decreeing that Chapter 125 of the Laws of 1906 and Chapter 604 of the Laws of 1916 of the State of New York, in so far as such statutes or either of them limit the rate to be charged for gas supplied by plaintiff are, and each of them is, confiscatory and deprives plaintiff of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution

of the United States for each of the reasons and causes specified in the Assignments of Error Nos. 1 to 49, inclusive, hereinbefore enumerated; and, with respect to Chapter 125 of the Laws of 1906, for the additional reason that there was no issue raised by the pleadings and tried before the Special Master as to the constitutionality of that Act, the sole issue involved in the case having been whether Chapter 125 of the Laws of 1906 as amended by Chapter 604 of the Laws of 1916 was confiscatory since January 1, 1919.

51. In ordering, adjudging and decreeing that the enforcement of said statutes, and each of them, in so far as they, or either of them prescribe a rate or price to be charged for gas supplied by plaintiff be in all respects suspended and restrained and that the defendants be restrained and enjoined from enforcing the provisions of said statutes with respect to the rates or price to be charged by plaintiff for gas supplied by it, and from instituting or causing to be instituted any suit, action or proceeding to enforce the said statutes, or either of them, or any provision thereof, or from taking any action under the Public Service Commissions Law of the State of New York, or any other statute of said State, to enforce obedience thereto with regard to the rates prescribed thereby for gas supplied by plaintiff, and from interfering with plaintiff forthwith and while the decree is in force, charging, billing and collecting a rate or charge in
162 excess of that fixed by said statutes or either of them for gas supplied to its consumers other than the City of New York, for each of the reasons and causes specified in the Assignments of Error Nos. 1 to 49 inclusive, hereinbefore enumerated; and, with respect to Chapter 125 of the Laws of 1906, for the additional reason that there was no issue raised by the pleadings and tried before the Special Master as to the constitutionality of that Act, the sole issue involved in the case having been whether Chapter 125 of the Laws of 1906 as amended by Chapter 604 of the Laws of 1916 was confiscatory since January 1, 1919.

52. In ordering, adjudging and decreeing that plaintiff recover costs and disbursements of the defendants.

53. In denying the motion of the defendants herein for the vacation or modification of the decree on the ground of the inequitable rate fixed by the plaintiff subsequent to and under the protection of the said decree, for the reason that the facts submitted in support of said motion warranted the Court in finding that the rate of $1.50 per thousand cubic feet, fixed by complainant is now inequitable and unjust and will become more inequitable and unjust with the passage of time and with the depression in all of the costs of making gas which is now in process of becoming each day more marked.

54. In holding upon the disposition of the said motion for the vacation or modification of the injunction decree herein that the decisions entered by the statutory Court in various other litigations, which said decisions granted preliminary injunctions to the plaintiffs in such litigations, did not grant a rate which would be remunerative to such plaintiffs but which would leave the said plaintiffs still under the sting of financial necessity to go ahead and try

their cases; for the reason that such ruling was immaterial to the issues here involved, was a ruling which in a way was a modification of a decisive ruling in other cases and was a ruling which had no pertinence to the question before the Court.

55. In ruling that the burden of proof upon such motion
163 was upon the defendants herein; for the reason that the Court should have taken judicial notice of the rapidly decreasing cost of production of gas and should have sent the matter to a Special Master for full disposition, and for the further reason that the cost of making and distributing gas by plaintiff had been decided by the Court only a short time before the hearing of said motion, and such decision was binding on plaintiff on such motion.

56. In finding, upon the decision of said motion, that at the present time and for a time in the future concerning which the said Court could not venture to even form an opinion, the most favorably situated gas making concern within the limits of the City of New York cannot reasonably expect to make and distribute gas and pay interest (at rates now ridiculously low) upon the money it has borrowed in the past, for less than $1.20 per unit; and that this gas company is by no manner of means the most favorably situated within the City's limits, for the reason that said finding is gratuitous and irrelevant, is based upon no proof then or at any other time before the Court, had no bearing upon the issues there involved and is contrary to the evidence and the weight thereof.

57. In finding upon the decision of said motion that a twenty-five per cent profit (which is the difference between $1.20 and $1.50) is as a profit on anything not so grossly inequitable as to shock the conscience of a decent man; because said finding is contrary to the law and to the evidence and the weight thereof; and further because if a company can make and distribute gas and pay as well the interest upon its entire indebtedness for $1.20 per unit, it should be shocking to the conscience of the Court for the plaintiff to obtain a profit of 30 cents per unit over and above such cost of production and distribution and interest charges, particularly where the indebtedness of the company represents a very large proportion of the property upon which it is entitled to a return.

164 Dated January —, 1921.

CHARLES D. NEWTON,
Attorney General of the State of New York.

WILBER W. CHAMBERS,
Solicitor for Defendant Charles D. Newton.
Office & Post Office Address, The Capitol, Albany, N. Y.

TERENCE FARLEY,
Solicitor for Defendant Lewis Nixon.
49 Lafayette Street, New York City.

JOHN P. O'BRIEN,
Corporation Counsel,
Solicitor for Defendant Harry E. Lewis.
Municipal Building, New York City.

165 [Endorsed] U. S. District Court Southern District of N. Y. Kings County Lighting *County*, Plaintiff, vs. Charles D. Newton, as Attorney-General of the State of New York, et al., Defendants. Assignment of Errors. Wilber W. Chambers, Solicitor for deft. Newton, Capitol, Albany, N. Y. Terence Farley, Solicitor for deft. Barrett, #49 Lafayette St., New York City.

166 By the Honorable One of the Judges of the District Court of the United States for the Southern District of New York to the Kings County Lighting Company, Greetings:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden in the city of Washington, D. C., in the District of Columbia, on the 14 day of February, 1921, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein Alfred M. Barrett, constituting the Public Service Commission of the State of New York, for the First District, and Charles D. Newton, as Attorney-General of the State of New York, are appellants, and to show cause, if any there be, why the decree entered on the 20th day of October, 1920, in the United States District Court for the Southern District of New York, should not be corrected and reversed and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the District above named this 14 day of January, in the year our Our Lord, One thousand nine hundred and
167 twenty-one and of the Independence of the United States the one hundred and forty-fifth.

JOHN C. KNOX,
U. S. District Judge for the Second Circuit.

168 [Endorsed:] U. S. District Court Southern District of N. Y. Kings County Lighting Co., Plaintiff, vs. Charles D. Newton, as Attorney-General of the State of N. Y., et al., Defendants. Citation. Wilber W. Chambers, Solicitor for deft. Newton, Office & P. O. address, Capitol, Albany, N. Y. Terence Farley, Solicitor for deft. Barrett, Office & P. O. address, #49 Lafayette St., New York City.

169 District Court of the United States, Southern District of New York.

CHARLES D. NEWTON, as Attorney-General of the State of New York; Alfred M. Barrett, Constituting the Public Service Commission of the State of New York for the First District, and Harry E. Lewis, as District Attorney of Kings County, Appellants,

vs.

KINGS COUNTY LIGHTING COMPANY, Respondent.

It is hereby stipulated, consented and agreed by and between the solicitors for the respective parties above named, that the testimony

taken before the special master herein, as now printed and on file with the clerk of the United States District Court, for the Southern District of New York, shall be the record on appeal herein and the provisions of paragraph "B" of Equity Rule 75 in regard to the reduction of the record and the preparation of the case on appeal, be and they are hereby waived.

Dated, New York, April 1, 1921.

WILBER W. CHAMBERS,
Solicitor for Appellant Newton.
TERENCE FARLEY,
Solicitor for Appellant Barrett.
JOHN P. O'BRIEN,
Solicitor for Appellant Lewis.
INGRAHAM, SHEEHAN & MORAN,
Solicitors for Respondent.

170 [Endorsed:] District Court of U. S., Southern District of N. Y. Charles D. Newton, as Attorney-General of the State of New York et al., Appellants, vs. Kings County Lighting Co., Respondent. Stipulation Waiving Printing of Records, &c. Wilber W. Chambers, Solicitor for deft. Newton, Office & P. O. Address, Capitol, Albany, N. Y. Terence Farley, Solicitor for deft. Barrett, Office & P. O. address, 49 Lafayette St., New York City. John P. O'Brien, Corporation Counsel, & Solicitor for deft. Lewis, Office & P. O. address, Municipal Bldg., New York City.

171 District Court of the United States, Southern District of New York.

CHARLES D. NEWTON, as Attorney-General of the State of New York; Alfred M. Barrett, Constituting the Public Service Commission of the State of New York for the First District, and Harry E. Lewis, District Attorney of Kings County, Appellants,

vs.

KINGS COUNTY LIGHTING COMPANY, Respondent.

It is hereby stipulated and agreed by and between the parties hereto that the record on appeal to the Supreme Court of the United States herein, shall consist of the following papers, to wit:

(1) Pleadings, decree, etc.

a. Bill of Complaint.

b. Subpœna.

c. Marshal's returns.

d. Answers of defendants.

e. Order appointing special master.

f. Order of substitution.

g. Report and opinion of special master.

h. Defendants' exception to special master's report and opinion.

i. Complainant's exceptions to special master's report and opinion.

k. Opinion of Judge Hough and decree.

l. Petition and allowance of appeal.

m. Assignment of errors.

n. Citation.

172 (2) Testimony in extenso.

(3) Exhibits:

Complainant's exhibits Numbers 1, 2, 6, 12 to 18, inclusive, 52.
Defendants' exhibits Numbers D-1 to D-6, inclusive, D-8 to D-20, inclusive, D-23, D-24. Judgment roll in the action of Kings County Lighting Co. vs. Egbert E. Woodbury and others.

Dated, April 2, 1921.

WILBER W. CHAMBERS,
Solicitor for Defendant Newton.
TERENCE FARLEY,
Solicitor for Defendant Barrett.
JOHN P. O'BRIEN,
Solicitor for Defendant Lewis.
INGRAHAM, SHEEHAN & MORAN,
Solicitor for Complainant.

173 District Court of the United States, Southern District of New York.

CHARLES D. NEWTON, as Attorney General of the State of New York; Alfred M. Barrett, Constituting the Public Service Commission of the State of New York for the First District, and Harry E. Lewis, District Attorney of Kings County, Appellant,

vs.

KINGS COUNTY LIGHTING COMPANY, Respondent.

The foregoing record consisting of

(1) Pleadings, decree, etc.

a. Bill of complaint.

b. Subpœna.

c. Marshal's returns.

d. Answers of defendants.

e. Order appointing special master.

f. Order of substitution.

g. Report and opinion of special master.

h. Defendants' exceptions to special master's report and opinion.

i. Complainant's exceptions to special master's report and opinion.

k. Opinion of Judge Hough and decree.

l. Petition and allowance of appeal.

m. Assignment of errors.

n. Citation.

(2) Testimony in extenso.

(3) Exhibits:

Complainant's exhibits Numbers 1, 2, 6, 12 to 18, inclusive, 52.
Defendants' exhibits Numbers D-1 to D-6, inclusive, D-8 to D-20, inclusive, D-23, D-24 and judgment roll in the action of Kings County Lighting Co. v. Egburt E. Woodbury, and others.

174 is hereby approved as a true and complete and properly prepared record of the evidence in the above entitled cause.
Dated, New York, April 2, 1921.

CHAS. M. HOUGH,
United States Circuit Judge.

175 [Endorsed:] —. Southern District of N. Y. Charles D. Newton, as Attorney General of State of New York, et al., Appellants, vs. Kings County Lighting Co., Respondent. Stipulation and Judge's Certificate. Wilber W. Chambers, Solicitor for deft. Newton, Office & P. O. Address, Capitol, Albany, N. Y. Terence Farley, Solicitor for deft. Barrett, Office & P. O. Address, #49 Lafayette Street, New York City. John P. O'Brien, Corporation Counsel, N. Y. City, Solicitor for deft. Lewis, Office & P. O. Address, Municipal Building, New York City.

176 District Court of the United States, Southern District of New York.

CHARLES D. NEWTON, as Attorney-General of the State of New York; Alfred M. Barrett, Constituting the Public Service Commission of the State of New York for the First District, and Harry E. Lewis, District Attorney of Kings County, Appellants,

vs.

KINGS COUNTY LIGHTING COMPANY, Respondent.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties, being the pleadings and decrees as follows:

(1) Pleadings, decree, etc.

(*a*) Bill of complaint.

(*b*) Subpœna.

(*c*) Marshal's returns.

(*d*) Answers of defendants.

(*e*) Order appointing special master.

(*f*) Order of substitution.

(*g*) Report and opinion of special master.

(*h*) Defendants' exceptions to special master's report and opinion.

(*i*) Complainant's exceptions to special master's report and opinion.

(*k*) Opinion of Judge Hough and decree.

(*l*) Petition and allowance of appeal.

(*m*) Assignment of errors.

(*n*) Citation.

(2) Testimony in extenso.

(3) Exhibits:

177 Complainant's exhibits Numbers 1, 2, 6, 12 to 18, inclusive, 52.

Defendants' exhibits Numbers D-1 to D-6, inclusive, D-8 to D-20, Inclusive, D-23, D-24 and judgment roll in the action of Kings County Lighting Co. vs. Woodbury, and others.

Dated, New York, April 2, 1921.

WILBER W. CHAMBERS,
Solicitor for Defendant Newton.

TERENCE FARLEY,
Solicitor for Defendant Barrett.

JOHN P. O'BRIEN,
Solicitor for Defendant Lewis.

INGRAHAM, SHEEHAN & MORAN,
Solicitors for Complainant.

178 UNITED STATES OF AMERICA,
Southern District of New York, ss:

CHARLES D. NEWTON, as Attorney-General of the State of New York; Alfred M. Barrett, Constituting the Public Service Commission of the State of New York, First District, and Harry E. Lewis, District Attorney of Kings Co., Appellant-Defendants,

vs.

KINGS COUNTY LIGHTING COMPANY, Respondent-Complainant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 5th day of April in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-fifth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

179 [Endorsed:] District Court of U. S., Southern District of N. Y. Charles D. Newton, as Attorney-General of State of New York, et al., Appellants, vs. Kings County Lighting Co., Respondent. Stipulation and Clerk's Certificate as to Appeal Record. Wilber W. Chambers, Solicitor for deft. Newton, Office & P. O. Address, Capitol, Albany, N. Y. Terence Farley, Solicitor for deft. Barrett, Office & P. O. Address, #49 Lafayette Street, New York City. John P. O'Brien, Corporation Counsel, N. Y. City, Solicitor for deft. Lewis, Office & P. O. Address, Municipal Building, New York City.

a United States District Court, Southern District of New York.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Before Hon. Gordon Auchincloss, Special Master.

Transcript of Reporter's Minutes.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York.

Barclay, 8477.

1 United States District Court, Southern District of New York.

In Equity.

18-97.

KINGS COUNTY LIGHTING COMPANY, Complainant,

against

CHARLES D. NEWTON, Attorney-General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, and Harry E. Lewis, District Attorney of the County of Kings, Defendants.

Before Hon. Gordon Auchincloss, Special Master.

61 Broadway, New York, N. Y., August 1, 1920.

Appearances:

Messrs. Ingraham, Sheehan & Moran, Solicitors for plaintiff, by Samuel F. Moran, Esq., of counsel.

The Attorney General of the State of New York, by Messrs. Wilbur W. Chambers, Clarence R. Cummings, and James P. Hill.

Terrence Farley, Esq., Solicitor for the Public Service Commission of the State of New York for the First District, by Messrs. William S. Jackson, Ely Neumann, and Edward M. Deegan.

2 Mr. Moran: The purpose of the meeting, Mr. Master, is to arrange for the hearings under the order appointing you Special Master in the action.

The Master: Is there a stipulation? Have you agreed on a stipulation?

Mr. Chambers: On the rate base?

The Master: Yes.

Mr. Chambers: Not yet.

(Discussion off the record.)

Mr. Chambers: If the Master please, the complainant has a temporary injunction, and they are presumably enjoying a rate under the temporary injunction which affords them a fair return. That was the purpose of the temporary injunction, so as far as that is concerned there is no reason for quick trial any more than there would be in any ordinary case, it seems to me. But, if we could stipulate this rate base, we could go forward, I think, at a very early date. Perhaps Judge Hill and Mr. Cummings and myself ought to have this afternoon to decide, but it seems to me the first thing to dispose of is the rate base. Now, when would you want to try it?

The Master: I have one court engagement that I don't know exactly when it is going to materialize, but I am ready to sit this afternoon or any time tomorrow.

3 Mr. Chambers: Of course, we would not be ready as quickly as that.

The Master: Or I think the day after would be all right. I promised Judge Knox that I would sit as continuously as possible.

Mr. Hill: If we run over to September, I would like certainly to indulge in some Mondays.

The Master: Do you anticipate that if you stipulate this rate base you will run over into September?

Mr. Chambers: Of course, I had in mind that I would not begin at all until September, because I did not think that the Public Service Commission could be ready with their operating expenses until about then.

Mr. Cummings: You see, they hand in schedules and then the Public Service Commission check them, go over them, and it takes considerable time. Of course, it depends on what their experts can do, in the Public Service Commission.

Mr. Chambers: You understand we are trying a rate case now; we are trying rate cases continuously, the Attorney General is. We are trying the New York & Richmond case now; we just finished the New York & Queens case. We are trying the New York & Richmond case now, and the Brooklyn Union case begins September 5th; and the six Consolidated cases were set down this morning for September 2nd, not to begin the taking of testimony, but a preliminary hearing; and if our experts are required to prepare a rate base, they will need some time, but if we can stipulate that out of the way there is no reason why we should delay the case a minute. We do not want to, anyway.

4

The Master: How about it from the Public Service Commission's standpoint?

Mr. Jackson: The Public Service Commission is very anxious to expedite this hearing just as fast as we can get along. I think the statistician, Dr. Weber, will be through going over the material that the complainant has furnished by the 10th.

Mr. Neumann: I think that is the date he said.

The Master: By August 10th, you mean?

Mr. Neumann: Yes.

Mr. Jackson: We have had it in mind that with this rate base stipulated, and counsel for the complainant agreeing, that we could accommodate ourselves to his methods and let him introduce what proof he could, and reserve cross-examinations, and in any way expedite the presentation of the case. That was the idea, that was the agreement that we had. So, so far as we are concerned, we are ready to go ahead in any way that will reserve our rights and give us opportunities, but waiving the matters of form and accommodating ourselves to the complainant, and, of course recognizing that the Attorney General has his obligations to be taken care
5 of.

The Master: What do you want to do, Mr. Moran?

Mr. Moran: I want to proceed with it just as speedily as possible. It is a question how long the plaintiff can maintain its operations. It is costing it, I think, about $1.06 to manufacture and distribute gas now, without any return on capital at all, paying 10 cents for oil, and coal is, I don't know how high—it is going up every day. It is absolutely without funds, and it is only a question of a brief period until it will find itself in such a position that the material men will not supply it with coal and oil, and it may be it won't be able to meet its payroll—I suppose the help will quit.

When the matter was brought on before Judge Knox for the appointment of a Master, the affidavit stated these facts, and he was asked to appoint some one who could give it attention right away, and he stated at the time he announced your appointment that you could give it your attention. Now, the plaintiff and its counsel hope and believe that it will be possible to proceed here with such speed as to get a decree of the Court in such a reasonable short time as to enable it to continue its operation, not only meet its operating expenses but borrow the capital which is necessary to make the additions that are imperative in order to keep the plant going the
6 coming winter.

The company serves about 250,000 people out there. That is a large community; I think it is the third largest gas company in the State of New York. The population, you will observe, is larger than Syracuse, I think larger than Albany, half as large as Buffalo. There are over 1,500 applications now from consumers for service that the company is unable to supply, unable to get the meters, unable to get the service pipe, hasn't the plant capacity to manufacture the gas. This is all brought about by the fact that we can't get capital with a 60 cent rate, statutory rate. Inventors won't let it have money without some assurance that it can show earnings to pay a return on the money.

Now, through this channel, the Master and the Court, it was hoped we could get relief promptly—not next November, not next September, but right away. To meet that situation, the operating expenses being as they are, the plaintiff has agreed here to accept what it considers a very modest valuation of its plant and facilities, one that can't be disputed, just simply as a rate base here. It claims, of course, that the value is a good deal larger, but it will consent for the purpose of this trial, in view of the emergency and the crisis that confronts the company and the public, to accept that.

Now, then, that is agreed to—and it has been agreed to
7 by the Public Service Commission—that leaves simply the question of what it costs to make gas, manufacture and distribute gas. It ought not to take us men very long to do that. The company has to keep its accounts under a uniform system promulgated by the Public Service Commission; it has kept them, and it has furnished these statements to the Public Service Commission. They have had it in the annual report for 1919, as long ago as February; for the first six months of this year a statement has been furnished some week or so ago, and they have checked it over, or are checking it over now, and I have been told by the men working in the office that the work will be finished today.

Mr. Hill: Is that so?

Mr. Moran: Yes, the office work will be finished today, they have checked that over.

Now, I would like, and although I am not going to insist upon this at all, I feel that the situation is such that the defendants might satisfy themselves out of court on those operating expenses, at least on some of the expenditures there. Gas companies' expenditures are very diversified, classified in probably forty to fifty different accounts. The defendants might satisfy themselves out of court, so it would not be necessary to put in formal proof of everything.

But if they can't do that, why, I am ready to proceed any
8 day with these operating expenses. We have them carefully tabulated; we have the auditor and accountant who kept the books, who will come here and testify just how they were kept and what each expenditure means. We have the contracts under which we purchased material, we have our labor sheets under which we employed the labor; we have two or three witnesses experienced in the gas business who will testify as to the reasonableness of those expenses. We can go right along and put that in.

There is the other alternative, that if the defendants cannot satisfy themselves that the accounts were reasonably correct, that they indicate any points on which they want proof. I do not make the suggestion that we take that course, because I am afraid it would only amount to delay, because it is possible that they might not feel themselves justified in accepting any of them after a time had elapsed.

So I want to go ahead, Mr. Master, with the testimony just as soon as we can. I do not want to rush the gentlemen, if they want some time to think and talk, and so forth, but I think we ought to get started this week, if not this week, certainly by Monday.

The Master: If you put in your testimony, would the procedure then be that they would reserve cross examination until all of your testimony was in?

Mr. Moran: If they wanted to do that I would not object to it. If that would shorten up things I would not object to it.

Mr. Neumann: It would depend on the situation that confronted us.

Mr. Jackson: To get the hearings under way we are willing to do that, reserving the right to require further proof. You see, that would mean cutting down our preparation that ordinarily we might require, but we are willing to do that.

The Master: It might assist you in preparation.

Mr. Neumann: With some witnesses we may be able to go forward and cross examine right away; others that depended upon an analysis of the figures, we could not until we had that analysis from our statistical bureau. We would not want to delay them, and yet we would not want to give up the right to cross examine.

Mr. Jackson: As it may seem necessary at the time. We will expedite the trial all we can, and I suppose the necessity for that will appear to your Honor at any time.

(Discussion off the record.)

Mr. Moran: In reference to the injunction. I feel under obligation to say that the company applied to the District Court for an interlocutory injunction, and it asked for an order restraining the defendants from enforcing the statute pending the outcome of this action. In its papers, in its complaint and in its affidavits, it showed to the Court that it had charged 95 cents a thousand cubic feet since July 1, 1911. Prior to that time it charged $1.00, and the statutory rate then was $1.00. The statutory rate remained $1.00 until July 1, 1916. We reduced the rate, however, from $1.00 to 95 cents two years before that. When the statutory rate went into effect on July 1st, we started an action in the State Court, continued to charge our 95 cents under an injunction granted there, which required us to impound that 15 cents difference. We impounded the difference down until 1918, put it in the bank. We then applied to the State Court for leave to withdraw the funds that were then impounded and to be relieved from impounding further funds, on account of the fact that our expenses were such that 95 cents did not enable us to make those deposits.

The Court granted us that relief; that is, we were relieved after August 7, 1918, from depositing any more money; we were permitted to use the money in making additions and extensions to our property, and to withdraw the funds already deposited, for the same purpose. We operated under that injunction until the 29th of March, 1920, when a judgment was entered in that action dismissing our complaint on the merits without prejudice, which, of course, abrogated and terminated that injunction. We continued to charge 95 cents, notwithstanding that we had no order of Court; we continued such charge on account of the necessi-

ties of the situation, that by charging only 80 cents we would be compelled to close our doors.

We did not feel that the defendants would interfere with our charging 95 cents at all; we did not feel that we needed any injunction. The people had paid 95 cents and they would continue to pay it, and we did not feel that the defendants would prosecute us for violation of the law, that is, seek to recover penalties, because we thought that they realized that we can't serve gas at 80 cents, and that the statute would not be enforced against us.

But 95 cents in not enough. We wanted to raise that rate above 95 cents, and we felt that we should have an order of the Court to enable us to do that, that is, to enjoin the defendants from interfering with us on our raising the rate, probably to $1.25, and using all the money in the operation of our business. We told the Court that if we could raise the rate we could carry on our business, otherwise we could not; and we applied for the temporary injunction.

12 Now, the Court granted us an injunction restraining the defendants in this cause from interfering with us or from attempting to enforce the statute, and that was granted on conditions: One, that we do not charge more than $1.00; two, that we begin on the 15th of August to deposit the difference between 80 cents and the rate that we may charge with a Master who would in turn deposit it in a bank here. We cannot accept that injunction order, we cannot make that deposit, because our records show that now, this very day it is costing us over $1.06 and $1.07 just to make the gas alone, without any return on capital at all.

Mr. Chambers: Something is wrong with your company then.

Mr. Moran: Probably so. How can we make any deposit? We have no protection out of the injunction order at all.

Mr. Chambers: Will you consent that it be vacated.

The Master: What is the status then? The injunction is in force, isn't it?

Mr. Moran: The Court rendered an opinion——

Mr. Neumann: The Federal opinion.

The Master: Yes, under the three District Judges.

13 Mr. Neumann: Mr. Moran, I think, in his chronology of events, omitted one statement. Didn't you make an application to the Appellate Division of the First Department——

Mr. Moran: Yes.

Mr. Neumann: — for a continuance of that injunction and a stay pending your appeal?

Mr. Moran: We made an application to the——

Mr. Neumann: Yes; the Appellate Division denied that.

Mr. Moran: We made an application to the Appellate Division in connection with our appeal from the judgment of the State Court, for an injunction.

The Master: What I want to get at is this——

Mr. Moran: I know you do, and I want to get at it too, Mr. Auchincloss.

The Master: What is this case that we are talking of here, this case that I am Special Master in? Is this an application for an injunction?

Mr. Moran: For a permanent injunction.

Mr. Chambers: And to have the statute declared confiscatory. They have had one trial, you know.

The Master: But the appointment of this Special Master is not under the injunction granted by the District Court?

Mr. Chambers: Oh, no; that was only preliminary.

Mr. Moran: That was a step in this action.

Mr. Chambers: Until the trial, pedente lite.

The Master: Could I have the application in this case and also the order?

Mr. Moran: Yes.

Mr. Chambers: You understand this case was tried before Mr. Justice Greenbaum.

The Master: No, I did not.

Mr. Chambers: They have had their trial. They brought their action to have the statute declared unconstitutional, this company, and had a full trial lasting months, and finally were defeated—defeated in January, 1920, this company—and final judgment was entered holding that the statute was not confiscatory. Now they have appealed to the Appellate Division from that judgment entered last winter, and that appeal is pending undetermined. They then made a motion before Mr. Justice Greenbaum to reopen that so that they might put in their 1919 prices, and he denied that, and the whole thing is in the State courts now. Not being satisfied with what was going on in the State courts, they bring their action in the Federal courts to continue on from the place where Mr. Justice Greenbaum left off in that suit; and what I can't see is, why all this haste? They have had their day in court and Mr. Moran and Judge Scott say that they are about to be ruined. But I understood if they got a preliminary injunction they would be all right, and now they still say they are not all right. Will they ever be? And they are serving the consumers over there——

Mr. Moran: I wish to correct that.

The Master: Just a minute on that, on the question of haste. It is not a question as to whether I think there should be haste or not, but Judge Knox advises me that in his opinion there should be as speedy a determination of this litigation as possible.

Mr. Chambers: There should be.

The Master: And that is why I want to work out some scheme which is perfectly agreeable to every one to start this ball rolling.

Mr. Chambers: You are right.

The Master: Is there any objection to Mr. Moran's starting to put in his testimony? You can appear here and listen to it, of course, but if you don't want to cross examine and you want to prepare certain papers to cross examine on, why can't we go along on that basis?

(Discussion off the record.)

Mr. Chambers: It is agreed that if we do not agree on a rate base, we are to have a reasonable time to prepare, as we go along?

The Master: Oh, we can meet that. Of course, you are to have a reasonable time.

16 Mr. Chambers: I think I understand the situation.

Mr. Neumann: If we do not agree on the rate base, it means we would have to go out and inventory the entire plant and put a value on each and every item of it, which is a large undertaking, and Mr. Moran realizes that himself, because he would have to prepare just as well as we would.

Mr. Chambers: Our experts are all busy now on the Brooklyn Union.

Mr. Moran: Mr. Birdsley is your expert; he has inventoried this property and rendered an opinion on it. He could come in and testify without any preparation at all.

(Discussion off the record.)

Mr. Chambers: Our answer nets up that the City of New York is a proper party and was not included, and that therefore there is a defect of parties defendant, and we do not want to waive that objection in any way here.

Mr. Moran: In proceeding with the proof of expenses, are there any particular items that the defendants want the plaintiff to establish, any particular intensity? You see, we spend over there about $1,200,000 to manufacture and sell gas in a year. We are going to show the expenses for a year and a half; that will be the expenditure of probably $1,800,000. That expenditure is made for labor, services in operating the plant, in the purchase of coal,

17 oil and other supplies; and these purchases as made from the dealer do not all go into any particular period.

For instance, we will buy a lot of meters and a lot of coal and a lot of oil in 1919, and we won't use it in 1919, so we have got to put it in a storeroom. Then we have to run a little account with ourselves, checking it out of there, in order to tell just how much we use in a year. And our labor payroll will all go into our operating expenses, with the exception of such part of the time as is used in making additions or extensions to the plant, capital. So we have to constantly and daily and hourly allocate a man's time between operating expenses and plant, and we have to constantly keep a running account with our storeroom on our supplies used.

Now, these are the things that confront a man who endeavors to prove a case, because if I come in here with my coal bills, my checks which I paid for coal and oil, they don't prove anything in regard to expenses for the year 1919, because that coal and oil went into our tanks, and so forth, and remained there until we used it and checked it out, and we have all those accounts. If the defendants have any one of those items or accounts that they want particular proof on, we would be glad to concentrate on that. I take it that what we all want here is to find out how far from the truth the plaintiff has gone in making the allegations of their complaint as to the cost of making gas.

Mr. Jackson: That is not the proposition at all.

Mr. Neumann: I think, Mr. Moran, what you are requi
to do is to prove your case.

Mr. Moran: I will.

Mr. Jackson: We do not assume any of the allegations of
complaint are true, except such as are admitted by the answer.

Mr. Neumann: We will *except* the whole case to be made
with the legal burden of proof.

Mr. Jackson: If the plaintiff will put in his proof in a satisfact
and independent and material way, we expect that when he cla
that the statute is confiscatory, he is able to prove it.

Mr. Moran: All right.

Mr. Chambers: Beyond a rational doubt.

Mr. Jackson: And we expect, when he stated that it costs him
much to make gas, or his expenses were so much, that he is able
prove it, and, of course, that necessarily is subject to question a
the propriety of his allegation, whether he padded his expense
order to prove the rate is confiscatory. Now, that is necessarily
subject of inquiry, and, of course, it can't be disputed or questi
until the particular proof is advanced.

Mr. Moran: I take it, the defendants still claim that the pl
till can make gas for 50 cents?

Mr. Cummings: Always. Don't you think it would b
good idea for the Master to go up and look at the plant be
starting hearings?

Mr. Moran: An excellent idea. I would be glad if the Ma
would do that.

The Master: Where is the plant?

Mr. Moran: It is down at 55th Street and the New York Ba

(Discussion off the record. Arrangements were made to visit
plant of the complainant on Wednesday, August 4th, 1920.)

Further hearing was thereupon adjourned to Tuesday, August
1920 at ten o'clock a. m.

1921 United States District Court, Southern District of New York.

Before Hon. Gordon Auchincloss, Special Master.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Transcript of Reporter's Minutes.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York.

Barclay 8177.

20 KINGS COUNTY LIGHTING CO.

v.

NEWTON et al.

61 Broadway, New York,
August 10, 1920—10.00 a. m.

Met pursuant to adjournment.

Present:

The Master,
Mr. Moran,
Mr. Hill,
Mr. Chambers,
Mr. Jackson.

Mr. Moran. If the Court please, at the preliminary meeting I stated the nature of the cause. Since that time I have furnished you with the pleadings, and I think the defendants have furnished you with their pleadings. The plaintiff is ready to proceed, and I believe there is nothing for me to say in the way of opening, except what has been said, that it is an action brought to have the statute, Chapter 604 of the Laws of 1916 suspended on account of the fact that its enforcement amounts to confiscation of the plaintiff's property in violation of the Fourteenth Amendment of the Constitution of the United States.

I think it is well to state the order of proof which I propose we follow. We are attempting to remove from the case any
21 question of valuation. Plaintiff is *prompted* to take that position in view of the fact that the revenue at the 80 cent rate will not meet operating expenses. Not since the 1st of January, 1918 has the plaintiff been able to manufacture and distribute gas at 80 cents per thousand cubic feet, without any return upon capital at all. In 1919, it actually cost the plaintiff, according to its expense accounts, I think over 86 cents, just operating expenses so to speak. 1920, the first six months, ending June 30th, it cost the plaintiff something over 95 cents just to manufacture and distribute. These costs are costs for a full period of six months, and some of the material there has greatly risen in value, in cost, in the last month or so. At the present prices that we are paying for oil, coal and labor I believe it will cost the plaintiff over $1.06 and possibly $1.10 to manufacture and distribute, manufacturing heating quality gas. To make the 22 candle power gas would cost at least ten cents a thousand cubic feet more, probably as high as $1.20 a thousand cubic feet.

I think I made an error there in saying that if I did. I meant to say that in 1919, the costs to the plaintiff were 86 cents, and in the first six months of 1920, above 95 cents. I am afraid I gave
22 my figures changed. I want to get that straight.

Now, as I said, the plaintiff is prompted to accept for the benefit of the case a minimum valuation of its property, because as its counsel conceives the situation, it is entitled to have the statute suspended, its enforcement suspended from mere operating expense account alone, without any return on capital. As I understand, the question for the Court to decide now, and the only question for the Court to decide, is whether this statute should be enforced at the present time, and if it should not be enforced, its enforcement should be enjoined, that is, the public officials, charged with the duty of enforcing it, should be enjoined from enforcing it.

The question of what rate the company is entitled to is not before the Court. If it were, if the rate which the company was entitled to was before the Court, we would necessarily be required to have a valuation, an exact valuation of the company's property, in order to determine how much is needed for a return upon that property over and above the expense of operation and so forth.

Believing, as we do, that that question is not before the
23 Court, we are willing to accept. I use the term advisedly now, accept for the purposes of the legal question, the constitutional question before the Court, a valuation which the other parties, I believe, will concede for the same purpose, without prejudice to any of us. I have submitted——

The Master. Let me ask you to explain just what your position is there. You state that the only question before the Court is the constitutionality of the statute; and if the statute is unconstitutional at this time, then your position is that the company has a right to go ahead and charge any rate it may see fit.

Mr. Moran: No, I do not take any position in reference to that at all, your Honor.

The Master: But that it is not within the——

Mr. Moran: The Court is not concerned with it.

The Master: I noted that Judge Hand the other day in the Consolidated case set down a rate at which they should charge,—$1.20, didn't he?

Mr. Moran: Well, he set a limit upon what they could charge.

Mr. Chambers: They could not charge more than that.

Mr. Moran: More than $1.20.

Mr. Chambers: He placed a limitation.

24 The Master: Do you concede that this Court in this case has the same right?

Mr. Moran: The Court in this case—well, the only authority——

The Master: Or do you say it has nothing to do with it?

Mr. Moran: The only authority I have for the Court placing a limitation upon what the company may charge is Judge Hand's opinion, and I don't know whether it has ever been done before. If you are asking for my personal opinion on it, I will say that I am not prepared to express it.

The Master: I just wanted to get that.

Mr. Moran: No, I don't understand that has been done before. Even if anything like that were done, all the Court would do, as Judge Hand did, is put a limit upon the amount. Judge Hand has not fixed any rate.

The Master: No, I know that.

Mr. Moran: In fact, he concedes or admits that it is not a function of the Court to fix a rate.

The Master: Yes.

Mr. Moran: And he has just put a limit upon *there*, and he has required it, as I understand it, to be impounded, whatever they charge above that, pending the establishment of the rate by

25 the Legislature or by the Public Service Commission, if that authority should be delegated to it.

Now, I might say right now, because there is no use in having any misunderstanding about the situation, any such procedure in this case, would amount to the utter ruin of the company, and a great inconvenience and damage of its customers, because it would have to suspend business.

We are here today under an order appointing yourself Master here, and we are here trying this issue in these sultry days for no other reason than to keep gas upon this town, to use the phrase of the gas men. We will establish here, beyond the peradventure of a doubt, if it is not admitted—we will establish it by the witnesses or by the public authorities that unless this company expends at least $1,000,000 forthwith, as fast as it can be expended, this company will not be able to operate this winter. And we will establish that it cannot get that money, nor a single dollar of it until and unless this Court pronounces this statute unconstitutional and unenforcible. Investors will not believe the officers of this company, and they will not believe its counsel, or any array of counsel, that the statute is unconstitutional, unless the Court so declares. When and if

26 the Court does so declare and permits the company—and the

company, of course, then will be permitted to charge a reasonable price for its gas, they will be in a position to seek the new capital necessary to perform its functions there and keep gas upon the town.

Now, it is even worse than that. Regardless of the necessity for additions and extensions, regardless of the necessity of expending $1,000,000 or any other sum to increase the capacity of the plant, and right from the very expense of operation at the present time, costing as it does today, over $1.10 to buy the coal, the oil and employ the labor, this company cannot turn out the gas very many more days, just on account of the expense of producing it. It can't do it, that is obvious. How can it spend $1.10? That is not book entry, it is actual out of pocket expenses. The coal dealer and the oil dealer won't long permit their account to remain unpaid. They have an ample market for their commodity, and they will send it where they can get paid for it. Surely the laborer won't return the following week unless he is paid on Saturday night, and unless the company is in a position to meet these everyday expenses it cannot keep the gas there.

We have made what I consider a great effort during the last eight or ten months. The officers and managers of this company
27 are entitled to credit and they are entitled to the thanks of that community for the great effort they have made, and kept gas on this town up to this time. From what we see in the papers and what we read around, you would think that the men charged with the operating of a gas company are a good deal different from what they really are; and until a man has come in contact with the actual operation of the plant under the emergency that this company has been working, you will never understand the sacrifice of these men, the sacrifice that these men make to keep the matter going.

Now, that being the situation—and that is all apropos, if the Master please, of what I was going to say about the order of proof—that being the situation, I shall proceed to call the witnesses who will——

Mr. Chambers: No.

Mr. Moran: Just a moment.

Mr. Chambers: I want to make some motions.

Mr. Moran: Oh, yes. Who will show the expenses, the cost of manufacturing and distributing gas at the present time, during this six months just past and during the calendar year 1919. If any one wants to know what it cost prior to that time, our books and records are available, and we will bring them in and show that also.

28 The Master: This complaint reads as of the first three months, doesn't it?

Mr. Moran: Yes, but it is perfective; it says that it is now costing over a dollar. All we had there, all we had of actual figures at the time the complaint was prepared was three months.

The Master: Yes.

Mr. Moran: We had what it cost in the first three months, and we say then there has been a rise in the price of coal and oil and

that it is costing more now, and its enforcement will— Of course, all these actions, if the Master please, are prospective; the judgment entered deals with the future and not with the past, but the Court must resort to the past, to the experience of the past, to ascertain what the future will be.

The Master: You have got to make a point some place, though. You can't have these things at the close of the hearing, like the old Consolidated case taking a year to try.

Mr. Moran: Yes.

The Master: In that case did the Master permit testimony during the last three months of that year as to what it was
29 then costing them?

Mr. Moran: Her permitted testimony——

Mr. Chambers: Now, in the Consolidated case the Master ruled that if they opened—after they closed their case, if they wanted to go into a further period, why they would have to give us, it would be a new issue, and they would have to give us a chance to meet it. That is, they can't go on while this trial is in progress and keep trying it for 1920 and 1921.

The Master: I think you should set some time when you stop, Mr. Moran.

Mr. Moran: That is for actual figures, yes. I have taken July 1, 1920, because that is the six months' period, and we will take our actual figures from that. I won't stop at that, I will show what it costs for coal today, show more than likely what it will cost through the rest of the year, because the Court has nothing to do with 1919 and nothing to do with the first six months of 1920—there is no misunderstanding about that. That water has gone over the dam, we have suffered our loss there. The Court can't make the consumers pay more than they paid, it can't determine our right to refund anything, so that is not here at all.

The Master: That is perfectly true, but the basis of it——

30 Mr. Moran: The question from now on is the basis for finding out what it does at the present time cost, and whether the statute will amount to confiscation in the future. We take these periods in the past to see what it cost, and then we match that up with the present unit prices of coal, oil, labor and that sort of thing—we match that question with the prospects for the future, and we see whether the time is sufficiently extensive in the future, as given to us to see the future, whether the statute should be suspended.

And I will call the witnesses to establish the operating expenses first.

31 The stipulation about the rate base, so to speak, has not been formally executed. I have not heard from the defendants in a number of days on that, but I imagine that is something we can take up out of court.

Mr. Chambers: Yes.

Mr. Moran: And get it arranged before we need it. We do not need it now. We can go on with our expenses and get it all disposed. We don't need that now.

Mr. Chambers: Let me make my motion.

Mr. Moran: Surely.

Mr. Chambers: I want to say this in answer to what Mr. Moran said, and I hope you will not be unduly influenced by what he did say. He contended on the prior suit before Mr. Justice Greenbaum, that they were about to go out of business and would not be able to furnish gas. All that Mr. Moran has said over and over again. In the Consolidated Gas Company case in 1906, they claimed that they would be utterly ruined and would not be able to continue in business if the statute was not declared confiscatory. Nevertheless they were defeated finally and they are still doing business.

Now, I trust that you will not be, as I say, unduly influenced by his claim that they will not be able to furnish gas, because
32 it is like a voice crying in the wilderness. I don't believe that that is the situation at all.

Now, the fact is that this company has never complied with the statute, they have never furnished gas for 80 cents as the Legislature said they should, they have always charged their consumers 95 cents. And Mr. Justice Greenbaum held that that was ample for 1916, said that 80 cents was ample in 1916, 1917 and 1918; or at least he held they were not entitled to relief for 1918.

Now, if 80 cents was ample in 1916, they were collecting 95 cents; and if 80 cents was ample in 1917, and they were collecting 95 cents—which is a fact—and if 80 cents was ample in 1918 and they were collecting 95 cents, this company has fared pretty well, as you will see by that.

Now we come to 1919, and part of 1920, and we move to dismiss the complaint as to this period upon these grounds:

First, that the complaint fails to state any cause of action whatsoever.

Second, that this company—and this appears upon the face of the complaint, upon the face of the bill of the complaint—has
33 failed to comply with the statute, in that it has charged its consumers continuously more than the statutory rate, without leave of court; and therefore comes into court with unclean hands in that regard.

Third, upon the further ground that this company has continuously—and this appears from the bill of the complaint, upon the face of the bill of the complaint,—violated the statutory requirement as to the candle power.

We say that not only should the complainant plead that it complied with all of the requirements of the statute which it seeks to destroy, but also that it complied with that part of it which relates to furnishing gas of the quality prescribed by the Act, namely, 22 Candle Power gas.

Fourth, upon the further ground that the prior judgment which was entered in the New York County Clerk's office on the 29th day of March, 1920, and the proceedings taken subsequent thereto in that same action, are res adjudicata; and in a moment I am going to ask you to suspend all course of procedure until I can offer that judgment in evidence as the basis of this first ground for dismissal of the bill of complaint.

Fifth, upon the further ground that there is a defect of parties defendants here, that the City of New York is a proper party
34 defendant and has been omitted, and that is set forth in the answer of the defendant, the Attorney General. And let me elaborate upon that just a little bit. In the former suit of this company, which I have already alluded to, tried before Mr. Justice Greenbaum, the City was made a party defendant and participated in that trial, and took a prominent part in the litigation. In the Jamaica case, I think it was, Mr. Justice Greenbaum held that the City of New York in this kind of a litigation was a proper party defendant. In the New York and Richmond case Mr. Justice Squires held—a similar action, which is now on trial—Mr. Justice Squires sitting in Richmond County held that the City of New York was not a proper party and an appeal was taken from his order to the Appellate Division, Second Department, which resulted in a reversal of the order, and the Appellate Division are now committed to the proposition, by the reversal of that order, that the City is a proper party in this kind of a litigation.

True, that is a State Court action, but the point I make here is that we are now dealing with State affairs,—an Act of the legislature of the State of New York, a domestic corporation, and the locus in quo of the controversy, these matters are all within the State, and
35 there is no reason why they should be in the Federal Court at all, except for the fact that there is more than $3,000 involved in the action.

So I say that the State Courts having held now that the City of New York is a proper party, that the Federal Courts ought to give some faith to that rule laid down by the State Courts and ought to follow the ruling of the State Court in that regard.

Now, I am going to ask you to suspend temporarily until the defendants can offer in evidence the judgment in the prior action, the judgment of March 29th, 1920, and the proceedings subsequent thereto, which I now offer in evidence.

Mr. Morgan: Just a moment. I object.

Mr. Chambers: Now, wait until I offer it. I offer in evidence a judgment in the action of the Kings County Lighting Company, plaintiff, against Egbert E. Woodbury as Attorney General, and others, in the Supreme Court, New York County; which judgment was entered in the office of the Clerk of the County of New York on the 29th day of March, 1920. It is the judgment roll that I am offering in evidence. Now, does counsel object because we haven't it physically present?

36 Mr. Moran: I object to its being offered and being taken up at this time. I don't understand——

Mr. Chambers: Well, not because we haven't got it here?

The Master: You simply offer it in support of your motion?

Mr. Chambers: That is all. Now, this procedure will follow——

The Master: I will tell you what I will do. I will deny your motions at the present time, and give you an exception, and then later you can renew them.

Mr. Chambers: I see.

The Master: If you see fit.

Mr. Chambers: Yes, I will take exception to each denial. That makes the record complete.

Mr. Jackson: Do I understand that the judgments in that action will then be allowed in evidence at the present time?

The Master: Not at the present time.

Mr. Jackson: Do you make any separation between the offer of the judgment roll and the balance of your motion, Mr. Chambers?

Mr. Chambers: Well, yes, the rest of the motion of course does not depend on the judgment roll. I understand that you deny all.

37 The Master: Each motion.

Mr. Chambers: Each motion made to dismiss, each ground.

The Master: Yes.

Mr. Chambers: And give the defendants an exception.

The Master: Yes.

Mr. Chambers: Now, with my offer of the judgment roll, we also offer the proceedings in that action subsequent to the judgment roll, which resulted in an order denying the re-opening of the action.

The Master: Yes. Are those proceedings in this——

Mr. Chambers: No; they are not here. No, wait a minute. The decision of Mr. Justice Greenbaum is here, and the judgment. I think some of the others are too. Wait. Perhaps I had better mention that. Yes, the judgment is here; I had better mention that.

With the offer, I offer the opinion of Mr. Justice Greenbaum, New York Law Journal, March 30, 1920, and a subsequent opinion he wrote, which is not dated; also the order I had in mind was the order made on the 23rd day of April, 1920, by the Appellate Division of the Supreme Court, First Department.

Mr. Moran: You offer the proceedings taken subsequent to the judgment?

Mr. Chambers: Yes, in that action.

38 Mr. Moran: Of course, if that were received it would shorten the case very much.

The Master: I don't know what the proceedings subsequent to the judgment *was*, in that case.

Mr. Chambers: I offer them as a bar to the present action, being res adjudicata.

The Master: Well, what are they?

Mr. Chambers: Well, after the judgment they made a motion to re-open.

Mr. Moran: That was before the judgment.

Mr. Chambers: The trial.

Mr. Moran: That was before the judgment.

Mr. Chambers: Was that before?

Mr. Moran: Yes. Are you offering that proceeding too?

Mr. Chambers: Yes. Then the papers I offer are the papers prior to the judgment instead of subsequent. That is all I offer.

the order resulting—the order on the motion to re-open, and including 1919 operating expenses. The order denying that motion is what I offer.

Mr. Moran: Of course the order of itself is not intelligible. It is just motion denied.

Mr. Chambers: Well, I do not offer your moving papers there nor do I want to be bound by them.

39 Mr. Moran: You will observe it will shorten the trial greatly if you put that in.

The Master: I don't see that any of them are admissible at this time.

Mr. Chambers: Well, perhaps not. Then we will take an exception.

The Master: Yes.

Mr. Chambers: And offer them later and renew our motion.

The Master: All right.

Mr. Jackson: Now, for the Public Service Commission, I beg to make the same motion upon the same grounds and to save space upon the record may we not have the stipulation that objection and exception on behalf of one defendant will be in behalf of all? Is there any objection to that?

Mr. Moran: What are you referring to,—these motions that are made?

Mr. Chambers: No; all the way through.

Mr. Jackson: All the way through the hearing.

Mr. Chambers: Any defendant who objects.

Mr. Jackson: It will save space upon the record, will it not, as a matter of saving any rights?

Mr. Chambers: Any objection made by any defendant will
40 be deemed to be made by all the defendants. That has been done in most of these cases.

The Master: Have you any objection to that, Mr. Moran, or would you rather have the objection specified?

Mr. Moran: Of course, if we entered into such an understanding now, we can alter it at any time, I understand.

Mr. Jackson: Unless an exception is specified.

The Master: Unless counsel for the plaintiff questions the objection or questions the exception.

Mr. Moran: I say, we can withdraw from it at any time?

The Master: Withdraw from it at any time, yes.

Mr. Moran: Withdraw from it at any time, yes—subject to that I consent.

Mr. Jackson: Then I did not get——

The Master: Now, I make the same ruling as to your motions.

Mr. Jackson: And exception for the Public Service Commission.

The Master: An exception to the Public Service Commission.

Mr. Jackson: I do not know as I quite follow Mr. Moran's opening in this respect, but I would like to have it stated that stipulation as to the valuation will not be conditioned upon any
41 limitation of the power of the Court to provide in any manner its fees in case the statute shall be deemed unconstitu-

tional, proper procedure to be decided upon as the occasion may arise so far as any stipulation as to valuation is concerned. I imagine that he did not intend to suggest anything to the contrary, but I would like to have that understanding.

Mr. Moran: I can only answer that incidentally.

Mr. Jackson: Yes.

Mr. Moran: I can only mention incidentally, that matter is not before the Court, the question of valuation is not before the Court at this time on the stipulation or anything of that sort.

The Master: That was in answer to my question, wasn't it?

Mr. Moran: Yes.

The Master: Well, Mr. Moran, will you proceed with the witness?

Mr. Moran: Mr. Gonnoud.

ALBERT J. GONNOUD, called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

(The witness stated that he resided at 1034 75th Street,
42 Brooklyn, New York.)

Direct examination.

By Mr. Moran:

Q. What is your position, Mr. Gonnoud?

A. I am auditor and Assistant Secretary of the Kings County Lighting Company.

Q. How long have you held those positions?

A. Since August 1919. In January 1919, I was acting auditor of the Kings County Lighting Company, and then until August, when I was elected assistant secretary and formally appointed auditor of the company.

Q. Were you connected with the company in any way prior to your work as acting auditor which began January 1st, 1919?

A. From June, 1918, I was in the employ of W. E. Freeman, certified public accountant, as senior accountant; and during my employment there I completed the audit of the company's books for the year 1917.

Q. Which was made by Mr. Freeman?

A. Made by Mr. Freeman's direction.

Q. And you did that work when?

A. I did that work from June up until December 1918; that is, I did that work from June 1918, to December 1918, and during that time I also reorganized the accounting system of the company in so far as it related to the Commercial Department.

Q. Then you have been—this work was done mostly at the company's office?

A. Yes.

Q. And you have been at the office of the company, as
43 I get it, since June 1918?

A. Yes.

Q. During the first six months of your work there, you were in Mr. Freeman's employ, you were auditing the books?

A. Yes, sir.

Q. Beginning the first of January 1919, you became the acting auditor of the company?

A. Acting auditor of the company.

Q. And you were elected auditor and assistant secretary about the middle of 1919?

A. Yes.

Q. And you held those positions since?

A. Yes.

Q. What experience did you have prior to that time, as an accountant?

A. For about three years I was auditor of passenger accounts for the Copper Range Railroad, that was from 1911 to 1914; and from March 1915, until September 1917 I was ccountant for the Big Ledge Mining Company at Duluth, Minn.; and from that time until June 1918, I was auditor for the Great Western Smelters Corporation at Mayer, Arizona.

Q. Mr. Freeman for whom you worked, is a certified public accountant?

A. Yes.

Q. Have you taken courses in accountancy?

A. Yes.

Q. Where?

A. At La Salle Extension University.

Q. And you have been actively engaged as an accountant for how long?

A. For about nine years.

Q. Beginning in 1911?

A. About 1911.

Q. With the companies you have mentioned?

A. Yes.

11 Q. Now, the Kings County that you speak of is the plaintiff in this cause?

A. Yes.

Q. And you worked at its—what we called its commercial office at New Utrecht ave.?

A. Commercial and general office.

Q. At New Utrecht ave.?

A. Main office of the company.

Q. At 1802 New Utrecht ave.?

A. 1802 New Utrecht ave.

Q. In the County of Kings?

A. County of Kings, Borough of Brooklyn.

Q. And that company since you have been there has been engaged in the manufacture and distribution of gas?

A. It has.

Q. Have you had charge of the books and accounts and so forth of the company?

A. I am in full charge of the books and accounts and records of the company of all departments.

Q. And you have assistants under you?

A. I have assistants under me.

Q. A number.

A. Three general assistants.

Q. And you have a staff of bookkeepers there, haven't you?

A. Yes, I have quite a number of bookkeepers.

Q. You are not prepared to say how many are in the general office?

A. No, I am not. I should imagine there are about 112 through the commercial and general department. They are not all, however, under my direct supervision.

Q. What is your age, Mr. Gonnoud?

A. I am thirty-two.

Q. Are the books and accounts of the Kings County Lighting Company kept according to any particular system?

45 Mr. Hill: We object to that as calling for a conclusion. I will withdraw that. I thought you were going to ask if it was in accordance with the system of the Public Service Commission. I withdraw the objection at this time.

A. They are kept in accordance with the uniform system of accounts.

Mr. Jackson: Wait a minute. That is not the question he asked you. Just read that question back again.

(The question was read by the reporter as above recorded.)

A. Yes, they are kept in accordance with the uniform system of accounts of gas corporations.

Mr. Hill: That is objected to as a conclusion, and I move to strike it out.

A. (Continuing.) Promulgated by the Public Service Commission of the State of New York for the First District.

The Master: Go ahead and tell how they are kept.

Mr. Moran: Well, that will be a big undertaking.

The Master: Well, you are going to tell anyhow.

Mr. Moran: We are going to, yes.

The Master: I will strike out the conclusion.

Mr. Chambers: That is a very important point in the case, whether they are. That is for the Court to say. He can say how they are kept. That is what we claim, the Court should pass
46 on that question.

Q. Mr. Gonnoud, do you in the company attempt to follow any system of accounts in keeping the books and accounts of the company?

A. Yes.

Q. What system do you attempt to follow?

A. We attempt to follow the uniform system of accounts as outlined——

Mr. Chambers: Just a minute. I object to that. Do not answer until we get a chance to object. I object to that on the ground that it is incompetent, irrelevant and immaterial and a question for the Court to determine. He can state how they keep them, of course; that can't be objectionable, but as to drawing the conclusion—it is very important, that question, very important.

The Master: Well, I will let him state that he attempted to keep them in accordance with that system, and then we can see as the case goes on whether he does or not.

Mr. Jackson: If he said they were kept in view of that system prescribed——

Mr. Moran: What is that?

47 Mr. Jackson: Instead of attempting—if he said that he kept them in view of that system.

Mr. Moran: Well, I do not accept your amendment.

Mr. Chambers: I think it is objectionable. I take an exception to the Master's ruling.

The Master: Exception.

Mr. Chambers: Exception to the defendants.

Q. I show you a pamphlet entitled "Uniform System of Accounts for Gas Corporations, as prescribed by the Public Service Commission for the First District, State of New York, final order and modifying order, case 578;" and ask you if that pamphlet contains the text and title of the accounts which you refer to as the uniform system of accounts?

A. It does.

Q. Now, has the company received from the Public Service Commission that order containing the text of the accounts there substantially as you have it in your hand?

A. I believe it has.

Q. Have you got one of those in your office?

A. I have.

Q. Do you use it over there?

A. Yes.

Mr. Moran: The paper I showed the witness is a pamphlet furnished me by the Pulic Service Commission, and which contains the order of the Commission made on the 8th of December, 1908, promulgating a system of accounts for gas corporations doing

48 business in the first district, and an order of the Commission in the same case dated June 29, 1917 modifying in some respects the prior order, which I want to offer in evidence as the system of accounts promulgated for gas corporations in this district, and according to which the company's books are made up.

Mr. Chambers: All I have to say to that is, you tried to show by this witness that he attempted to live up to that, and you did not have it in evidence at all before that.

The Master: There is no objection then, is there?

Mr. Jackson: Well, I object.

The Master: I mean, this is the system of accounts? This contains the system of accounts?

Mr. Jackson: I understand that is a correct copy. I object to this book being used for any other purpose and to show that a form and manner of classifications of accounts was prescribed, and I object to its being used as any proof whatever—the fact that complainant complied with the rules and regulations therein contained as any evidence whatever of the accuracy of their accounts. It goes only to the form and manner of classification of accounts, and has no respect to accuracy or the truth of any item. So far as it is
49 pertinent to the form of classification of accounts, we have no objection.

The Master: We will receive it now. It remains to be seen whether they kept their accounts according to it or not.

(Pamphlet received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Chambers: They will claim they keep their books in accordance with this uniform system of accounts promulgated by the Public Service Commission, and then they will claim that you ought to take all their books in evidence just on that. We contend the uniform system of accounts was never put in force and effect for any such purpose. We are entitled to common law proof just the same and we insist upon it. That is the contention between us and that will be the issue; and that is the point. Perhaps some higher Court will decide at some time.

Mr. Jackson: The point was pointed out in the order of the 29th of June, 1917. There it is, that "in prescribing this uniform system or a method of keeping accounts, records and books, to be observed
by such corporations, the Commission is not undertaking that
50 any item set out in any account will have the Commission's approval, either as to amount or character, in fixing a rate or authorizing any issue of securities," and so on.

Mr. Chambers: And Judge Hand made some comment in his decision on that—thought that the books were admissible in evidence because the Public Service Commission had something to do with them through this order. I think he was clearly in error, because as you say, the uniform system of accounts seems to indicate that they never had any idea of issuing this order and then saying that the books, if kept in accordance with that, would be correct. We say we are entitled to common law proof. The contents of these, they have to prove their books just the same as they would have to prove them in any other litigation; and this order does not relieve them. That is the point of your objection?

Mr. Jackson: Surely.

Mr. Chambers: Well, we have no objection to the uniform system of accounts being admitted as such, but we do claim that it does not have the force and effect of proving their books by any means.

Mr. Moran: Have the objections been disposed of?

The Master: Yes. We will receive it in evidence at the present time.

51 Mr. Jackson: Just an exception to the receipt for the Public Service Commission.

The Master: Exception.

Q. The company's books covering these transactions for 1919 and 1920, I understand are in the building here.

A. The 1919 are, but 1920.

Q. They are being brought into the room now.

A. Yes. 1920, of course, are current books and are being kept at the main office. We must have these to continue our business with.

Q. Do you keep the accounts according to any particular periods? Do you keep accounts for particular periods?

A. Yes, we keep them——

Q. What is the period of accounting employed by the company? Is it a month or a year or a shorter or longer period?

A. We keep for the calendar year, we keep the accounts. We also, of course, show things from month to month, but the accounts are closed out, and the income statement closed out to surplus and closed accounts, at the end of the year.

Q. You keep accounts which purport to show the expenses incurred by the company in a calendar year in the manufacture and distributing of gas?

A. Yes.

Q. And is that expense divided up among a number of different accounts?

A. It is.

Q. Coal is used—a good deal of coal is used by the com-

52 pany, according to its records, is it not?

A. It is.

Q. A good deal of oil?

A. A good deal of oil, yes.

Q. Considerable labor is employed?

A. Yes.

Q. Take, for instance, the item of oil: do you keep an account in which the cost of oil is shown?

A. Yes.

Q. What account is that? What is the title of that account?

A. Material and supplies.

Q. That is, the material and supplies account shows the cost of oil purchased?

A. Purchased.

Q. Not the cost——

A. Not used.

Q. Not used, but the purchased?

A. Purchased.

Q. What expense account shows the oil, cost of oil used?

A. Water gas oil.

Q. Water gas oil. Is that one of the accounts prescribed by the Commission?

A. It is.

Q. What number is it?

A. It is account No. 607, shown on page 11.

Q. That is, the text of the account appears on page 11 of this?

A. I don't know if this is the same page or not.

Q. Yes, that is right. The text of that account in the order reads: "Charge to this account the cost in storage tanks of gas oil or naphtha used in making gas. This includes invoiced cost of oil used, freight, demurrage charges and labor and cartage employed in getting
53 oil from point of shipper's delivery to storage tanks."

A. Yes.

Q. Now, oil, when it first comes—when it first appears on your books—appears in material and supplies; is that right?

A. Yes.

Q. And is it transferred, some or any part of it, transferred from material and supplies to water gas oil?

A. It is.

Q. At what cost is it transferred from material and supplies to water gas oil?

A. At the cost in the tank.

Q. Well, what cost for the oil itself?

A. The purchase price.

Q. The purchase price?

A. Plus the handling charges.

Q. The handling charges—that is, whose handling charges?

A. The handling charges from the point of delivery to the company's dock to the oil tank.

Q. You have been at the company's works?

A. Yes.

Q. And they have oil tanks there?

A. Yes.

Q. In order to put the oil from the car, from the barges, into the oil tanks, the company has to——

A. Pump it.

Q. Pump it?

A. Yes.

Q. And the expense of that pumpage is put into water gas oil account?

A. Yes, that proportion of it, of course, that is used.

Q. Yes, of course, there is only that that is used. What information comes to you or to your department as to the amount
54 used in a year, for instance?

A. Each day a measurement of the tank is taken at the beginning of the period, seven o'clock in the morning, and subtracting from the previous day's reading they arrive at the amount that was consumed, the tanks being hooked up with the gas making apparatus through pipe lines. All oil leaving a tank, of course, we assume is being used in the manufacture of the gas.

Mr. Chambers: That is not within your knowledge.

The Witness: Yes, it is.

Mr. Chambers: The measuring?

The Witness: The measuring.

Mr. Chambers: You do the measuring? You know it is measured? You measure it?

The Witness: I know it is measured, yes. I do not do the measuring. The measuring is done by what we call a stores keeper, who signs the slip showing that the oil has been delivered to the gas making apparatus. The man in charge of the gas making apparatus, that is, the engineer of the plant, signs the same slip to show that the oil has been used.

Mr. Chambers: All you know is he says it upon that slip?

The Witness: Well, the slip is made up, yes, and it is signed by him.

55 Q. Mr. Gonmond, you are speaking about the quantity of gas oil that might be used in a given day?

A. Yes.

Q. In any day?

A. Yes.

Q. Have you the quantity of gas oil used in a year? Are you able to compute that?

A. Yes.

Q. If so, how—will you please tell us?

A. *This* slips are sent to our office and are checked, we accumulate them on our records——

Q. Just a minute.

A. Then we take an inventory——

Q. Just a minute, Mr. Gonmond. I am speaking now of the quantity for the year.

A. Well, for the quantity for the year, the engineer at the works takes an inventory of the oil on hand, he examines these tanks, reads the gauges, takes the inventory at the beginning of the year; and we receive the bills showing the amount that was purchased. This amount purchased is delivered at our works, and receipt is sent up showing that that amount was received. To the inventory at the beginning of the year we add the purchases during the year, and from that we subtract the amount of oil as shown by the inventory on the last day of the year, or for the beginning of the first day of the succeeding year, and that will give us the amount of oil that was actually used in the manufacture of gas.

Q. During that year?

A. During that year.

56 Q. So it consists of your purchases during the year, adjusted by the differences in the amount on hand in the beginning and end of the year?

A. That would be it, yes.

Q. If you had the same amount on hand at the end of the year as you had at the beginning, it would constitute simply your purchases?

A. Yes.

Q. If you had more on hand at the end of the year than you had at the beginning, then the amount used would be slightly less than your purchases?

A. Yes.

Q. Is that right?

A. Yes, that is right.

Q. When you speak of inventory, that simply means that t amount in your two tanks—the company has two tanks?

A. Two tanks.

Q. Two oil tanks, and there is a gauge on the outside which sh the elevation of the oil in the tanks?

A. Yes.

Q. Now, if you know, from any record—for I don't take it, an don't offer the witness as a man who has been in any oil tank a measured it—can you tell us whether those tanks hold as much how much oil these tanks hold, just about? Visualize it just fo moment, you know. Do you know? If you don't——

A. I don't know offhand.

Q. All right. You don't know whether they hold a billion g lons or ten gallons?

A. No, I don't know.

Q. You don't know? They are quite big tanks?

A. Yes, one of them is larger than the other.

Q. Well, there are only two of them, you know that?

57 A. Yes.

Q. Now, the oil that appears in this account, "Water G Oil," your expense account, goes in at a cost to the company of t oil for one thing?

A. Yes.

Q. You do not add any percentage or profit to it?

A. No.

Q. You do not deduct any percentage of loss?

A. No.

Q. It is a cost proposition?

A. Cost.

Q. That is right. Now, in determining how much the co pany receives in the course of year of oil, can you tell us how t oil is ordered? Who orders the oil, for instance? Do you ord the oil?

A. No, the purchasing agent orders the oil there at the wor

Q. I am not speaking now of the man who makes the contra but today, if they want oil, who gets the thing of going to get t oil?

A. The engineer at the works.

Q. What does he do?

A. He makes a requisition of it, requesting—he needs so mu oil, and he requests so much oil. This requisition is forwarded me, showing the account to which the purchase is to be charged.

Q. You would know if it was oil which was to be charged material and supplies?

A. Material and supplies, yes.

Q. And then that goes to the Vice-President and General Ma ager, who approves the purchase of the oil?

A. Yes.

Q. Yes.

A. Then it goes to the purchasing department who
58 makes up the order on the oil company.

Q. And the order is sent out to the oil company?

A. The order is sent out to the oil company, and one copy of the order is retained by the purchasing department and two copies are forwarded to the works. The works keep one copy as their permanent record, and the other copy they use as a receipt, that is, when the oil is received they sign that order showing that the oil has been received, and then that copy is sent up to my department and we check it against the bill.

Q. In the meantime the bill has come from the oil company?

A. The bill has come from the oil company.

Q. Which shows the quantity of oil?

A. It shows the quantity of oil as measured by a representative, a third party. There is a third party who measures the oil; that is, they are a sort of a Referee who is appointed, a member of the New York Produce Exchange, and he measures the oil for both parties.

Mr. Chambers: Now, I object to that. That is another question. I move to strike out "he measures the oil." You don't know what he does?

The Witness: He makes an affidavit that he measures the oil

Mr. Chambers: Yes. I think that ought to be stricken out because that is one of the things—

59 The Master: The witness is the Auditor, and of course, he does not know what these different men do, but he is telling the course of procedure. Isn't that what your point is?

Mr. Moran: Yes.

The Master: I think we can give him a little latitude in that. We understand that he is the Auditor of the Company.

Mr. Chambers: I appreciate that.

Mr. Jackson: The proper statement is that the Referee measures the oil. Of course, that he does not know about. He does make an affidavit that he measures the oil. I suppose that is all right.

Mr. Moran: Do you want us to incur the expense of measuring the oil?

The Witness: The oil is measured, of course, by the company when it is received, but we don't use any oil out of that particular tank.

Mr. Chambers: You find a difference between that certificate and the measurements, too, I know.

The Witness: Yes, we do find differences both ways, sometimes more and sometimes less. They average about the same. Of course, that is due to several causes, it might be difference in temperature, and so forth and so on.

60 Mr. Chambers: But the temperature is also fixed over there when the Produce Exchange man does that.

Mr. Jackson: I suppose differences in temperament also.

Mr. Chambers: Right there I just—I do not like to interrupt—

he is describing generally the procedure, but we may as well know when we are coming to something important. Now, that is one of them. That throws doubt, we say, whether they are getting the oil that they are paying for, and so on, as you will see.

Mr. Moran: Perhaps.

Q. Well, anyway, you get a bill from the oil company specifying a certain quantity of oil?

A. Yes.

Q. And the price, and you check that over to see if the price is according to contract, if you have a contract?

A. Contract price.

Q. And you check the amounts stated on the bill from the report as to the amount received?

A. Yes.

Q. You keep that all under your jurisdiction?

A. Not my direct supervision.

Q. That is all kept there, and during the course of a year, you charge into your material and supplies a great quantity of oil, don't you?

A. Yes.

Q. That has been purchased?

A. Yes.

Q. And all that oils that has been purchased, if I
61 understand you right, is charged out of material and supplies and into water gas oil account during the year?

A. All that is used for that ——

Q. (Interrupting.) Wait. Save only the amount that may appear, the quantity thereof that may appear by an increase in the quantity on hand at the end of the year?

A. All the oil is not charged out to that account, only the oil that is used for gas making is charged to that account.

Q. And you have, besides this water gas oil—you use this oil then for some other purposes?

A. Why, we did in a few instances where we ran short of water gas tar. We have what we call tar burning boilers.

Q. Well, now, is that an ordinary use of water gas oil?

A. No, it is not.

Q. That was just one instance?

A. Yes.

Q. But if you did not have that instance, then what I said would be true?

A. It would be true.

Q. Even then, if you had charged any of it out for *fuel* purposes, as I say, why, that would go into another account?

A. Yes.

Q. And be charged all out of material and supplies into water gas oil or fuel account?

A. Fuel account.

Q. Except what might appear by an increase in the quantity on hand at the beginning of the next year?

A. That is correct.

62 Q. Now, you use other supplies besides oil, don't you?

A. Yes.

Q. And one of these, an important item of that, and an important supply that you use is coal; am I not right?

A. Yes.

Q. Now, I want to ask you the general question: When coal is bought, is it charged into a particular account?

A. It is charged into material and supplies when bought.

Q. Well, is there a material and supplies division so that we can find out where the coal is?

A. Yes.

Q. And oil? Now, when you say oil is under material and supplies, is there one I might call a sub account?

A. There is a sub account.

Q. Called what?

A. Gas oil account.

Q. Gas oil, and one for coal account then?

A. Different kinds of coal.

Q. But it is all in one big material and supplies account?

A. It is in the binders, yes; these binders of material and supplies.

Q. But it is all in one big account?

A. Yes.

Q. I mean by big that it has a whole lot of business in it?

A. Yes.

Q. The transaction of material and supplies is some busy account, isn't it?

A. Yes.

Q. And it is up and down?

63 A. These accounts are controlled by the material and supplies account as shown in the general ledger.

Q. These oil accounts and coal accounts, for instance, are classification of material and supplies and are kept in what we call subsidiary books?

A. Subsidiary books, yes.

Q. Subsidiary ledgers?

A. Yes, ledgers.

Q. And the general account is material and supplies?

A. Material and supplies, which is kept in a general ledger.

Q. Now, let me ask you something. Do all the materials that you use, the supplies, go into material and supplies account?

A. Practically all, not all.

Q Practically all, and all that do go in there are charged out to the various——

A. Operating expense accounts or other accounts, as used.

Q. Or if you use them for——

A. Capital accounts.

Q. Capital purposes, it is charged out to another account?

A. To the capital account.

Q. Now, do you say that some of your material and supplies go right directly to some account and don't go through material and supplies?

A. Yes.

Q. What, for instance?

A. Well, in repair jobs and in capital jobs, where we purchase some particular material and supplies for some particular job, we charge that directly out to the particular job in order that we get the proper charge to that particular job, handling, of course, and so on. If we were to purchase a repair to a machine, purchase for water gas sets, and accessories, we buy that and charge it right direct to water gas sets and accessories, and it would go right into that account.

Q. Suppose you bought some tubes for a boiler?

A. If we bought the tubes for a boiler, why that would go right directly against the boilers, unless we were going to hold these tubes in storage.

Q. I mean tubes for repair purposes?

A. That would go into repairs, boilers and accessories.

Q. If you bought more tubes than you need at a particular time, you would put them through material and supplies account?

A. Through material and supplies account.

Q. Now, this is important, why is it necessary to run it through a material and supplies account?

A. We have to do that in order to keep the expenses for a certain period correctly. We might purchase a great amount of stuff, we will say, a great amount of material and supplies during December of a year, and might not use any of those materials and supplies until the next year, the next current period of the calendar year. So we charge that into material and supplies and then charge from material and supplies into expense account, as the materials and supplies are used. Material and supplies account is used primarily because it is easier to have material and supplies on hand than it would be to purchase the material and supplies and use them the same day. In other words——

Q. (Interrupting.) Well, the operations of the company, you could not very well——

A. You could not possibly do that, so it is necessary to——

Q. Now, Mr. Gonnoud, could you charge your oil right into gas oil account, right directly?

A. We could not.

Q. Why couldn't you charge your deliveries now right in?

A. Why, we could charge it directly in and make an adjustment at the close of the year. We could take all our purchases during this particular year and charge it all into water gas oil, and then at the close of the year find out the difference between the amount on hand plus the purchases, plus the amount as shown on inventory at the close of the period, and then either subtract from the amount purchased or add to the amount purchased, whichever the case may be, and that would give us the same result.

Q. Well, what is the objection in your mind——

A. The objection to that——

Q. Just a moment. Will you state it?

A. Yes. The objection to that is we do not know the ship is

going, we do not know how much oil we are using each month to produce a certain amount of gas.

66 Q. Well, then, that is the point now. For the purpose of your monthly, and I might say, daily statements of how the ship is going, as you put it, how much oil is being used from day to day, how much you have on hand, *it is* necessary even to run the oil through a material and supply account?

A. Absolutely, because we must know just how things are going.

Q. And the coal you would say the same of?

A. Yes, the same.

Q. You put it through the material and supplies?

A. We do the same with the coal.

Q. Are coal and oil the principal materials that are used in the manufacture of gas according to your books?

A. Yes.

Q. I assume you do not know anything about the manufacture of gas yourself, but that is according to your experience in the company?

A. Yes, coal and oil are the principal things. We have oxide, that is, purifying materials, too.

Q. Well, the purchases of that in a year are very small, aren't they?

A. Yes, they are.

Q. Now, have those books been brought up?

A. Yes, sir, they are right here.

Q. Just bring them up. I would just like to have your general ledger, your ledger showing your general accounts for 1919. I understand you haven't the ones for 1920 here?

67 A. I haven't the one for 1920, but it is kept in the same way.

Q. Where is the 1919?

A. This is 1919. This contains 1918 and 1919.

Q. Now, the book you produced here, will you please describe it?

A. It is the general ledger of the Kings County Lighting Company, marked No. 4, covering the periods for the calendar years of 1918 and 1919; and shown therein are the——

Q. Well, never mind what is shown therein. That is what it is?

A. That is what it is.

Q. Now, what are the general accounts kept by the company which contain the expenses for the year 1919, what are the titles of those accounts; and please look at the book and gives us the page on which they appear. Have you got a list of the principal accounts that are kept in the book?

A. Yes, we have. Production expenses is shown on page 272.

Q. That is a general account?

A. That is a general account.

Q. Is that subdivided or are there accounts under that?

A. There are accounts under that.

Q. Now, what is one account under that—any thing we have been talking about?

A. Water gas oil.

Q. Water gas oil is one of them?
A. Yes.
Q. What is another?
A. Generator fuel.
Q. Generator fuel?
A. Boiler fuel.
68 Q. Boiler fuel?
A. Purifying materials.
Q. Yes.
A. Repairs of works and station structures, repairs to furnaces, boilers and accessories, miscellaneous works expense. Is that enough?
Q. Yes. Are all the accounts, are all the expenses which are incurred at the works producing gas kept in these sub accounts under production?
A. Yes. That brings us up to the shows us the cost into the holder.
Q. Now, what is another general account that is kept in here?
A. Transmission and distribution expenses.
Q. And what page is that on?
A. Shown on page 280.
Q. Is that a general account?
A. Yes, that shows us the cost of distributing the gas to our consumers.
Q. Yes. Is that classified into sub-accounts?
A. That is classified into sub-accounts. It shows us the distribution superintendence, that is, the cost of superintendence and clerks used in the office there; and repairs of meters, and the cost of changing the meters, resetting meters, and cost of turning on and cutting off of service; repairs of mains, repairs of services and so on.
Q. What is another general account that you keep?
A. Commercial expenses.
Q. What page is that on?
A. Commercial expenses shown on page 296.
Q. And is there any classification, sub-classification, of
69 commercial expenses?
A. There is. We show the cost of collecting bills, cost of reading meters, the cost of accounting work in connection with the collection of bills, and with the Commercial Department, and promotion expense.
Q. Are there any other general accounts kept?
A. We keep general and miscellaneous expenses, shown on page 304.
Q. Is that one mentioned in the uniform system?
A. Yes.
Q. Is that subdivided?
A. Yes, that is subdivided into salaries and expenses of general officers, general law expenses, miscellaneous general expenses, and insurance, and that is about what it is.
Q. Is there any other general account?
A. There is municipal street lighting expense, that is, the expense

of repairs to street lamps and what little operating expense there is.

Q. Well, that with your company is very small, isn't it?

A. Extremely small. That municipal street lighting expense is shown on page 288.

Q. Do you have any other?

A. We have tax accounts, shown on page 312, which show us the taxes charged against operation.

Q. Yes. Taxes charged against operation are——

A. Taxes on real estate, taxes on gross earnings, special franchise tax on gross earnings, and the special franchise tax.

Q. Now, any other general account?

A. We have uncollectible bills. That is a general account that is used for writing off the items that are uncollectible.

Q. Showing how much, practically how much you lose or should be either added to your expenses or deducted from your income in a year on account of uncollectibles?

A. It is a deduction of income of uncollectibles.

Q. Those are all the general——

A. Those are the general operating accounts.

Q. Now, Mr. Gonnoud, have you taken off the books, that is, the general ledger and the subsidiary ledgers, a statement showing what has been charged upon your books for the year 1919 for the manufacture and distribution of gas?

A. I have.

Q. Will you produce the statement please?

A. (Witness produces papers.)

Q. Now, the statement you produced here is marked "Kings County Lighting Company, Operating Expenses, 1919;" summary on page 1, following on page 2 is statement of detailed operating expenses, page 3 the same and page 4. Am I not right?

A. Yes, sir.

Mr. Moran: I would like to have this statement marked for identification.

(Statement marked Plaintiff's Exhibit 2 for identification.)

Q. The statement here which you have produced, I notice contains the terms that you have used in describing the general accounts?

A. Yes.

Q. And are the amounts that appear opposite each one of those figures the amounts that are charged on the books on the pages that you have referred to as you gave your testimony?

A. Yes.

Q. They are the amounts right there on those accounts?

A. There are two additional subdivisions here on this summary sheet.

Q. I see. What are they?

A. One is the promotion expense, which is a part of commercial expense, and the other item plant withdrawn from service, which is a part of the general and miscellaneous expense.

Q. Part of the general miscellaneous, all right. Now, let us pass

over the summary sheet a moment, and we go over details and we find production expense, a sort of a capitalization, and under it works superintendent, boiler house, labor, generator house labor, purifier house labor, and miscellaneous labor at works. Now,
72 that includes all the labor that is employed?

A. Yes, at the works.

Q. At the works.

A. Excepting the labor employed making repairs.

Mr. Chambers: Just a moment. I object to that on the ground that it calls for a conclusion. If you are trying to prove the fact, later on I don't want you to claim that you have proved all the labor. It purports to do that.

Mr. Moran: That is what they put in there. Then we will change it. Those are the only labor accounts at the works.

Q. Following those general ones, or following those labor accounts, there comes in—and that is all classified as total gas making labor, I notice.

A. Yes; that is the total labor used for making gas.

Q. Yes, and then we go down and in the next sub-accounts we find boiler fuel, generator fuel, water gas oil. Now, water gas oil as appears there includes some labor, doesn't it?

A. Yes.

Q. So does generator fuel?

A. Yes.

Q. Labor of handling?

A. Yes.

Q. Boiler fuel also?

A. Yes.

Q. Nearly everything down here, repairs, of course, they include labor?

A. Labor and material.

Q. So labor is scattered through practically all these
73 accounts?

A. Yes, sir.

Q. A small amount of labor occurring?

A. Yes.

Q. The following sheets also contain all the sub-accounts the amounts charged under the various sub-accounts?

A. Yes.

Q. Will you take this figure that you have got here for water gas oil, we spoke about that this morning, of $347,171.13, and show us in your general books and general ledger and your subsidiary ledgers, the make-up of that figure?

Mr. Hill: Which one?

Mr. Moran: $347,171.13.

Mr. Hill: You are using what year now?

Mr. Moran: 1919, the same one.

Mr. Chambers: You are still describing papers?

Mr. Moran: Yes. I am getting him to pick out a particular one.

Mr. Chambers: But you are not trying to prove now the amount here? The question looks so.

Mr. Moran: No.

Mr. Chambers: Because your books are not in and this is not in.

Mr. Moran: Oh, no, of course not.

A. It is shown right here $347,171.13.

Q. What is the book you produce now?

A. This is a summary of the sub-accounts. We summarize the sub-accounts. We keep in the sub-book the accounts from
74 month to month, and then we use this as a summary. We use two sub-books, one for even months and one for odd months, so as to facilitate the handling of the accounts. Then we summarize it under these captions, we carry for January, February the amount used for each month and for the elapsed months during the year, and then at the coming down to the final, we show the total amount used for the year as $347,171.13.

The Master: It will be very difficult to follow this witness's testimony unless we identify those books a little bit more.

Mr. Moran: Yes, we are going to identify it. As soon as he stopped I was going to have the book marked for identification.

A. (Continuing:) We show the amount of $347,171.13 as the amount of money, representing the amount of gas oil used in 1919.

Q. The book that you brought forward is entitled, "Summary Sheets, Operating and Capital Expenditures, Kings County Lighting Company, Divisional Accounts 1919"?

A. Yes.

Mr. Moran: I will have that book marked for identification.

(Book marked Plaintiff's Exhibit No. 3 for identification.)

Mr. Jackson: That covers the odd or even months?

The Witness: This covers all months, this is both together.

75 Q. Now, this summary goes back again to your sub-accounts?

A. Yes. These books, one is entitled "Operating and Capital Expenditures, Kings County Lighting Company, Even Months 1919."

Q. And the other one is what?

A. Is "Operating and Capital Expenditures, Kings County Lighting Company, Odd Months, 1919."

Q. That is what they contain, but what are they called in bookkeeping parlance?

A. Sub-ledgers.

Q. These are the sub-ledgers we have been talking about?

A. Yes.

Q. And contain the sub-accounts we have been talking about?

A. Sub-accounts we have been talking about.

Q. Those accounts reflect expenses or tend to reflect the expenses in the different months?

A. Yes.
Q. You call these ledgers?
A. Yes, we call them sub-ledgers.
Q. Let us have them marked for identification, two books covering the same year; one contains the sheets for the odd months and the other for the even months?
A. Yes.
Q. These are your sub-ledgers covering your accounts for the year 1919?
A. Yes.

Mr. Moran: We had better have them marked as one Exhibit, I think, because they are only separated for the purpose of convenience.

76 (Books marked Plaintiff's Exhibits 4 for Id., books 1 and 2.)

Q. Now, we were talking about gas oil. The gas oil account is kept in one or the other of these books?
A. Yes.
Q. Kept in both of them, I take it?
A. Kept in both, yes.
Q. Now, just explain this, Mr. Gonnoud. Turn to your pages and explain what you have in there?
A. This account shows the amounts——
Q. Well, now, what account are you referring to?
A. The gas oil account.
Q. Sub account, gas oil?
A. Sub account, water gas oil.

The Master: Refer to the book, will you please, too.

Q. Well, exhibit——
A. Shown on Exhibit 4 for Id. This account shows the amount of money——

Mr. Jackson: What page?
The Witness: The page is 26-260.
Mr. Jackson: Even months?
The Witness: Yes. This is odd months, this one.
Mr. Chambers: What month is that?
The Witness: That would show January, March, May, July, September and so on. And this shows the amount of money, representing the amount of gas oil used for gas making purposes during each of those months just mentioned, the odd months of the year.

77 Q. Now, you have down here for January, material and supplies $34,850.26?
A. Yes.
Q. What does that mean?
A. That means that that much money, representing the oil, has been charged to this account and credited to material and supplies; that is, taken from the material and supply account and charged into the operation of the company.

Mr. Chambers: That is, you claim that?

Mr. Moran: That is what the books actually show.

The Witness: That is what the books show.

Mr. Chambers: No; that is the trouble, Mr. Moran, you are getting right into—you are naming a figure just as if you were proving it.

Mr. Moran: No.

Mr. Chambers: Now, that is only your claim. I think he ought to avoid, in describing these books, going into a question like that. It appears just as if that was the amount now that you paid for oil. It is not proof at all, that is what you claim.

Mr. Moran: That is what our books show. It is put on the books, that is all.

Mr. Jackson: Are you citing this as an illustration of the bookkeeping system?

Mr. Moran: Yes, we are only trying to get at the system,—not only the system, but the gentleman — has kept the books and what he did in keeping them.

78 Mr. Chambers: He can do that without stating the amount.

Q. That is credited to material and supplies?

A. Yes, and charged to operating expenses.

Q. If we go to material and supplies account, will we find any reference to this?

A. Yes.

Q. What will we find?

A. You will find this amount was credited to material and supplies during that month and was charged to this account.

Q. Where does the labor come in here?

A. The labor used has already been taken care of in the handling expenses. We have what is known as handling expenses, which goes into a suspense account just the same as the material and supplies.

Q. Is it included in the figures appearing here?

A. Yes, it is included in those figures.

Q. Does labor handling expense get into material and supplies?

A. No, it does not get into material and supplies; we carry that in a separate suspense account, and we charge it in here at the same time that material and supplies goes in.

Q. Then you do not credit material and supplies with that figure going in there?

A. Not with this full amount shown in here. Part of it is credited to the suspense account of handling expenses.

Q. Handling expense?

A. Yes.

79 The Master: Does that figure include any labor?

The Witness: Yes, it does, it includes labor indirectly.

The Master: Yes.

The Witness: That is the labor of an engineer running a boiler to pump the oil.

The Master: Where do you find out the amount of that that is represented by labor?

The Witness: We find that in the journal entry. It is repr
sented there.

Q. Now, can you tell us that from this figure?
A. Yes.

Mr. Chambers: It is not exactly what it purports to be; it is n
gas oil, it is gas oil and labor.
Mr. Moran: He said that all the time.
Mr. Hill: It is gas oil in the tank.
Mr. Moran: In the tank.
Mr. Chambers: Plus labor in the tank.
Mr. Moran: Oh, no; it is the cost of the oil in the tank, includi
what they paid to the oil dealer and their own labor to get it in.
Mr. Hill: It is the labor of pumping from the barge at dock si
into the tank.
Mr. Moran: Yes.

Q. The book you have brought forward now, Mr. Gumoud, wh
is that?
A. This is the general journal, 1919.

80 Mr. Moran: Let us have it marked for identification.

(Book marked Plaintiff's Exhibit 5 for Id.)

Q. The book you have here is the general journal?
A. Yes, sir.
Q. And that is the book which contains the entries, you mig
say, connecting the——
A. This is the conveyance for carrying the entries, accumulat
entries from the other books; that is these sub-books, material a
supplies record, for instance, and other books, from one account in
another account.
Q. Now, we are working on the gas oil account for 1919, and
develops that the figures appearing in the subledger contained bo
labor and oil, material rather?
A. Yes.
Q. Does your ledger separate,—from the entries on your ledger a
you able to separate those figures into oil and labor?
A. No, I am not.
Q. What is it?
A. We are able to show the material and supplies, that is the cre
to material and supplies, which would show the cost of oil, with t
exception of the cost of handling the oil from the delivery point
the gas tanks. Now, in that handling there are both labor an
material, therefore it is impossible to divide between the labor an
the material of handling that oil. For instance, we use coal in th
to pump the oil from the oil tank; and of course there is t
81 labor of the man there pumping, the engineer, and of cou
the coal that is used. That is charged into an account call
Coal Handling Expense—it is coal and oil handling expense, b
we call it coal handling expense. Then we charge material an

supplies out here. We show a figure here in the month of November of $30,520.36, which is the cost of the oil used that month.

Q. Plus handling?

A. The purchase price—no, that is just merely the purchase price of the oil used.

Q. Well, that is what we want.

A. That is the purchase price plus the handling expense, and then we credit to the material and supplies the purchase price of the oil, and we credit to the coal handling suspense the amount of expense of handling that amount of oil.

The Master: What were those two credits in that particular item?

The Witness: Material and supplies, coal handling suspense.

Mr. Morse: What were the amounts of them?

The Master: The amounts.

Mr. Chambers: I take it this is just by way of explanation, not part of the——

The Master: I want to find out how they kept the accounts, that is all.

The Witness: We show here the total for all the gas making material used that month, and that credit is shown in here, mate-
82 rial and supplies $58,081.64, and the coal handling suspense being $293.90. That includes material and supplies, that includes tar boiler fuel, coal boiler fuel, generator fuel, water gas fuel and gas storage. And then the details of that are shown as an explanation below these accounts, you see, shown as an explanation here. You see, we take it this way: We take one journal entry, with fixed voucher No. 57—we have a fixed journal entry, and fixed journal voucher for each different transaction—you take fixed voucher No. 57 for all the months of the year, purporting to show the amount of material and supplies used, or the amount of money represented thereby, in gas making materials; and we list on there the amounts as shown in this accumulated data, you see, and then we credit as against that the material and supply account and the expense, expense of handling those materials and supplies. Now, the details of that, of course, are shown on here in explanation. They show the amount of gallons and the money represented thereby.

Q. Well, for instance, gas oil, you have balance November 1st, 1919, a certain number of gallons?

A. Yes, and we show $30,368.52 as being the amount of purchase price of gas oil used in that month.

Mr. Hill: That is the purchase price where?

The Witness: Purchase price at the point of delivery, not in the tank.

83 Q. That is purchased during that month?

A. No, no.

Q. You said so?

A. Well, $30,368.52 is the amount. That was the wrong amount there. That was the amount purchased during the month. You

see, on this journal entry we showed a balance on hand, the number of gallons at the beginning of the month and the amount of money it represents. Then we show the amount we purchased during the month, in both gallons and amount of money; and then we show the amount used during the month, both gallons and money; and then show the balance on hand at the close of the month; and this amount here of $30,368.52 is the amount of water gas oil—that is the purchase price of the water gas oil used in the operations, and the difference between that and the amount shown here, $30,520.36 would be the handling expense.

Mr. Jackson: Then that shows a separation?
The Witness: It does show a separation.
Mr. Jackson: Between your investment for the——
The Witness: It does show a separation, yes.
Mr. Jackson (continuing)—actual material, oil, and the investment for the labor in handling it. Does that show the separation?
The Witness: I beg your pardon.
Mr. Jackson: Does that show that separation? Are the items separately stated?
The Witness: It shows what?
Mr. Jackson: The actual investment for the material, oil,
84 and the investment in labor handling the oil or supplies, handling it?
The Witness: Labor and material.
Mr. Jackson: Does that show the separation?
Mr. Moran: Take there, you have the month of November, 1919,——
Mr. Jackson: I think the Master wanted to know if that book showed that separation, or where it was shown.

Q. How much is the oil, the actual oil itself, without any handling charges in that month.

Mr. Jackson: No, the point is without taking the figures.
Mr. Moran: We are going to get the others.
Mr. Jackson: Without stating the figures, the Master wanted to know where that is shown, and that book, that shows it. That answers the question.
The Witness: This shows it, yes.
Mr. Jackson: Why not explain what it shows.
The Witness: It does not show the labor separate, it shows the difference between the handling expense and the purchase price. The handling price——

Q. Can you name that amount here now, without any prejudice. Without prejudice, just name it for this particular month.

85 Mr. Jackson: I think there would be no prejudice if you took it for that purpose, in stating that item for illustration.

A. We used in the generator $30,368.52.
Q. Worth of oil?

A. Worth of oil, that is, purchase price at delivery. That together with the handling expense amounts to $30,520.36.

Q. Now, what is the difference, subtracted?

Mr. Chambers: The difference would be that handling?

A. The difference would be the handling. It would be $151.84.

Mr. Chambers: $151.84, and that includes labor and material too?

The Witness: That includes labor and material of handling, that $151.84.

Q. Now, the item here $293.90, labelled "Coal Handling *Suspense*," what is that?

A. This item $151.84 is included therein.

Q. And what else is in there?

A. Well, the handling, the handling charged applicable to the coal used during that period.

Q. That is, the coal and oil are both in there?

A. Yes.

Q. The handling expense of coal and oil?

A. Are both in that.

Q. Including both the labor and material?

A. Yes, are shown there.

Q. And for the month of November, that is $293.90?

A. $293.90.

86 Q. And the total expenditure for ——

A. Purchases was $58,081.64.

Q. Used.

A. Used.

Q. That is the cost of the coal and oil used?

A. Yes.

Q. As you measured it?

A. Yes.

Q. Was $58,081.64?

A. $58,081.64.

Q. That is what you charged into operating expenses for that month?

A. Yes.

Q. In addition to that you charged in $293.90 which was the expense to the company as you figured it of material and labor used in getting that coal to the point of consumption?

A. Coal and oil.

The Master: Does that include freight from the point of delivery to the point of use?

The Witness: No, it does not. Freight is included as the price alongside, you see.

Q. Freight is included in the $58,081.64?

A. Yes.

The Master: Then it is cost of oil at point of delivery, the company's place of business?

The Witness: At the dock, yes.

Q. Company's own handling. I may ask you this: The uniform system of accounts asks or requires that the expense of handling be put in in this gas oil account?

Mr. Chambers: Now, I object to that. It is an interpretation.

87 Q. Do you so understand it?
A. Yes.

Q. Is that why you did it?

A. Yes. The account does not. I do not know that the account shows that. The water gas oil charged to this account cost in storage tanks of gas oil or matter used in making water gas—yes, that would be the reason for it, yes. This includes in this, cost of oil used, freight, demurrage charges and labor and cartage employed in getting oil from point of shippers' delivery to storage tank, which would be from the dock to the storage tank.

Mr. Chambers: Let me ask you this: These men whose labor is in this figure you gave here, $151.84, those are your regular employees, aren't they?

The Witness: Yes.

Mr. Chambers: And they are on your weekly payroll?

The Witness: Yes.

Mr. Jackson: Do you want to ask further, Mr. Chambers at this time?

Mr. Chambers: No, not cross-examination. I just wanted to make sure of that. Of course, that ought to be gone into fully.

Q. Now, then, coal is the same way; we won't go into the details of it. Coal goes into the account, and for instance in the November expense here, how much was the cost of coal as your books showed on hand at the beginning of that month?

88 A. If we go into this coal, we will have to show the different kinds of coal. You see, in material and supplies we will show how much anthracite coal was on hand at the beginning of the month, how much was purchased during the month.

Q. Yes.

A. How much was used in the generators, during the month.

Q. Yes.

A. And how much was used in the boilers.

Q. Yes.

A. And how much was on hand at the end of the month.

Q. Yes.

A. So that that brings in two operations here. You see coal is used for two purposes, two different accounts. It will show up—it does not show the line of procedure so clearly as the oil which is used in this particular case here for only one account.

Q. Well, the method is just the same with the coal as with the oil?

A. The method is just the same with the coal as with the oil.

Q. Now, on other material is there a handling charge too, for instance repair material?

A. Yes.

Q. What?

A. Yes, there is a handling charge there.

Q. Oxide, is that handled the same way as the oil?

A. Oxide is not handled the same way as the oil.

Q. How is it handled? A. Oxide is handled entirely different.

Q. Does oxide go to material and supplies?

A. An oxide goes to material and supplies, and we charge
89 out according to the amount of gas made during the month a certain proportion of it, and that is adjusted when the purified material is no longer available, no longer good for use.

Q. And that is due to the fact that oxide which is taken out of material and supplies and put into use, won't be consumed perhaps that year at all?

A. No.

Q. It will run on over into another year, it is a thing that is used and taken out?

A. You see, we put the purifying material such as oxide—it is put in large boxes through which the gas is sent. Now, we revivify that, you see, we take it out and have the sun work on it.

Q. It is not all used up at once time like coal?

A. It is not used up.

Q. Now, does this book that you have here which you call a general journal, contain the entries, passing from material and supplies to your several expense accounts, the items appearing on our Exhibit 2 for Id.?

A. Yes.

Q. We started out very gallantly here to show a particular item; I guess we must have lost sight of it—$347,171.13. You got that from your summary?

A. Here is the summary.

Q. Yes, the summary which is Exhibit No. 3 for Id.; is that right?

A. Yes.

Q. Now, just find the page on that and see?

A. 26.

90 Q. And where are the figures?

A. It is shown there (indicating).

Q. Yes.

A. You see 26 shown on the summary here, we go to this book and we show the 26.

The Master: Go to what book?

The Witness: We go to the book marked Exhibit 4 for identification.

Q. Which is what?

A. Which is the sub-ledger.

Q. Yes.

A. And we see that on the 26th in this book in any sub-divisions of that shown there, you see. For instance, in water gas oil of course it is only one account, there is only one account in that, that is there is no subdivision beyond that.

Q. No, but water gas oil, it shows used during the year a charge

of $347,000. Now, we were talking about November. It shows how much in November?

A. $30,520.36.

Q. And that is the amount that we have just—that comes from there, that comes from your general ledger, sub-ledger?

A. Sub ledger, yes.

Q. Now, turn to your journal. Turn to your journal again now, and we have got there the——

A. $30,520.36, this amount.

Mr. Jackson: On what page?

The Witness: On page 157, journal voucher 157. We carried it as a progressive journal voucher, and a fixed journal
91 voucher. This also shows the amount which is posted to the general ledger.

Q. It shows the production expense and it shows the sub accounts, and it shows the general account too?

A. Yes.

Q. It shows *that* the general account is made up of?

A. Yes.

Q. The general account is production expense, and it is $58,375.50 for the month of November?

A. $.54.

Q. 54 cents, and in that is——

A. Tar boiler fuel, coal boiler fuel, generator fuel, water gas oil and gas storage.

Q. If we went into the general ledger to find the details that go to make up the different amounts in there, we can turn to these journal pages the same?

A. Journal pages and get those amounts, yes.

Q. All your material and supplies that are ordered, are handled so far as ordering them and charging them into material and supplies, the same as the oil was. You told us there about sending the order and the charging it to the store room?

A. Yes, exactly the same.

Q. And when it is used, it is charged out?

A. Charged out.

Q. That is the same with coal. Is coal purchased the same way—let me find—through orders?

A. Through orders, yes, sir.

Q. Now, are other materials purchased the same way?

A. Yes. Every material is purchased through orders
92 under the same system as outlined there.

Q. Including the repair material?

A. Yes.

Q. Now, let me find out about your labor. How is that taken care of?

A. Well, whenever it becomes necessary to employ labor, the head of that department who wishes to employ the men will agree on a certain rate, a rate of wage and working conditions, and will make up what is known as an authorization slip on which is shown the man's name and the occupation and the amount of the wage

and the date that he is to appear at work. This ticket is then forwarded to my department, and we turn it over to the Vice President and General Manager, who approve it, approve taking on this man at this rate. That is sent further to the pay roll department who make a record of it showing that this man was engaged on a certain date, and then it is forwarded to our addressograph department where a plate is made up showing the man's name and occupation, and the number that has been assigned to him. We assign progressive numbers to each new employee coming in. And of course the man starts in to work then. Then the addressograph department run off time tickets. Take for instance for the works, they run off what they call time cards for each day for each man. They run them off with this addressograph machine, having had the date cut in there, you see. Then that is run off showing the man's name and his occupation. Now, these cards are sent down to the production or the works—down to the works. As the man appears to work in the morning, he takes his card from the rack and punches it, showing that he appeared at a certain time to work. On the bottom of this card is shown a space, a space is provided to show to what account the man is to be charged. What time is to be charged, that is, what his occupation was. If he was a gas maker, it was to be charged to the generator house labor. The man goes out and works the time and comes in and punches the time going out, showing by means of the clock the number of hours that he has been at the works. And then the pay roll checker here, that is the time keeper at the works, finds out what the man has been doing during the day. If he is a regular gas maker and shows that way, the charge is the same from day to day, and he shows then the number of hours and the amount of time consumed,—the number of hours and the account to which the time is to be charged. These cards are all forwarded to the payroll department.

Q. Daily?

A. Daily. And the works in addition to this keep a memorandum time book record showing the name of the man and the number of hours during the week he works day by day. The pay roll department receive the work tickets and they post on to the pay roll which has been made up by the addressograph department, that is run off on the addressograph machine, the name of the man and the occupation. They enter there the number of hours. Then they have a distribution sheet which is attached to the payroll, showing the distribution of the time represented on the payroll the number of hours shown on the distribution sheet agreeing exactly with the number on the payroll. This memorandum book of which I spoke, is signed by the engineer at the works to show that he approvese of the number of hours, that he knows the man has worked that number of hours. That book is sent up and checked against the payrolls, to show that the same number of hours as shown on there, approved by the head of the department, engineer at the works, to show——

(Interrupting.) Is that checked under your supervision?

A. That is checked directly—all these things are checked directly under my supervision, the pay roll department being under my supervision. And this distribution then agrees with the amount of money that is expended during the time, the number of hours and the amount of money, and then this is attached to the payroll.

Now, if there are any changes—we take, for instance, at the authorization starting at the first week in January, they are checked absolutely with the payroll to see that the amounts coincide with the amounts shown on the authorizations, which have been approved by the vice president and the general manager. Now, any
94 changes since that time are marked on what we call change sheets. We put these change sheets, they are attached to the payrolls, to show what changes have occurred from the previous payroll. On the top of the distribution we show the amount of the previous payroll, the number of men and the amount of the previous payroll, and the number of men and the amount of the present payroll; and these change slips show the changes since the previous payroll, such as if we put on John Jones between times, we show the date that he was put on and his rate, if John Smith left the employ of the company we show the date that he left the employ of the company.

Q. Well, now, Mr. Gumbrecht, tell the Master this: Have you books or records that will show the dollars and cents paid out by the company in the year 1919, we will say, for labor and services?

A. No.

Q. Separate and apart from materials?

A. No, we have not.

Q. You have not?

A. No. I was going to explain this thing, explain where we spread this work, where this is shown on our books.

Q. Well, but it goes into the different accounts?

A. Yes, sir.

Q. We know that?

A. Yes, sir.

Q. The uniform system requires it, but I want to find out—we have a vast expenditure here of probably over a million dollars for making gas in 1919. Can you tell us how much of that
95 is labor? Is there any book of record that will show that?

A. There is no book of record that will show that.

Q. Is there any book of record that will show how much you paid for services rendered, including common every day laborers, gas makers, gas makers' helpers, repair men, officers and everything in the year 1919?

A. Yes. That is the accounts payable will show it from month to month. It is not accumulated in the accounts payable. The accounts payable will show it.

Q. Will the accounts payable show how much you paid out?

A. Yes.

Q. I want to get this: That is the actual out of pocket payments to employees each month?

A. Yes.

Q. That will show it?
A. Yes.
Q. And you could total that up and tell us how much it it?
A. Oh, yes, we could do that.
Q. But it is read into these expense accounts, statements that u have brought here, that is, distributed into the different ac-unts?
A. Yes.
Q. And that is required by this uniform system, as you construe

A. Yes.
Q. You may be entirely wrong about it, but——
A. Yes, as I construe it.
Q. As you construe it, and you report it in that fashion to the blic Service Commission, do you?
A. Yes.
Q. And have they ever complained that you have mis-construed it?
A. No.
Q. Have you a check then—well, that is the labor?
A. Well, I had not quite finished.
Q. All right.
A. Now, these payrolls I sign each one personally, examine the yroll and see that the distribution agrees with the amounts as own on there, and I sign each payroll personally. And then se payrolls, the distribution, they become the same as a dealer's voice, they are a bill against the company, and they are spread on accounts payable record showing the amount paid for labor, and n spread across the different accounts to which it is charged.

The Master: Who determines to what account a particular labor-salary shall be charged?
The Witness: Why, that is determined of course by myself. I ermine of course that a man working in a certain occupation will charged to a certain account.
Q. And that is because in your judgment——
A. I issue instructions covering that to a man who is doing that rk.
Q. Because in your judgment that is what the uniform system of ounts requires it to be charged to?
A. Yes.
Q. A man who makes gas, who stands at the machine there and ns on the oil and lets in the blast, and so forth; does the uniform tem of accounts show his time shall be charged?
A. Yes.
Q. How does it show it shall be charged?
A. To generator house labor.
Q. Take a man who shovels the coal into the boilers, does the uniform system of accounts show how his time shall be rged?
A. Yes.

Q. How?

A. To boiler house labor.

Q. Take a man putting oxide into the purifying boxes, does it show how his labor shall be charged?

A. Yes.

Q. How?

A. Purifier house labor.

Q. And the fellow that sweeps the yard, cleans it up before the counsel and court go down there, what does his go in?

A. Miscellaneous labor works.

Q. A fellow that handles the coal from the dock into the shed there, does it show where his will be put?

A. Yes.

Q. What?

A. Coal handling suspense we charge that to.

Q. But it goes into the generator coal if it is generator coal?

A. Eventually.

Q. Yes; and the fellow who handles the oil?

A. Eventually gets into the water gas oil.

Mr. Chambers: What do you do with the fellow that sweeps up, and then some of the time assists with this oil? That 8501 there for that or whatever it was, 8151, what do you do with that? Suppose he works part of the time——

The Witness: We would not have a man who works part of the time on that and part of the time on the other.

98 Mr. Chambers: You do have them where they work part of the time?

The Witness: You mean where we have them part of the time on one and part of the time on another? The foreman in charge of this man informs the timekeeper as to what work they are doing, and the timekeeper who has these instructions from me can tell just to what account it is *go* be charged. Now, if he is in doubt as to what account it is to be charged to, he gets in touch with me or my assistant, and he explains the nature of the work, and we determine then, or I determine the account to which it is to be charged.

Mr. Chambers: Take that 8151. To what account do you charge the labor in that?

The Witness: Coal handling expense.

Mr. Chambers: Oh, no, that was oil.

The Witness: Well, we call that coal and oil handling expense. We call it for abbreviation sake coal handling *sus*pense.

Q. Is that under the uniform system of accounts, called coal handling *sus*pense?

A. No, it is not.

Q. That is an account you keep for convenience?

A. For convenience sake.

Q. To get it from the payroll into the gas oil account?

A. Yes.

Q. And from the payroll into the generator house coal or whatever it may be?

A. Yes.

99 Q. Now, a fellow down there may work at five different jobs the same day?

A. Yes.

Q. And an effort is made, so far as you are concerned, to get that fellow's full six hours or eight hours in the proper account?

A. Yes.

Q. If it got into the wrong account, the whole business got into the wrong account, what effect would it have on your total operating expenses for the year?

A. Absolutely none.

Q. It would not increase the amount of the payroll paid to that fellow?

A. No.

Q. It would appear in your monthly accounts payable,—it would not enlarge that?

A. No.

100 Q. It would not affect the total amount here, but it would — too much charged to one of the subaccounts?

A. Subaccounts.

Q. And too little to the other. But so far as the total expenses of the company for the year were concerned, it would not make any difference, would it?

A. No.

Q. And isn't that true of every employe of the company?

A. It is true.

Q. Except so far as they might work on capital account?

A. Capital expenditure, of course.

Q. If a man worked making gas for a half day, and the other half day laying a gas main, it is important to get it into the right account?

A. Absolutely important to get it right.

Q. Because one goes to the operating expenses, and the other affects capital account?

A. Yes.

Q. So far as that is concerned, is that handled through your department, to see if a fellow is in the one place or the other?

A. Yes, for every capital expenditure we make, regardless of what it is, we make up what is known as an extension and improvement requisition, a work order; and this work order directs that certain work will be performed and shows the amount of—for instance, in the case of mains, it will show the amount, the approximate amount of main to be laid on this particular job.

101 Q. Well, I don't care to go into that.

A. And every man at work, every man that works on that, his time is charged to that number and that particular job; and this number, of course, is the capital account number and you use the capital account number as a governing number, that is a control number. We assign a number for each capital account, subdivision for each capital account, and then we put a dash there and then progressive numbers for each job that is undertaken.

Q. What percentage, if you could tell us, of your total expenses in 1919 for labor and services appear in your operating expense accounts—pretty near all of it?

A. Yes.

Q. The common labor, probably all of it?

A. No, we use a lot of common laborers for mains and service.

Q. You have not laid many?

A. No, not very many.

Q. In 1919—that is what I mean?

A. It is very, very little.

Q. Your expenditures for capital extensions in 1919 have not been very extensive?

A. Not directly. Of course, contract—we do most of it under contract, and it does not affect our labor.

Q. Now, Mr. Gonnoud, you have a check, as I get it, on the amount that is in these expense accounts for labor from your payrolls account, total expenditure for labor in a year, that constitutes a check on that?

A. Yes.

Q. If you made no capital additions at all, used your force
102 all the time manufacturing and distributing gas, your expenses for the year would be the sum of your labor and service expenditures and your material and supplies expenditures?

A. Yes, with the exception, of course, where—that is, you mean the actual out-of-pocket expenditure. Of course, we are a week at the end of the period, which would not be up until the next week—the money would not be paid out until that time.

Q. Yes, I see; but assuming there would be no trouble at the end of the year?

A. Yes.

Q. Now, have you got any check—there is considerable use in the way of material in making repairs, besides the supplies that are used, that are consumed, like coal and oil? You use material in making repairs?

A. Yes.

Q. And those materials are purchased ordinarily and put into material and supplies, except what go right into the works?

A. Yes.

Q. Of course, what goes right in is charged right in there, it appears in your suspense accounts as such?

A. Yes, sir.

Q. And it has been actually spent, you know that?

A. Yes, and it goes into a special job number, assigned to that job.

Q. Now, you take materials out of your store room, and while they are in store room, they are in material and supplies account?

103 A. Yes.

Q. You take them out of there and use them in repairs?

A. Yes.

Q. And these items we have here, repairs to mains, repairs to meters, repairs to gas machines, repairs to boilers—there are such materials?

A. Yes.

Q. And somebody, as he uses the materials, makes a note of the amount?

A. Yes.

Q. The storekeeper keeps an account of how much is taken out, it goes out of his store account, he sees how much goes out in quantity?

A. Yes.

Q. And he reports that to your office?

A. Yes.

Q. And you credit that material and supplies with the amount taken out?

A. Yes.

Q. And you credit the particular sub-account on material and supplies taken out?

A. Yes.

Q. You charge it into operating expenses?

A. Yes.

Q. Now, what check have you at the end of the year on the total expenditures for operating expenses of materials used in repairs, have you any check?

A. Yes.

Q. What is your check?

A. An inventory is taken at the close of the year, showing the amount of material—physical inventory, showing the amount of material and supplies on hand at the beginning of the year
104 and at the close of the year. Now, we take the amount of material and supplies on hand at the beginning of the period; to that we add the amount of material and supplies purchased during the period, and we subtract the amount of material shown on hand by the inventory at the close of the year, which gives us the amount of material and supplies charged out during the period to the several accounts.

Q. And they will be charged out of storeroom to a capital account or to a repair account?

A. Yes.

Q. An operating account or repair account and after the taking of the inventory, is it necessary to have any adjustments?

A. Sometimes it is necessary to adjust. We investigate to see where the adjustment is and what is the cause, and if we can possibly locate it, we locate it.

Q. Were such inventories taken at the end of 1919?

A. Yes.

Q. Of everything?

A. Yes.

Q. And at the beginning of 1919?

A. Yes, that is the close of 1918.

Q. At the close of 1918?

A. Yes. With regard to the issuance, just the mere issuance of the supplies, this method is pursued: If a man requires some material for a certain job he takes what we call a material and supplies issue slip, makes that out showing the material and supplies and the

job number to which it is to be charged, he knows the job
105 he is going on. He puts that job number, which is the account number and the job number, showing the job which it is to be charged to. Then he goes to the storekeeper, who issues this material. He, of course, first signs this slip to show that he has received the material. That is a receipt for the material, that the material is handed to him and that he has received it. The storekeeper signs the material slip also to show that he has delivered this material to the man, and then the storekeeper assigns the subaccounts number that is to be credited to the material and supplies.

Q. Now, Mr. Gonnoud, have you made a report to the Public Service Commission?

A. For the year 1919 we made the usual annual report that is required of all gas corporations.

Q. You are not required to make reports more frequently than a year by any general standing order of the Commission?

A. No.

Q. And you have made that for 1919?

A. I have.

Q. But none for 1920?

A. None for 1920.

Q. And one was made for 1918?

A. 1918, yes.

Q. Have the books of the company for 1919 or 1920 been audited by any outside concern to your knowledge?

A. Yes, we had a Mr. H. C. Hobson, Certified Public Accountant, make a complete audit of the books for the year 1919 and for the six months period ending June 30, 1920.

Q. Has any representative of any of the defendants, to
106 your knowledge, examined the books?

A. Yes.

Q. Who?

A. The Public Commission's representatives, Mr. Howard and Mr. Ross.

Q. Have been at the company's office recently going over the books?

A. They have been at the company's office recently going over the books for both 1919 and 1920, and they since, some time in either the latter part of February or the 1st of March—the Public Service Commission have had in their office, the annual report made out for the year 1919, which they have.

Q. That was filed along in March or February?

A. Latter part of February or March, yes.

Q. Now, this statement 2 for identification, that has been furnished to the defendants and to the Public Service Commission?

A. It has.

Q. Now, before we leave that. Has it been your endeavor, as an auditor of the company to keep and have kept its books according to this uniform system of accounts, Exhibit 1 that I put in evidence? Has it been your endeavor?

A. Yes.

Q. Have you examined that order of the Commission and the title and the accounts and the text of the accounts? Have you examined it?

A. Yes.

Q. Read it once through, anyway?

A. Oh, yes.

Q. Have you studied it?

A. Oh, yes, I have a little.

Q. You are very familiar with it?

A. Quite familiar, yes.

107 Q. You consult it probably as often as you do any book in the English language, do you?

A. Yes, I consult it quite frequently.

Q. Daily?

A. I would not say daily, but I would say weekly to be safe.

Q. You could stand an examination on its contents?

A. Well, yes, I could stand an examination.

Q. You offer yourself as a person competent to interpret that, don't you?

A. Yes, I do.

Q. And to keep any set of books according to it?

A. Certainly. I could not quote it verbatim, though, that is.

Q. Well, you probably could not quote anything verbatim, any more than any of the rest of us; we are past that age. Have the figures for the first six months of 1920 been kept in the same way that you spoke about 1919?

A. Yes.

Q. Now, do you carry all the accounts, every one of the accounts described there by the Public Service Company?

A. I will say practically.

Q. Any you omit?

A. Yes.

Q. What?

A. Store and stable expense.

Q. Any other?

A. That is all.

Q. They have an account called General Amortization Gas, do you have that?

A. We haven't that, no.

Q. That account, General Amortization Gas, in the uni-

108 form system of accounts is an expense account?

Mr. Chambers: Just a minute. I object to that as incompetent, irrelevant and immaterial. Do you realize you are testifying right along, and not the witness?

Q. Well, is that an expense account?

A. It is.

Mr. Chambers: No; I object to that as improper, irrelevant and immaterial.

The Master: Read the question.

(The question was read by the Reporter as above recorded.)

Mr. Chambers: Interpreting Exhibit 1. It is a question of law.

The Master: He says he does not keep the account anyway, so I don't suppose you want to go into it.

Mr. Chambers: It is very important in this case—amortization.

Mr. Moran: It is.

Mr. Chambers: Yes.

Mr. Moran: You won't let us have anything to say about it, will you?

Q. Well, you don't keep that account—all right. The book shows what it is for. You do not keep it?

A. No.

Q. Do you keep any account that is not prescribed by those books?

Mr. Chambers: Any account not prescribed by those

109 books?

Mr. Moran: Yes, does he have any account not prescribed in the uniform system of accounts, bearing any different title.

A. No, we do not. We might have subaccounts that further clarify that account, don't you see?

Q. Will you find the one, Plant Withdrawn from Service, in the uniform system of accounts? Is there such a title in the uniform system of accounts? Plant Withdrawn From Service.

A. No, but we call that account Plant Withdrawn From Service.

Q. But you don't find that, that is not in the uniform system of accounts?

A. It is not.

Q. And how much do you charge into that account for expenses each year?

A. Charge one cent per thousand for the cubic feet sold.

Q. Now, on Exhibit 2 here you have got $12,872.46 for plant withdrawn from service. Following that cost per thousand cubic feet sold, it is one cent?

A. Yes.

Q. Is that an arbitrary amount that is charged in there?

A. That is an arbitrary amount.

Mr. Chambers: Just a minute.

Mr. Moran: Well, that is right, it is arbitrary.

Mr. Chambers: I object to that as incompetent and irrelevant.

110 The Master: What is the name of the account?

Mr. Moran: Plant withdrawn from service. It is on the first page, your Honor.

Mr. Chambers: I object to that figure, too. That is no way to put down plat withdrawn from service. They may not have any yet do charge a cent.

Mr. Moran: We are going to explain it fully. We may not have any, that is true. We are going to explain it fully.

The Master: I think you ought to explain what the figures are what they are all about.

Q. What does it mean there? I do not mean what does it mean, but how is that made up?

A. That represents one cent per thousand cubic feet sold during the year.

Q. In other words, you sold 1,287,246 cubic feet of gass?

A. Yes.

Q. And you put into that account, as expense of that company one cent per cubic foot of gas you sold?

A. Yes.

Q. And you did that, as per the direction of the executive officers of the company, didn't you?

A. Yes.

Q. And you will let them tell what it is for, won't you?

A. Yes.

Mr. Chambers: Just a minute.

Mr. Moran: They will do that.

Q. You do that by direction of the company?

A. Yes.

111 Mr. Chambers: You asked him if he will permit them or let them tell.

Mr. Moran: Yes. Well, that is license.

The Witness: They direct me to do it.

Q. Taxes there are the amounts actually paid out for taxes—are they the amounts actually paid out for taxes?

Mr. Chambers: They are where?

Mr. Moran: On Exhibit 2 for identification.

Mr. Chambers: Now, I object to that as incompetent, irrelevant and immaterial. That is beyond—he is way outside of describing the paper. Now, he says the taxes there, are they the actual taxes. We haven't any proof here that they have paid out any money for taxes at all yet.

The Master: That is perfectly true.

Mr. Chambers: I think he ought to—in all these cases, they have required him to prove these taxes by the bills, actual payment. Now, he can't come on here and say, We paid so much for real property taxes. They have got to prove those taxes were laid against his property and that they paid the bills.

Mr. Moran: I am going to ask the witness now—

Mr. Chambers: That is what I object to.

The Master: Your objection is well founded. I will sustain the objection.

112 Q. Are the amounts that are entered for taxes taken from the bills received by the company from the tax authorities?

A. Yes.

Q. You have got the bills?

A. I have them, yes.

Q. Have you them with you?

A. Yes.

Q. You have them right here with you?

Mr. Moran: Do you want to take time to have all that accounting busiuess?

Mr. Chambers: Yes, sir, you bet you, on taxes. What taxes are you going to show—1919 or what?

The Witness: Real property—

Mr. Moran: Just a moment, now. This statement, this amount says that is made up from the bills anyway that is the idea.

The Witness: Yes.

Mr. Chambers: Is it 1919?

Mr. Moran: 1919 we are talking of.

Mr. Chambers: None of it is estimated?

The Witness: Those taxes in there? Let us see.

Mr. Chambers: Now, you had better look at that and make sure.

The Witness: I am looking at it.

Mr. Moran: We are going to give the details of that in a minute.

Mr. Chambers: He said they are all taken from the bills.

113 Mr. Moran: Wait a minute. I do not want the bills now. We are not going into the bills just as this time. They are taken from the bills.

The Witness: Real estate taxes are taken from the bills.

Mr. Moran: Yes, certainly. We have a statement here about taxes. We will show just what those taxes are.

(Whereupon, a recess was taken until two o'clock p. m.)

114 Afternoon Session.

Direct examination.

Continued by Mr. Moran:

Q. Did I understand you to say, Mr. Gonnoud, that the Exhibit No. 2 for Identification here is taken from your books and shows the several accounts kept on your books, expense accounts, and the amounts charged in there for the year 1919?

A. Yes, it does.

Q. And this is to your knowledge correctly transcribed from the books?

A. Yes, it is.

Q. Have you prepared a statement showing the same expense of the same figures, in different detail; as, for instance, in your production costs there, showing the tonnage of coal and gallons of oil and that sort of thing?

A. I have.

Q. Is the statement I show you such a statement?

A. It is, yes.

Mr. Moran: The statement that I have just shown the witness is entitled "Kings County Lighting Company, Cost of Production and Distribution and the Result of Operations for the Year Ended De-

cember 31, 1920." I would like to have it marked for Identification.

Marked Plaintiff's Exhibit No. 6 for Identification (2 sheets).

115 Now, for instance, on Exhibit 2 for Identification you have production expenses given. Of course, now when I say that I mean the $757,461.72?

A. $757,641.72.

Q. No, I am speaking now of production expenses on Exhibit 2.

A. But you transposed the figures.

Q. $757,641.72.

A. Yes.

Q. Production expenses?

A. Yes.

Q. The statement that we have just had marked for Identification, Exhibit No. 6, does it show of what that is made up; I mean the tonnage of coal, gallons of oil and other things?

A. It does.

Q. Just explain that Exhibit No. 6 for Identification. You give a quantity of coal there.

A. In this exhibit I show the quantity of coal and oil, that is the major materials used in the making of gas, and I show the number of tons, as in generator coal I show 22,594.80 tons at a price of $8.407 per ton, bringing out and extending the amount of money which represents the number of tons at that price.

Q. For instance, you have got generator coal there, $189,943.68?

A. Yes.

Q. You have an account on your books generator coal of that year, of the same amount?

A. I have.

Q. And it is shown on Exhibit No. 2 for Identification?

A. Yes, it is.

116 Q. And this differs, Exhibit 2, and shows the tons of coal that go into that?

A. The tons of coal and the pounds per thousand cubic feet made—pounds of coal necessary to make that quantity.

Q. Of course, all you have to do is to divide it?

A. Yes, it shows quantities.

Q. And it shows quantities here. These figures were taken or extracted by you from the books, were they not—the tonnage of coal?

A. Yes.

Q. It is an analysis of that generator coal account as appears on the other Exhibit?

A. Yes.

Q. To get the number of tons?

A. Yes.

Q. And the average cost per ton?

A. Yes.

Q. In your books it is shown that coal was purchased at various prices?

A. That is right.
Q. But that is the average cost?
A. That is the average cost.
Q. Are those long tons or short tons?
A. Long tons.
Q. Is it bought in long tons?
A. It is bought in long tons.
Q. Does that average price of $8.407 include the handling expense?
A. It does.
Q. It includes the handling expenses we have talked about today?
A. Yes.

117 Q. Now we come down to boiler fuel here. Is boiler fuel coal an account on your Exhibit No. 2?
A. No.
Q. What is it on there?
A. Boiler fuel.
Q. Boiler fuel?
A. Yes. That includes boiler fuel coal and boiler fuel water gas tar here, and gas oil, yes.
Q. In other words, on Exhibit No. 2 there is an account boiler fuel which you have separated on this exhibit and show that it consists of three different kinds of fuel, and you show the tons of each, or the gallons of each, and the average cost; is that right?
A. Yes, that is correct.
Q. Go on to gas oil here on Exhibit No. 6 for Identification. What do the figures after that purport to represent?
A. The number of gallons of gas oil used in the generators for making gas during the year 1919, the average cost per gallon, the total amount of money representing the number of gallons used in the operations, the cents per thousand cubic feet made, and the number of gallons required to make 1,000 cubic feet.
Q. That gas oil in the amount of dollars that you have got here is taken from the Exhibit No. 2 for Identification?
A. Yes.
Q. It is now in that account?
A. Yes.
Q. You have segregated here or analyzed it to show the number of gallons and the average cost per gallon?
A. Yes, I have.

118 Q. And it includes the handling charges, too?
A. It does.
Q. Water,—where does that appear? Is there an account called water on your books?
A. Yes, there is.
Q. How?
A. Yes, there is. It is a sub-account shown here on this other Exhibit.
Q. Exhibit 2 for Identification. Refer to them by number.
A. On Exhibit 2 for Identification. It is shown there under the caption Production Expenses, on page 2 of that.

Q. That is water that is purchased from the City?

A. It is water that is purchased from the City, and cost of water of our own pumps, pumping the water from the Bay. We pump some water from the Bay. It is the cost of water used in the manufacture of the gas.

Q. Water that is used for the steam there, to make the gas?

A. It is used for the steam and is used in the wash boxes, in the generators, and it is used in the condensers.

Q. Iron oxide, as appears on Exhibit C, comes under what account of Exhibit No. 2 for Identification?

A. Purification supplies.

Q. And you have taken out purification supplies to the extent of finding out there is an iron oxide there of 8,000 bushels?

A. And other sundry supplies, $289.91.

119 Mr. Jackson: If I may interrupt, that water item, is that the amount paid to the City?

The Witness: Part of it is paid to the City and part of it is the expense of pumping our own water.

Q. You have a well there?

A. We have a well there and we also have——

Mr. Hill: Is labor in that, too?

The Witness: There would be labor in that, too.

Mr. Hill: Pumping the well water?

The Witness: Yes, wherever it appears there may be labor in it. We have another pump, a centrifugal pump, at the end of the dock.

Q. You have there the total material and you give the cost of material, total material; that means all the material used in making gas?

A. Yes, in the manufacture of the gas.

Q. Now we come to an item called the residuals, water gas tar produced, a certain number of gallons, the price, and, carried out in red figures, $49,258.80. Will you explain what that means?

A. In the manufacturing of gas the residual called water gas tar is produced, and we use that residual in our case for burning under the boilers; so that we credit the cost of manufacturing with the full amount of the water gas tar produced and we charge under boiler fuel, water gas tar, the number of gallons of gas
120 tar actually burned.

Q. Water gas tar is charged as an expense of production at $48,174.55?

A. Yes.

Q. That does not mean that you purchased water gas tar from outside sources?

A. No, it does not.

Q. It means that in the manufacture of gas there is a water gas tar that is a residual?

A. Yes.

Q. Which you utilized as a fuel under your boilers?

A. Yes sir.

Q. You get the quantity of that used in gallons?

A. Yes.

Q. And you charge the manufacturing expenses with that, at the same price as the oil, I observe?

A. Yes, that is right.

Q. Why do you take the same price of oil?

A. We use a gallon of oil—a gallon of oil will yield so much tar, you see, and we use the same price because that is the best price we can use. There is no other way of calculating that. Of course, it would make no difference if we used a greater amount or a smaller price, because it goes in and comes out, but we do use the cost of the gas oil.

Q. The tar comes into it, as you understand—there is a residual there because it comes out of the oil?

A. Yes, it is a residual of the oil.

Q. Of the oil, and you charge it into your expenses at

121 the cost of oil?

A. Yes.

Q. And then you credit it again at the same cost?

A. First of all we credit it and then we charge it up as we use it, at the same price.

Q. I know, but getting your expenses, you charge it in?

A. Yes.

Q. I notice the number of gallons you have charged in to expenses, varies from the number of gallons produced.

A. That means that we produced more than we used in that particular period. We produced 765,312 gallons and we used only 749,367 gallons. That would show that the difference between them is still on hand.

Q. At the end of the year there?

A. At the close of the year, yes.

Q. Is there any particular object in charging it in and then crediting it again?

A. Why yes, in order to allocate the expense to the proper account, and this is in accordance with the uniform system of accounts and we are obliged to do it.

Q. That is a requirement?

A. Yes, that is a requirement of the Public Service Commission that we use it, and we try to follow that in every instance, you see.

Q. If it is necessary, if you want to get the costs in a year, because you might produce more than you used?

122 A. Oh, yes.

Q. As is shown right here. For instance, you credit here $49,258 and you charge in $48,174. That means that your operating expenses is credited here with about a thousand dollars or over a thousand dollars more than it is charged?

A. That is correct, because we have produced that during the period. So therefore that should be credited with that, and then we can only charge in the period the amount actually used in manufacturing the product.

Q. If you did not credit it and charge it that way, it would not appear as a fuel expense, would it?

A. No, it would not appear as a fuel expense, but it would make this difference: It would show that our operating expenses—it would show our operating expenses in this instance about $1,000 higher than they actually are.

Q. But your cost of fuel would not show up at all, it would lack about $18,000; that is true?

A. Yes.

Q. Is that right?

A. Yes.

Q. It would just appear in the total cost of manufacturing your gas?

A. Yes, because that fuel takes the place of other fuel. You see, the water gas tar would take the place of coal to a certain extent. To what extent I do not know.

Q. You proceed there to the gas making labor. That is
123 a figure taken from your books?

A. It is.

Q. It appears on Exhibit 2 for Identification?

A. Yes, it does.

Q. It includes works superintendence and boiler house labor and generator house labor—all labor of the works except repairs?

A. All labor incidental to the manufacture of gas at the works.

Q. You have cost of production, you have got repair labor and material. Where is that taken from?

A. That is taken from the books of the company.

Q. It is a combination of the accounts actually carried on your books and designated what?

A. Repairs to works and station structures, repairs of furnaces, boilers and accessories, repairs to steam engines, repairs to gas engines, repairs to miscellaneous tower plant equipment.

Q. Well, you have kept the repair items in some accounts on your books?

A. Those repairs items that have reference to the works.

Q. The works production of gas?

A. Yes.

Q. In other words, your books show that you spent $13,000 for repairs, both labor and material, in the works that year?

A. Yes.

Q. You have some miscellaneous works expense: what is that?

A. That would be electricity used at the works. For instance, in our meters there. There would be trucking ex-
124 pense, hauling of ashes, and so forth. There would be lubricating oil and any other incidental expense.

Q. And coming along, we have gas storage. What does that mean?

A. That is the cost of operating the gas engine and the cost of operating valves at the holder station, where the holder is—the cost for the storage of the gas before it goes out on our distribution system.

Q. That is taken from one of the accounts in the system of accounts?

A. Yes.

Q. The total figure here is supposed to represent the expense of making gas and putting it in the holder, is that the idea?

A. Yes.

Q. At the foot of this I note some figures, a number of thousand cubic feet sold, and on hand, and so forth. I am first going to enquire about the sales to consumers which here appear at 1,279,445,244 cubic feet.

A. Yes.

Q. That purports to represent the sales to the consumers?

A. Yes.

Q. As registered by their meters?

A. Yes, and, of course, that includes the amount that goes to the City.

Q. The amount sold to the City also?

A. Yes, for street lighting.

Q. Didn't you have that set out separately?

A. It is set out separately on the second sheet.

Q. It appears on the next sheet, yes.

A. Yes.

125 Q. Mr. Gonmoud, you have here divided these expenses by the number of cubic feet made and got a unit price, a unit cost per thousand cubic feet for each one of these items?

A. Yes.

Q. You have also divided your tons of coal by the number of cubic feet made and got the pounds per thousand cubic feet made?

A. Yes.

Q. A factor, therefore, in getting the cost per thousand cubic feet and the quantity of material used per thousand cubic feet is the number of cubic feet made?

A. It is.

Q. You have not told us how you got that yet, have you?

A. No.

Q. Well, we won't ask you to tell it now. I want to find out how you ascertained the number of cubic feet sold. Is that the amount registered in consumers' meters?

A. It is.

Mr. Hill: We object to this as hearsay, except as an explanation of this statement.

Mr. Moran: That is what I want to find out right here. The company sells gas to consumers, and in this here according to its records it is over 1,200,000,000 cubic feet, and if the defendants are not willing to accept that statement, why, I will have the witness go on and tell how the number of cubic feet sold to the con-

126 sumers is determined by the company, by the number of cubic feet sold to the consumers. I just want to know whether they want that or not, because I would hesitate to have the witness go into that elaborate explanation to show a fact, which must be ascertained in the very nature of things for the company to do business at all—in other words, no gas company could do business very long unless it read its consumers' meters and found out how

much it was, so it could bill them. The gentlemen evidently want proof on that. All companies read their meters and have systems to ascertain it, and the bills are thus rendered and paid.

Mr. Hill: May it please your Honor, in explanation of my objection, no complaint is made that the rate of the City is confiscatory. I desire to have him go into detail enough so that we can allocate the expense, the portion of the overhead against that portion which is sold to the City; because they do not complain that the gas they sell to the City is sold at a confiscatory rate. They are satisfied with that. A certain percentage of their gas is sold to the City. I mean to say they are satisfied with that rate.

127 Therefore, it is the position of the Attorney General that that amount which is sold to the City cannot be considered as bearing upon the question of whether this rate is satisfactory. The portion of coal and the portion of labor, the portion of the overhead which is properly chargeable to the gas that goes to the City, should not be considered as bearing on the question of whether it is confiscatory. It is the contention of the Attorney General that the amount which they receive and pay for is not sufficient, when compared with the amount they manufacture, to indicate anything. That is, we might contend that perhaps there is negligence and carelessness in the handling of the gas. Some 17 per cent of the gas is lost from the time it is manufactured until it reaches the consumers' meters. I want enough detail so that that fact may appear before your Honor.

Mr. Moran: This is just on the point. The aggregate readings of the consumers' meters for the year—do you want him to tell how we get at that?

Mr. Hill: Yes.

Mr. Moran: It is very likely.

The Master: Let me ask you, Judge, do you question this amount? You state that you are not willing to accept this amount at 1,279,000,000, as representing the readings of the meters, plus the

128 amount of gas sold to the City?

Mr. Hill: That also includes the amount sold to the City, he says.

The Master: Yes, but you do not question their statement as to how much their meters show, do you?

Mr. Hill: I do not question how much their meters show. They estimate the amount sold to the City.

Mr. Moran: Then you do not want me to go on and show how the——

Mr. Hill: I am willing that you should show that in a lump sum simply, and without detail, the actual readings of your customers' meters, as distinguished from that sold to the City.

Mr. Moran: All right.

The Master: You just want him to split this between customers' meters and City meters?

Mr. Moran: That is all right. It would take the witness two hours to do the other.

Q. The reading of the meters and the ascertaining of the amount sold, the billing of it, is under your charge?

A. Absolutely.

Q. You have a system there of checks and balances which insure in your judgment accuracy in that work?

A. Yes, we have a control over every step, you see.

129 Q. All right, do not go into the detail of it. At the bottom of this page on Exhibit 6 for Identification, you state an increase of gas on hand. Explain what that means.

A. Well, we had on hand at the beginning of the period.

Q. That would be in the holders?

A. Yes, in the holders. We had that much more on hand at the close of this period than we had at the beginning of this period.

Q. For instance, your holders held 2,500,000 cubic feet?

A. Yes sir.

Q. And there were 105,000 cubic feet more on hand on December 31, 1919, than there was on the morning of January 1, 1919?

A. More increase on hand, sure.

Q. The company used 7 million odd cubic feet here?

A. Yes.

Q. That is the quantity used how, by the company?

A. Well, it is used for lighting purposes throughout the company, and it is used for operating the gas engines.

Q. Is it metered?

A. It is all metered, yes.

Q. The company has meters to register whatever it uses in its offices as light?

A. Yes.

Q. There is some used to run the gas engines?

A. Yes sir.

Q. Is that all metered?

A. Yes.

Q. It is all metered, whatever use it is put to?

A. Yes, after the gas passes the meter, of course.

130 Q. The sales to consumers here it is stated here includes what you sell to your private customers and also the City?

A. Yes.

Q. Therefore your gas or the total amount then, or the increase on hand, and used by the company and sold to consumers in that year, according to your books and records, amounted to how much?

A. 1,287,353,844 cubic feet.

Q. Of that quantity of sales to consumers, can you tell us how much of that was sold to private consumers and how much to the City?

A. It is shown on the next sheet.

Q. On the next sheet of Exhibit 6 for Identification; is that right?

A. Yes.

Q. Page 2?

A. Page 2.

Q. And it gives what amounts?

A. It gives for municipal street lighting, 49,885,444 cubic feet;

municipal buildings, 3,647,200 cubic feet; commercial sales, 1,226,312,600.

Q. The commercial sales is what the private consumers use?

A. Yes.

Q. For all purposes, in the City?

A. Yes.

Q. The Municipal buildings, what is sold to municipal buildings, is that metered gas?

A. Yes, it is.

Q. And that is metered and read in the same way that the private consumers' meters are read?

A. Yes.

Q. Municipal street lamps, are those metered?

131 A. No, they are not.

Q. How do you get that amount?

A. We have an elaborate schedule showing the hours of consumption, and it is figuring the 3½ cubic feet per hour of consumption per lamp.

Q. About how many lamps do you furnish light with for the City, do you know?

A. Oh, about 3,500.

Q. Are you under contract with the City?

A. There is no contract with the City, no, but we are supplying it.

Q. No contract?

A. No, but they are directly connected with our mains, you see, and they have a written contract with some other lighting company, the Welsbach Street Lighting Company, to light and extinguish the lights, and they light and extinguish the lights.

Q. You just furnish the gas?

A. Well, the gas is furnished through our mains.

Q. Yes, it goes through, you cannot help it?

A. Yes.

Q. And your company keeps track of the number of lamps?

A. Yes.

Q. And posts?

A. Yes.

Q. And the number of hours that they are supposed to be lit?

A. Yes, and the outages and discontinued sometimes and relighted, you see.

Q. Do you have a watchman?

A. No, we do not.

Q. Does the City?

A. No, the City does not.

132 Q. Or inspectors?

A. No, the City has no inspectors. The policeman on beat sometimes reports the outages if he finds the light is out, but it is wholly controlled by this street lighting company. The Welsbach Street Lighting Company have a contract to light and extinguish those lights.

Q. Anyway it is estimated at 3½ cubic feet per hour?

A. Per hour burning according to schedule.

Q. Per lamp?
A. Per lamp.
Q. And the City makes some adjustments on your bills for it; I mean as to their lamps?
A. Yes.
Q. The number of hours of consumption and the quantity?
A. Yes.
Q. That quantity there, 49 million, is what percentage of your total sales?
A. As 49 is to 1,226, approximately.
Q. Well, what is it?
A. That would be about——
Q. No, not to your total sales.
A. Well, as 49 is to 1,279.

Mr. Hill: About 4 per cent.

Q. Yes, about 4 per cent, is it not?
A. Yes, about 4 per cent.
Q. That is the gas sold to the City?
A. The gas sold to the City is about 4 per cent of the total sold.
Q. The municipal street lighting is about 4 per cent?
A. The municipal street lighting is about 4 per cent of the
133 total amount of gas sold.
Q. And the total sales to the City, which are 53 million, are about what per cent of the total sales from all sources?
A. About the same thing.

Mr. Hill: 4 plus.

Q. It won't be 5, will it?
A. No.
Q. A little over 4.

Mr. Hill: 4 plus.

Q. That is the way you get at your total sales of gas in the year?
A. Yes.
Q. On Exhibit 6 for Identification, page 1, you have total make, manufactured gas, as distinguished from the total sold?
A. Yes.
Q. What is the make for 1919?
A. 1,566,628,000.

Mr. Hill: Are you proving this as a fact or is it a mere explanation?
Mr. Moran: I am going to get you, Judge, what you want me to.

Q. Tell us how that figure is obtained. Do you know anything about how that is obtained?
A. Yes, we have a station meter that meters all the gas that is manufactured and sent up to the holders for distribution to the consumers, and this one station meter registers all gas passing through it. It is an electrical meter.

134 Mr. Moran: You do not want me to call the people who read that meter, do you?

Mr. Hill: I do not think so. I assume this is your loss, 17 per cent.

Mr. Moran: Yes, we have through from the sale.

Q. It is by the use of that figure of make, by dividing the quantities by that figure of make, that you get the cost per thousand cubic feet made as stated in the column here?

A. Yes.

Q. For instance, 18.35 cents for the cost of manufacture?

A. Yes.

Mr. Hill: You will pardon me, but I will not go into it then. The 4 per cent loss that is sold to the City is figured on the amount sold?

Mr. Moran: It is.

Mr. Hill: The per cent would be raised to about 5 or 5 plus, if you took into consideration the amount unaccounted for.

Mr. Moran: I presume so. No, it would be worse.

The Master: Worse, yes.

Mr. Moran: It would be the other way; it would go the other way; instead of up to 5 you would go below 4. The amount we sell to the City is a good deal less than 4 per cent of our total make.

135 The Master: As 49 is to 1,566. It is a little over 3.

Mr. Hill: What I am getting at, though, is that the proportion sold to the City should carry a portion of the unaccounted for, because you use your unaccounted for to arrive at your cents per units.

Mr. Moran: Judge, if you will pardon me, you want to have a percentage of our business with the City both as to sales and as to make?

Mr. Hill: That is right.

Mr. Moran: It appears that our sales to the City are 4 per cent plus of our total sales. I should say that the amount of gas we make for the City is the same percentage of the amount of gas we make for all purposes.

Mr. Hill: That is right.

Mr. Moran: So you see you do not need any other percentage; it is the same percentage.

Mr. Hill: I will think about it. Those figures are too big for me to figure quickly in my mind.

Mr. Moran: We probably have the same amount of loss, of unaccounted for, in our sales to the City as we do in the sales to our consumers.

The Master: That is all speculation, of course; you have no proof of it in the record.

136 Mr. Moran: Doctors might differ about that. As I say, there might be more loss by this 3½ per hour than there is shown in the consumers' meters, but that is something we will not bother with now.

Q. That shows, then, using that quantity of make as how many pounds of generator coal used per thousand?
A. 32.30.
Q. And of boiler fuel coal?
A. 18.80.
Q. Pounds per thousand; is that right?
A. Pounds per thousand, yes, make.
Q. And of boiler fuel water gas tar?
A. That is .48 gallons.

Mr. Hill: Is this just an explanation?
Mr. Moran: It is just what the figures here show.
Mr. Hill: You are not proving that as a fact now?
Mr. Moran: No, this is just what their books show, their accounts.
Mr. Hill: I want an opportunity to object to the introduction of the books.
Mr. Moran: Surely.
Mr. Hill: And proof as matters of fact from the books. I want an opportunity to object to that.
Mr. Moran: Certainly.

Q. And the gas oil, how many gallons per thousand made?
137 A. 3.43 gallons per thousand cubic feet.
Q. As we turn to page 2 of Exhibit 6 for Indentification we have the cost of distribution and other expenses. Is there anything there in your cost of distribution different than what appears on Exhibit 2 for Identification, which is according to the uniform system of accounts?
A. No, there is nothing except in some cases there is a little different grouping.
Q. This is a little more condensed than the other?
A. Yes.

The Master: To all intents and purposes these exhibits marked for identification are in evidence, are they not?
Mr. Hill: We desire to object to the introduction of them, in that they have not laid the proper foundation for the books of which these are copied, from which the data was obtained to make those.
The Master: I think you ought to make that objection now, because of course the witness is testifying from these as having been extracts from the books, and I have let it go on, on the general theory that this witness was the Auditor of the company and was perfectly competent to testify as to what the books said. If you say that the books are wrong or inaccurate or have been badly kept, or anything like that, I think you ought to make that ob-
138 jection now. But, of course, upon your cross examination you can disprove any of these statements.
Mr. Hill: It is our position, your Honor, that the burden is upon the plaintiff and they have not established their books and have not laid the proper foundation to introduce their books in evidence, they are incompetent, inadmissible and hearsay; that the books themselves are objectionable and are not proper to be received in

evidence at this time, and that, as the books themselves have not been properly authenticated and the proper foundation laid, this transcript which is taken from the books we object to as incompetent, inadmissible, hearsay and no proper foundation laid. We want an opportunity, we wish an opportunity, we believe we should have an opportunity, to cross examine upon various and numerous items in those books.

The Master: There is no question about that. You can cross examine about anything in the books that is brought out, but on the question of whether the books have been authenticated or not, or identified as the books of the company, do you question that at this time?

Mr. Hill: We do not question but what they are books of the company, but we think they should produce the people who made the original entries in those books, to the end that we may
139 examine and cross examine them as bearing upon the correctness of the items as they entered them, and that we are entitled to common law proof of the correctness of the books before they are received in evidence.

Mr. Jackson: I had understood that Mr. Moran intended to furnish proof of that kind, and was only explaining at the present time the examination that this witness made of these books.

The Master: Take this item water gas oil. It may be the position of the Public Service Commission or the Attorney General that supplies have been bought improvidently or that improper entries have been made against that account. All of that I would expect you to bring out on your cross examination. I do not know how we are going to get on with this thing unless we are permitted to put in the books and have them explained, at any rate, by the Auditor who is supposed to know about them. Now, he has got a lot of clerks under him, undoubtedly, who make these entries from time to time. He has explained to us rather fully just how his system of accounts is set up.

If your point is that Mr. Moran has not identified these books as the books used in the routine business of the company, as de-
140 scribed by the witness, it seems to me that he has identified them.

Mr. Hill: That is not the point. Here is my thought. You take the oil, we believe that in order to establish the amount of oil which was used there, they should not do it by a man who never saw any of the oil, a man who simply received a slip from someone else or a book from someone else and from that book or those slips made entries upon books several miles away from where the oil was. We believe that they could produce here on the question of that oil the man who made the measurement thereof and who made the original entry of the amount of oil that was pumped into the tanks of the company. There is a man there who made the original entry of the amount of that oil that came in. That is vital as to how much oil actually went in to their holders, and we believe it is the duty of the plaintiff to carry the burden of proof, and we do not believe that he is carrying the burden of proof by pro-

ducing here a man who some miles away is recording on a book what someone else observed and wrote down, and we do not think they have properly authenticated the books in that regard. The same will apply to coal.

The Master: You do not question these entries that he is testifying to?

141 Mr. Hill: Why, we have no knowledge, and we assume and we believe as a matter of fact—of course we do not want to make a concession at this time—that Mr. Gonnoud correctly wrote down or copied from some other records these records they have here on oil and coal and time, but there was a man down there at the plant who kept the time. Unless we have an opportunity with witnesses they have produced, witnesses who are particularly within their custody, it would be very simple to have a man's time charged up as working all day in the generator house eight hours in the making of gas, and also to have a part of his time in fact used on pumping this oil, and in that way it would be very simple to get his time into two accounts. The man who made the original entry of that time we could cross examine and ascertain that fact from.

The Master: I will let this witness go ahead and explain these accounts. What do you propose to do, Mr. Moran, in your proof, do you propose after this witness has identified and gone over these various items to adduce additional proof with respect to them?

Mr. Moran: I am feeling my way, your Honor. I will introduce all that I feel is necessary. Now, as was illustrated here this morning or just a moment ago, about the quantity of gas we sold, I have gone over with the witness the proof we have of that and

142 have obtained a statement that they would not contest that so that was passed very easily. I cannot tell how many of those things might be obstacles or that we can get by with in that same way. But if your Honor wants to find out what my general plan is I will tell you now. Mr. Gonnoud, being the Auditor of the company, has brought in the books that he has kept under his charge, that is the general books and the subledgers and so forth and had them identified, which I propose to offer in evidence later. Now, the books are bulky and inconvenient to handle. I have had prepared from them these schedules that we are talking about here, these exhibits which Mr. Gonnoud has testified were correctly transcribed from the books, so we will use that instead of the book account as a matter of convenience. It adds nothing to what is in the books. If there is anything additional to what is in the book, the book prevails, and I think counsel will agree with me that this is more convenient than the books themselves. And I do not think counsel will question that Mr. Gonnoud took these correctly from the books. We have analyzed these accounts as shown on the first sheet here to show the quantities used, that being a more intelligible way for the layman, and so forth.

Speaking of gas oil, we have here the amount of gas oil

143 the number of gallons used per thousand cubic feet, and the amount used during the whole year. I thought I had made it clear by Mr. Gonnoud that there cannot be very much of an error

in the amount of oil that we use, because we use nearly all we buy every year, the only variation being in the difference in the quantity in the tanks at the beginning and the end of the year. So we could not be very much in error on that. It is utterly silly to call the man here who used oil in the gas machines on any particular day or in any particular month or even for six months, because when you got all through, what would it amount to? One man used so much.

The question is whether this company has in its expenses here a reasonable amount of oil, a reasonable amount of oil for the quantity of gas made. The same with coal, a reasonable tonnage of coal for gas made. Whether the labor item here is reasonable for the work done, and so forth. It does not make much difference where those expenses appear, what accounts they appear in, provided that the sum total is reasonable.

As to the amount of oil, I propose to prove by three witnesses, who I think, are all of them superior men in their line of business, that this quantity of gas that we made in 1919 could not have been
111 made with a use of a less quantity of gas oil; or, in other words, that we did finally, to turn out our gas, use only 3.43 gallons of oil per thousand cubic feet. I propose, in a word, to corroborate these books, show that they are accurate, by these experienced men. As to generator fuel and generator coal, I propose to show that instead of using 32.30 pounds, within our limits we would be reasonable if we had gone as high as 36, or 35 anyway.

So now what is the use of calling the man who shovelled the coal into the generator. We see the type of men who do that work, the good honest type of men, but they would not add anything to this case to call them in here and find out — much they measured up, when they used it, because the real question is the whole quantity that they used.

The Master: I wanted to find out really what the position of the Attorney General was on this point. So far as these being summaries of what is in the books, there is no question that they are accurate, is there?

Mr. Hill: You mean these?

The Master: These papers of summaries of what appears on the books?

Mr. Hill: There is no question about it.

The Master: Then for all intents and purposes, for what they are worth, these documents are in evidence, as I understand it. They have been testified to. You may say they are worthless.
145 Mr. Hill: They started in explaining them, as I had understood. I did not know they had offered them in evidence.

The Master: But they are talking about every one of them.
146 Mr. Moran: I agree with the Master that when we say the generator coal has cost us so much, we are testifying to a fact that is in our books.

The Master: Yes, it is in your books. Judge, you may say that the books reflect an entirely inaccurate and misleading state of facts, so far as the business is concerned; that is perfectly proper for you to argue on, on any of your motions or any cross-examination or any

thing else, as I conceive it. But the reason I raised this point now was to put in your mind the thought that is in my mind, and that is that for all practical purposes these documents that this witness has been testifying to are in evidence as summaries, statements of figures that appear in the books, and I was wondering if you took the same view about it.

Mr. Hill: No, I did not have the same view. I took the view that we were still explaining, and all the morning it was an explanation. That is why I brought the question up.

The Master: I think it started off at that, but I think it has turned the other way.

Mr. Hill: I desire to move to strike out any testimony as to figures, and expense of conducting the business given by this witness, except in so far as they explain an exhibit, which I had assumed the attorney for the plaintiff was questioning about in laying
147 the foundation for offering them in evidence.

Mr. Jackson: Mr. Moran protested that several times. Now, because he was allowed latitude in his questions without objection, I think that on his part he should not now contend that these are exhibits. I think he had contemplated offering some further proof before he formally offered these in evidence as tending to prove anything.

The Master: I do not see that they prove anything. What I say is that they simply are extracts from his books.

Mr. Jackson: He has testified to that.

The Master: What that proves I do not know yet.

Mr. Jackson: He has not pretended to offer the books in evidence yet. And, of course, it would be premature to offer these in evidence before the books were.

The Master: I understand he offered the books in evidence.

Mr. Jackson: I understand he was not quite ready with his fundamental proof on that.

The Master: How about that, Mr. Moran? Is there any objection to your offering the books in evidence now?

Mr. Moran: No, I intended to offer the books in evidence while the witness was on the stand.

The Master: As a matter of fact, he is testifying to them,
148 and I think it would be proper to put them in.

Mr. Moran: Yes, I will offer them.

Mr. Hill: I object to them, that the proper foundation has not been laid, on the ground that there is no proof as to the correctness of the books, that they do not appear to be books of original entry, and no person that made up the books of original entry has been sworn as to the correctness of the entries; that it denies us the right to cross-examine those witnesses who did make the original entries from which these books are prepared. They are incompetent and inadmissible.

In argument in support of that, it was stated here just as a side line, thrown in, that the oil is measured by some outside person, and that the company's measurement varies often times many gallons from that measurement of the outside person. The public should

not be required to pay for oil that does not go into this gas. If it should appear on cross-examination that the man who made the measurement—that it did vary from the amount which was paid for, the officers of this company are negligent, and the people should not be made to pay for their negligence, their bad management, in paying for more oil than they received.

Mr. Moran: Will you permit an interruption?

Mr. Hill: Certainly.

149 Mr. Moran: What have you to say about the fact that the quantity of oil used—assume, as all gas men will agree, that it would be surely impossible to manufacture the gas that we manufactured in 1919, with less than 3.13.

Mr. Hill: What have I to say to that?

Mr. Moran: Yes.

Mr. Hill: You can put in just as much oil as you wish. I am quoting you now as an expert. You can manufacture gas without any oil and have about 300 B. T. Us. and you should have put in four gallons and over if you had wanted a 22 candle power gas. You can put in just as much or just as little oil in gas as you wish.

Mr. Moran: But the quality remains?

Mr. Hill: The amount of gas you made did not require that amount of oil. I think you paid too much. The same thing applies to coal.

Mr. Moran: What is that?

Mr. Hill: I mean the same thing applies. They take some one else's weigh- on coal. They buy it as weighed down in Perth Amboy. Some of it was weighed any way down there. But you pay on whose weight?

Mr. Moran: We pay on the Government's weight, on the shipper's.

Mr. Hill: On the shipper's weight?

150 Mr. Moran: Yes.

Mr. Hill: All right.

Mr. Moran: It is weighed at the mines.

Mr. Hill: The man who actually measured it and furnished these figures, he should examine him.

Mr. Moran: He is down at the mines.

Mr. Hill: Not your mines, though.

Mr. Moran: Certainly not.

Mr. Jackson: I think the result of it is this—that your Honor must determine upon the facts what was actually used and what was actually done, and that may be recorded correctly by the books and may not be. To rely merely upon the books, saying these are the company's books, and then to produce witnesses who are experts and say that as the company has kept those records, whatever those records may be or whatever the basis may be for them, that seems to be a reasonable amount—that might all be true, but still it would not be the correct basis for your Honor's determination, because it might not coincide with the facts, although it might be a reasonable proposition.

The Master: That is not what I am passing on now.

Mr. Jackson: What is the reasonable cost of gas, or a reasonable

charge against the consumer? But the point to be determined is what was the actual cost, and should not be the actual cost to
151 the consumers of the gas manufactured by this company so as to make this rate legal or illegal.

The Master: That is not what I am passing on now. I am not passing on the probative value of these books.

Mr. Jackson: No, but it goes to the fact whether the books should be in evidence for any purpose whatever. They are not material to this issue unless they are properly founded upon the facts, and just because they are the company's books and this auditor says they are the company's books, does not make them material to the issue. The issue is the fact of what was spent. When that amount is proven, then it becomes material as to whether it was reasonably spent or properly spent. That is another question, your Honor.

But first it must be established whether the books represent the facts. There must be somebody—there must be some connection made, but just to say these are the company's books, we are going to rely on the company's books, and then produce an expert to say that that price represented by the company's books is reasonable, I think is absolutely flying in the air without any foundation at all. It seems to me there must be some evidence to show these books were correctly kept to that extent, although I would not want to
152 argue at any unnecessary length or greater detail than necessary, so far there is not one word to connect the books with the ground—that is, the actual fact.

The Master: That is perfectly true.

Mr. Jackson: And before that is done, it seems to me it would be improper to put them in evidence and go backward then and establish any ground for the evidence.

The Master: I will let him try the case the way he wants to. I will let the books go in at the present time and over-rule your objections.

Mr. Hill: Exception.

Mr. Moran: Then I will offer in evidence the company's Ledger No. 4 for the year 1919, referred to by the witness this morning.

The Master: These are offered in evidence over the objection of the defendants and an exception allowed to the defendants in each case.

(Marked Plaintiff's Exhibit No. 7 in evidence.)

Mr. Moran: I will offer in evidence the Plaintiff's Exhibit 3 for Id., being the summary sheets for 1919.

(Marked Plaintiff's Exhibit No. 3 in evidence.)

Mr. Moran: I will offer Plaintiff's Exhibit No. 4 for identi-
153 fication, in evidence, being the sub-ledgers consisting of two books, for the year 1919.

(Marked Plaintiff's Exhibit No. 4 in evidence.)

Mr. Moran: I will offer in evidence Plaintiff's Exhibit No. 5 for identification, the general journal for 1919.

(Marked Plaintiff's Exhibit No. 5 in evidence.)

Mr. Moran: I will offer this Exhibit 2 for identification in evidence, as a transcript of the books which have already been received.
Mr. Hill: The same objection as to the books.
The Master: Overruled.
Mr. Hill: Exception.

(Plaintiff's Exhibit No. 2 for identification marked "in evidence.")

Q. In this system of bookkeeping you have here what is called a trial balance which you referred to this morning. It indexes the accounts?
A. Indexes the accounts, shows the balances for each month and right up to the close of the year.

Mr. Moran: I would offer that in evidence, too.
The Master: Is this a new book?
Mr. Moran: It is a new book, but it is a trial balance. It is merely an index of the accounts and carries the balances in each account from month to month, of the general ledger.

154 Q. An accountant going through the books would want to use that, would he not?
A. He would want to use that.
The Master: It is one of the regular books of account of the company?
The Witness: Yes.
Mr. Jackson: Without repeating the objection to all these books, I suppose the fundamental objection applies, with an exception?
The Master: Yes.
Mr. Jackson: And that applies also to the schedules?
The Master: Yes.

(Trial balance marked Plaintiff's Exhibit No. 8.)

Q. You have as a part of your bookkeeping lay-out other books that accountants would want to refer to, have you?
A. Yes, the accounts payable and distribution.
Q. You have told this morning how they are distributed to different expenses?
A. Yes, with all the bills from the dealers, spread over the different accounts.

Mr. Moran: I offer that, being a part of the bookkeeping lay-out, and that is all.
Mr. Hill: The same objection.
Mr. Moran: So if your accountants would want to look at it you would have this to work from.
Mr. Hill: The same objection.
The Master: The same ruling.
Mr. Hill: Exception.

(Marked Plaintiff's Exhibit No. 9.)

155 Q. You have handed me here a book entitled Accounts Payable Ledger. That is one of the books of the general layout?

A. Yes.

Q. And it is entitled and contains as its title Accounts Payable of the Company?

A. Yes, our accounts from the outside concerns from whom we purchase material.

Mr. Moran: I offer that in evidence.

The Master: It does not include sales accounts?

The Witness: No, it is just an account where we owe John Jones $10 and we put it in here, and then when we settle it, we put it in there.

(Marked Plaintiff's Exhibit No. 10.)

Q. Does labor come in here?

A. Yes, labor, because that is treated as in here.

Q. And consumers' accounts?

A. They do not go in there.

Q. You have what are called consumers' ledgers?

A. We have what are called consumers' ledgers.

Q. You have how many consumers' ledgers?

A. 76 ledgers.

Q. Containing accounts with about how many people?

A. Approximately 40,000.

Q. That is the number of consumers you have?

A. Approximately.

Q. How many bookkeepers have you got on that?

A. Eleven bookkeepers.

156 Q. On those ledgers?

A. Yes.

Q. And they do not work on these books at all?

A. No.

Q. The books that were brought in here, they do not work on them at all?

A. No.

Q. We were speaking about page 2 of Exhibit 6. I think you said that on Exhibit 6, page 2, you have your distribution costs grouped just a little differently than they are on the other, but the total distribution cost is the same?

A. Yes.

Q. In the books of the company?

A. Yes.

Q. You had some explanatory data at the foot of this page 2. For instance, under taxes of which we were speaking this morning although we did not have reference to this——

Mr. Hill: I desire to object to the evidence of the witness on the ground that the books have been received in evidence for what they are worth, and as to all taxes the entries upon the schedule Exhibit 6 are not the best evidence as to the payment of taxes.

Mr. Moran: They have not been paid, Judge.

Mr. Hill: And the witness is testifying from hearsay as to the payment of them. It does not appear that he personally paid the taxes.

Mr. Moran: They have not been paid at all.

Mr. Hill: And his testimony is incompetent and inadmissible on the question of taxation.

157 The Master: I do not know what question you are going to ask yet. You have not asked any questions, but on the question of taxes, can you not show these tax bills and agree with the Judge as to what taxes have been paid, and agree with the Judge, and shorten the matter in that way.

Mr. Hill: The point is that there is a lot of that land that is not used in the manufacture of gas, as your Honor recalls going over there. A portion is leased to the Morse Docks.

Mr. Morse: That is all taken out.

Mr. Hill: They have taken it out on an arbitrary rule. The Court has something to say about it.

Mr. Moran: Well, we will tell about that.

Mr. Hill: About used and non-used property?

Mr. Moran: We will do that.

Mr. Hill: Apparently they are going to swear Mr. Gomoud here and have him just wholesale this taxation question.

Mr. Moran: No, Judge, no.

Mr. Hill: And I desire to object to it.

Mr. Moran: We do not wholesale anything; we retail it now.

Mr. Hill: I want to add my objection to the tax, that is all.

158 The Master: You go ahead, Mr. Moran, because we will have to have some better proof than this.

Q. What you have here under taxes you have purported to state the assessed valuation and the tax levied?

A. Yes.

Mr. Hill: I object to that, that the document itself, Exhibit 6 is the best evidence of what it purports to say.

Mr. Moran: I agree with that, but will you let him explain it just a little bit.

Mr. Hill: If his Honor tells him to.

Mr. Jackson: The trouble is the explanation is in evidence.

The Master: It is not in evidence, what the assessed valuation was. That is not the best evidence of that. With that understanding we will go ahead.

Mr. Hill: Exception.

Q. You have set down here a figure that represents the assessed valuation of the land?

A. Yes.

Q. That is all the land of the company?

A. Yes.

Q. Used and not used in the gas business?

A. Both used in the gas and not used in the gas business.

Q. Does it come out just $750,000 the different parcels?
A. Yes.
Q. Does that include the holder station land?
A. Yes, $750,000.
Q. Any way you have bills you can produce here showing that valuation?
A. Yes.
159 Q. I think you have them in court, have you not?
A. I have them right with me.
Q. Showing assessed valuation of $750,000?
A. Yes.

Mr. Hill: I want to object to this matter of proving taxes, this method, as you have.
The Master: I will sustain your objection.
Mr. Moran: Then we will have him bring out the bills.

Q. These that you show me here are the tax bills from the City Department for the year 1919?
A. Yes, sir.
Q. And the tax bills that you used in setting up your expense for the taxes of that year?
A. Yes.

Mr. Moran: I offer them in evidence.
Mr. Hill: As preliminary to an objection, may I question the witness?
The Master: Certainly

By Mr. Hill:

Q. Do these tax bills contain the levy upon the property belonging to the company that you have leased?
A. Yes.
Q. In that in a separate bill?
A. No, they refused to separate that.

By Mr. Moran:

Q. You mean the City refused to separate it?
A. Yes, I took the matter up with the Board and they refused to separate it unless we sold that parcel.

By the Master:

160 Q. Is this part leased to the Morse Drydock Company that you are talking about?
A. Yes.

By Mr. Hill:

Q. Do you know how the area that you leased to the Morse people compares with the area that you used in the gas making business of the waterfront property?

A. I have that information over at the office. I cannot quote it now, the exact percentage of it, but it was figured out on a footage basis, on the area of land.

Q. On a square foot basis?

A. Yes.

Q. Did you take into consideration the rights which the Morse Company have over the dock that is abutting upon the property that you used in the gas making business?

A. Why, that estimate was prepared for me by the engineer of the company, stating just how much was to be charged to each part of it.

By Mr. Moran:

Q. You mean the area was given to you?

A. Yes, the area was given to me.

Mr. Hill: I object to the receipt of the tax bills at this time, as it appears that they are taxes incurred upon property other than that which is used by the plaintiff in the public service.

The Master: I will admit them with the understanding that they cover taxes assessed against all of the company's property,
161 and permit Mr. Moran to go ahead with proof such as he may see fit to adduce showing what part of that property is used in the public service and what part is not.

Mr. Hill: Then I will just ask him.

The Master: Do you want to accept that?

Mr. Hill: No, I won't accept that at all.

By Mr. Hill:

Q. Is it a fact that these tax bills include a levy on that part of the property which is leased to the Morse Shipyard Company?

A. It is.

By Mr. Moran:

Q. And probably the other parcel there, what do you call it, the Graynor street property?

A. The Center Street property.

Q. The Center Street property, is that in there?

A. Yes.

Q. That is not used?

A. No.

Mr. Hill: Is that something which we saw the other day?

Mr. Moran: No. That includes all our land.

By Mr. Hill:

Q. Do you own any land except that which your counsel has just mentioned, and the parcel where the plant is, and the parcel leased to the Morse Shipyard Company—do you own any other real property?

A. We own around the holder station.
Q. What?
A. The holder station.
162 Q. Any other real property?
A. No.
Q. Are you assessed for personal property?
A. No.
Q At any of your three offices?
A. No.
Q. Do you own your main office building?
A. We do not.
Q. And you are assessed no personal property on that?
A. No.
Q And none on your Bay Ridge office or other office?
A. No.

The Master: They are admitted with the limitation that I stated.
Mr Jackson: While we are on that, might I ask a question?
The Master: Certainly.

By Mr. Jackson:

Q. Has the Company made an application for the reduction of any of the assessed valuations?
A. I did not hear the question. Repeat it, please.
Q. Has the Company made an application for the reduction of any of the assessed valuations?
A. No, they have not.
Q. Have any of these taxes been paid?
A. No, they have not.

By the Master:

Q Were any penalties figured on these taxes?
A Yes, there is interest on taxes in arrears.
Q. On this compilation that you have made here?
A. No, there is nothing in there. I am not showing that
163 in operating expenses. That is shown as an income deduction beyond the operating expenses. We do not carry that in the operating expenses as an expense.

By Mr. Moran:

Q. Speaking about taxes not being paid, do you mean the 1919 taxes have not been paid?
A. No, they have not.
Q. Nor the 1918?
A. No, they have not.
Q. 1917?
A. One half of 1917 and one half of 1916 were paid.
Q. One half of 1917 and 1916 has been paid?
A. Yes, one half.

Mr. Hill: We object to this as immaterial and move to strike it out.

Mr. Moran: You asked the question yourself.

Mr. Hill: No, I did not.

Mr. Moran: The other counsel did.

Mr. Hill: On behalf of the Attorney General I move to strike it out.

The Master: I will let it stand for what it is worth.

Mr. Hill: Exception.

Q. How much taxes do you owe now, unpaid taxes?

Mr. Hill: I object to it as immaterial, on that same ground.

A. Approximately $280,000.

Mr. Hill: You will pardon me until I finish.

164 The Witness: Excuse me.

Mr. Hill: I object to it as immaterial and having no bearing on the question at issue, whether they have paid their taxes or not. It is not illuminating on the question whether they are making money or losing money.

Mr. Moran: I think we can explain facts brought out by the other side. At any rate, I think it is very material whether the company has paid its taxes or not.

The Master: I do not suppose in this suit we have anything to do with 1918 taxes. I will strike it out so far as it refers to 1918.

Mr. Jackson: My question was as to the 1919 taxes.

Q. The 1919 taxes are not all due yet anyway, are they—Oh, yes, the 1919 are?

A. Oh, yes, they are.

(Tax bills marked Plaintiff's Exhibit No. 11.)

Q. You have got down here the assessed valuation of land and the assessed valuation of improvements, and the total assessment?

A. Yes.

Mr. Hill: I object to it as immaterial.

Mr. Moran: It is on those bills.

Mr. Hill: I understand. Then it appears it is there.

Mr. Moran: I know, but I want to lead up to getting that

165 unused property out. That is what I wanted to do. I wanted to show how he does it. We have got his work there.

Mr. Hill: He does not know how they do it.

Mr. Moran: Yes, he does.

Mr. Hill: He says his engineer figures it out.

Mr. Moran: No, you are mistaken about that. I want to get it out, you know.

Q. Will you tell me whether this $2,219,500 is the assessed valuation of all the land with improvements?

A. Yes, sir.

Q. That is what we call real estate taxes?

A. Yes.

Q. The total tax on that is for 1919, what?

A. $52,380.20.

166 Q. Do I understand that that is the tax that would fall due to the company on the 1st of May and the 1st of November, 1920?

A. No, that is the tax that falls due in 1919.

Q. 1919, I mean. It is the actual tax due?

A. Yes, May 1st, and November 1st, 1919.

Q. And it is the amount shown by those tax bills received in evidence?

A. Yes.

Q. That is the amount?

A. Yes.

Q. You have below here, "Less amount charged to non-operating taxes, $5,016.18," have you not?

A. Yes.

Q. Is that the tax that has been figured upon a portion of the valuation of the works land allocated to the Morse lease?

A. Yes.

Q. The Morse lease covers a part of the upland and a part of the land under water, does it not?

A. Yes.

Q. Has this been allocated in proportion to the square feet of area occupied by Morse, and the square feet area occupied by your company?

A. Yes.

Q. I think the company has had this land appraised also?

A. Yes, it has.

Q. And the amount the appraisor found gives a certain value——

Mr. Hill: I object to this as a conclusion and immaterial.

Mr. Moran: No, it is a fact.

167 Mr. Hill: The appraiser's opinion should be given by the appraiser.

Mr. Moran: I am going to show you how much work we have done to get this right. Then I will agree that the appraiser's figure cannot come in here, but simply to show that we have had it appraised, and I want to find out if he has used the figures, or the comparative values of the appraiser.

Q. Is it allocated on that same basis?

A. Yes.

Q. And I think the Public Service Commission has had an appraisal, and it is according to their valuation, too, is it not—proportionately?

A. Yes.

Q. In other words, as to the relative values of the two pieces, the Public Service Commission and our witnesses are agreed on that?

A. We are agreed on that, so it is the same.

Q. So you have used it in the same proportion?

A. Yes.

Mr. Hill: When did you agree?
Mr. Moran: At the trial.
Mr. Hill: Do you mean in the Judge Greenbaum case?
Mr. Moran: Yes. That is, they get the square foot area, and they gave it a square foot area value. We have used it in the taxes here, and it is done under my advice. They allocated the taxes according to the appraisals, which are also done according
168 to the square foot area. Someone told me just what the percentage of the tax was.
The Witness: I do not recall it offhand.
Q. And that shows a real estate tax then? That is, you have charged in here to operating expenses, the amount $47,364.02, for the year 1919?
A. Yes, into operating.
Q. And you have in addition to that a special franchise tax, the amount you have given here of——

Mr. Hill: I object to that as immaterial, that the exhibit is the best evidence of what it contains.

Q. What do you mean by the special franchise tax?

Mr. Hill: I object to that, that the witness has not been shown to be an expert on that.

Q. I know, but you attempted to set down something here, Mr. Gonnoud, did you not?
A. Yes.
Q. What is it; tell us what it is?
A. That is the assessed valuation as shown on the bill rendered to us by the State, assessed to us by the State.
Q. Have you got that here?
A. It is in this exhibit.
Q. It is in the exhibit there?
A. Yes.
Q. The assessed valuation of the special franchise?
A. Yes.

Mr. Hill: Is the special franchise in there?
The Witness: Yes (handing counsel paper).
Mr. Jackson: I suppose any time during the hearing we
169 can object to a consideration of any particular items; that is, ask that they be reconsidered?
The Master: Yes.
Mr. Jackson: I am passing that for that reason.

Q. The amount you set down here is on the bill which is part of Exhibit what?
A. Exhibit 11.
Q. The equalized valuation of the special franchise, $1,410,000, taxes, $33,276. That is what you have got here, from this bill?
A. Yes.

The Master: Has that been paid?

The Witness: No, it has not.

Mr. Hill: Did you review that? Has an application been made to review that assessment?

The Witness: No, we did not.

Q. You know the company made an application to the Tax Board about it, to have it reduced?

A. Yes, they had a grievance statement.

Q. The next tax you have there, what is that?

A. It is the State tax on gross earnings.

Mr. Jackson: What was your question to him, and the answer about the complaint?

Mr. Moran: They made a complaint, a grievance statement.

Mr. Jackson: That has been done.

Mr. Moran: No, this is the result.

170 Mr. Hill: But then you took no proceedings to review their refusal to reduce.

Q. The gross earnings tax is a percentage of gross earnings taxed under the statute?

A. Yes.

Q. Has that been paid?

A. Yes, that has been paid.

Q. The gross earnings tax?

A. Yes, we have paid the gross earnings tax. That is the tax we have paid, the gross earnings.

Q. And capital stock?

A. And the capital stock tax.

Q. That is a Federal tax?

A. A Federal tax, yes.

Q. That is a Federal Excise tax on the fair value of your stock?

A. Yes.

Mr. Jackson: Are you going to have it appear on record as to what the special franchise tax covers?

Mr. Moran: I would be very glad to do it.

Q. The Special Franchise Tax, you understand, is the tax on the property in the street?

A. Property in the street.

Q. Plus the right to maintain it there?

A. Yes, plus any tax on any income over and above the fair return.

Q. No, I won't let you say that. It is the value of the right to maintain it there?

A. Oh, yes.

Q. The way they get at the value there, you do not know; you have heard they get at it on account of earnings, or something of that sort?

A. Yes.

Q. Then you have here the figure of total cost of gas sold,

171 $1,100,856.86. That is the same figure that is on Exhibit 2?

Mr. Hill: I object to that, that the exhibit itself is the best evidence of what the exhibit says, and that the testimony of this witness is hearsay, if he is offering it as proof of the fact that that is what the gas costs that was manufactured.

The Master: I will overrule the objection, with the understanding that the witness is testifying to a summary statement which has been taken from the books. What the probative effect of that statement is, I do not pass upon.

Mr. Hill: Exception.

Q. That is the same figure that appears on Exhibit 2?

A. Yes.

Q. Which was taken directly from the books?

A. Yes.

Q. And this is the same total of the expense account for 1919?

A. Of the operating expenses.

Q. You have computed here at the foot, the revenue at 75 cents to the City and 80 cents to the consumers, have you not?

A. Yes.

Q. And that shows a revenue of how much?

Mr. Hill: The same objection to that as made to the total cost, and the further objection that no complaint is made in the
172 bill of complaint that the price to the City is confiscatory, and that cannot be considered in this action.

The Master: Same ruling.

Mr. Hill: Exception.

A. The amount shown is $1,020,951.71.

Q. That exceeded or did not reach the amount of your expenses of operation according to your books?

Mr. Hill: Same objection.

The Master: Same ruling.

Mr. Hill: Exception.

A. No.

Q. By how much?

Mr. Hill: Same objection, and exception.

A. $79,905.15.

Q. This amount for gas sold is what you call revenue from sales, is it not?

A. Yes.

Q. Have you any other revenue besides revenue from sales of gas, that you credit as operating revenue?

A. Yes, revenues derived from the sale of appliances; that is the profit, the difference between the cost and the selling price of the appliance.

Q. And you have that stated here at how much?

A. $21,898.63. Then we have interest on——

Q. Before you go by that, tell us a little more just what that is. Does the company sell gas appliances?

173 A. Sell gas ranges, gas heaters, and gas appliances of all kinds.

Q. You purchase those and sell them to the consumers at a profit, do you not?

A. Yes, and this figure represents a difference between the purchase price of the appliance, that is, the cost at the warehouse, and the selling price of the appliance.

Q. You charge for installing them, and everything like that, where you do install them?

A. Yes, we charge for installing them. That would be in the selling price.

Q. In the selling price?

A. Yes.

Q. Then when you buy them and you sell them, you cover your cost of installation and all that in the selling price?

A. In the selling price.

Q. And this figure here is the sum total of your receipts over and above your expenditures for that sort of thing for gas appliances during the year?

A. Just for the appliances.

Q. Why do you say just for the appliances?

A. Well, it is not the profit over the cost of setting the appliance. We have charges against that. For instance, this $21,000 shows the difference between the cost of the appliance and the selling price. Now, that would not be all profit, because we had in that selling price, in order to charge the consumer for the cost of connecting the range, and then, of course, we have to go out and connect that range or connect that appliance, and that is charged in the expense accounts.

174 By Mr. Jackson:

Q. Is the expense of those connections charged in this account?

A. It is charged in these expense accounts.

Q. Is all labor in connection with that apparatus charged in this account?

A. No, it is not charged in this account; it is charged in the expense accounts above.

Q. Which expense account?

A. Well, it is charged in work on consumers' premises. That would be the charge of connecting the ranges and so forth.

Q. Does it enter into the price of gas and is it charged to that account?

A. It is charged as a part of the gas business.

Q. That does not answer it quite.

A. Yes, I would say.

By Mr. Moran:

Q. Yes, it is in that $1,000,000?

A. It is described by the Public Service Commission in the uni-

form system of accounts. They say we must charge the cost of connecting ranges to work on consumers' premises, and they put this work on consumers' premises among the accounts of the gas company.

Q. Is there any other expense account burdened with this appliance business.

A. Yes.

Q. What other one?

A. Promotion expense accounts. That would be promotion office expense and administration expense and advertising, part of the advertising.

175 Q. What would the total cost of work on consumers' premises in 1919 be?

A. It is shown on this exhibit, and it is, $9,133.25.

Q. Work on consumers' premises includes other work, does it not?

A. Let us see if I got the 1919.

Q. That is right.

A. Is that the right amount?

Q. Yes. Work on consumers' premises, that includes the cost of setting these stoves and other items, too?

A. Yes, it also includes other expenses or work on consumers' premises, such as adjusting and so forth.

Mr. Jackson: While we are on the subject, do you mind me interrupting your questioning?

Mr. Moran: No, not at all.

By Mr. Jackson:

Q. This great profit from the sale of appliances, do you keep the account of the sale of appliances separate?

A. Yes.

Q. All items pertaining to it?

A. Just those items that are prescribed by the uniform system. That is, we charge in there the cost of the appliances and we credit it with the sale of the appliances.

Q. Can you produce here a schedule from your books showing all of the items of expense that are connected in any manner with the sale of appliances?

A. Yes, with the exception of overheads. We do not carry that separately. It is all one business.

176 Q. Well, with the exception of overheads?

A. Yes.

Q. That is including in that all the work on consumers' premises that is occasioned by the sale of appliances?

A. Yes.

Q. You have that on your books so that you can gather it in a schedule?

A. We can produce that, yes.

Q. A separate schedule?

A. We could make that up, yes.

Mr. Jackson: Don't you think it would be possible to have that done, Mr. Moran, just for the information of the Court? Promotion expenses, I mean, all expenses connected with the selling of appliances.

Mr. Moran: I think they are all there. They all appear here.

Mr. Jackson: I think they are not separated. You say the item there, work on consumers' premises, includes both——

Mr. Moran: But the major part of it is appliances, is it not.

The Witness: Yes.

Mr. Jackson: Instead of saying the major part of it, can't we have the exact figure?

Mr. Moran: It would take a long time to get the exact figure, assuming it is all work on consumers' premises.

By Mr. Hill:

177 Q. Also isn't all promotion expenses, amounting to $9,000, chargeable against the gas appliance?

A. Yes.

Q. That is, there is $9,000 promotion, and $9,000 work?

A. Yes.

Q. On the premises. That makes $18,000, which reduces that only to $3,000 profit; is that right?

A. Yes.

Q. You have not included in that either the expense of the rental of the store to exhibit these in?

A. Yes.

Q. Included in each one of those items?

A. In the promotion office expense.

Q. Have you allocated to that a portion of the salaries of clerks and superintendents?

A. We have not any clerk that works on that particularly, so we have not allocated any part of them. We have the salesmen and so forth.

The Master: May I get a little enlightenment on that?

Mr. Hill: Yes.

The Master: Are you trying to reduce the amount of that $22,000?

Mr. Hill: I am trying to show, which is the probability, that that is a loss on the sale of appliances and it should not be in that business; that the public should not be in that business; that the public should not suffer the loss which they have on their retail business because there is a gross profit of $21,000, chargeable

178 against that is $9,433 work on consumers' premises, and over on Exhibit B, page 3——

The Master: I understand now.

Mr. Hill (continuing): Under promotion expenses is another charge against that of $9,000.

The Master: Where is that?

Mr. Moran: On page 3 of Exhibit 2, $9,145.43, which —— chargeable against that. That does not include that.

The Witness: Yes, it does.

By Mr. Hill:

Q. That is in which?

A. In the promotion office expense or office promotion expenses.

Q. Does it include clerks' hire, people that show these wares?

A. Yes, it includes all the clerk hire or people that show those wares.

Q. Light and heat of the office building?

A. Yes, light and heat.

Mr. Jackson: It does seem to me that the gas appliance business should be shown separately.

Mr. Moran: You are possibly right about it, but the Public Service Commission's rules say that it must be done this way.

Mr. Jackson: That is for a different purpose, but this is a little different, because we want the information for this court as to just what it should consider, and whether this item or that item
179 should be considered, and it seems to me they ought to be separated for the information of this Court if it would not be too much difficulty, before your case is submitted.

Mr. Moran: We have here those things analyzed. He can read it here. For instance, work on consumers' premises, just what it consists of.

Mr. Jackson: Both work on consumers' premises, Mr. Moran—let me understand it—that means in connection also or covering both the work in connection with gas appliances and installing them, as well as installing the gas service?

Mr. Moran: Oh, it does not include the gas service at all.

Mr. Jackson: Then it applies only to gas appliances.

Mr. Moran: Work on consumers' premises is—Mr. Gannond, turn to it. (Hands witness paper).

The Witness: Page 44 of the uniform system of accounts (reading): "Work on consumers' premises. Charge to this account the cost of installing gas stoves and other appliances on the premises of consumers, and all work done for consumers in maintaining the efficiency of their service, including complaint work and other work done in house beyond the end of the meter outlet connection.
180 This includes the cost of adjusting or changing location of house pipes, gas burners, fixtures, stoves, and appliances, and the cost of new pillars, tips, burners or devices not chargeable to repair accounts; it does not include such installation expense items as are provided for in the preceding account.

"Credit to this account cost element of receipts for jobbing which the accounting corporation has performed as agent under agency contracts."

Then it has two notes.

Mr. Jackson: As this is *capped* on the books as provided by that section, it does include not only gas service, but service in connection with the gas appliances.

Mr. Moran: What do you mean by gas services?

Mr. Jackson: The supplying of gas and not the sale and maintenance of gas appliances.

Mr. Moran: Yes, it does.

By Mr. Moran:

Q. For instance, if a man complained that the gas was poor, in order that the company may know that the gas was poor, they would go out and see that his stove was all right, and they would make it right, whether he bought it from them or some one else, and if there were some pipes needed, they would install them and charge
181 it to this account. Have you got this figure of $9,433.25, work on consumers' premises 1919 segregated to show what it consists of?

A. Yes.

Q. Just read it into the record?

A. Work on consumers' premises $9,433.25, includes and is made up as follows: Installing ranges, cookers and laundry stoves, sold by company, $1,965.81.

Mr. Jackson: From what is he reading?

Mr. Moran: He is reading from his analysis of this account.

Mr. Jackson: Is it something in that, I mean?

Mr. Moran: Oh, no.

The Witness: Yes, it is in the evidence. It is in the evidence in the form of the books.

Mr. Moran: It is in the books, yes.

Mr. Jackson: Is he reading from the book that is an exhibit in evidence?

Mr. Moran: No, he is reading a paper which is a copy of the books in evidence. If you prefer to take up the books and turn to the different pages in them, he can do that. Can you not?

The Witness: Yes.

Mr. Jackson: I did not know whether he was reading from an exhibit in evidence or not. It is not, is it?

The Witness: It is shown on the books of the company.

182 Mr. Jackson: It is not on any exhibit in evidence.

The Witness: The books are in evidence.

The Master: It is a summary from the books in evidence.

By Mr. Jackson:

Q. I mean, none of these schedules show it?

A. No, they do not show.

Q. They are in the books?

A. Yes.

Mr. Jackson: All right.

The Witness: I go on, now. Installing water heaters, $1,303.19; heating devices, $165.73; lighting devices, $96.73; industrial appliances and baking ovens, $1.18; other outside appliances, $110; instantaneous heater, $179.99; measuring and transporting appli-

ances to point of installation, $1,120.65; investigating complaints, 1,209.56.

By Mr. Hill:

Q. Right there, is that investigating complaints as to appliances r as to gas?

A. It would be to both. There is no way of aggregating the ifference. I do not know what we will find when a man calls up.

Q. I just wondered that.

A. (Continuing:) Jobbing work, $58.43; installing repair parts, 74.80; maintaining lighting devices, $1,237.35; regulating ranges, eaters, etc., $1,817.84, and setting up and removing arc lamps, 83 $90.19; pulmotor calls and expenses, $1.20. A pulmotor is used in the case of asphyxiation.

Mr. Jackson: Is that the total?

The Witness: That is all, that is the sum total.

Q. Now, will you pick out while you are on it, the items which ou mention which do not belong to the sale of gas appliances?

A. Investigating complaints, $1,209.56; pulmotor calls and ex- enses, $1.20——

The Master: I suggest that we better do that on your cross ex- mination; don't you think so?

Mr. Jackson: I suggested that they prepare a schedule?

The Master: They will have this in the record, then you can ask hat. Don't you think so, to save time?

Q. Have you answered that?

A. Yes.

Mr. Jackson: I thought it best if they prepared a schedule.

The Master: All right, either way you say.

Q. Would it be much trouble?

A. It would not be any trouble to take off those specifications.

The Master: Suppose you do that by tomorrow. I think it will ave time, instead of going over it now.

Mr. Jackson: I mean not only as to that heading, but all items of xpense that are under the heading of the sale and installation and maintenance of gas appliances—and a separation of them. I 84 think we are entitled to know the difference between the definite gas service, and the business of the sale and installa- ion of gas appliances. Then the question may come up as to whether the gas appliances and that business should be included or should be excluded, but I think we ought to have it definitely stated o we can consider it.

By Mr. Moran:

Q. The idea is, is it not, to conduct the gas appliance business without loss to the company?

A. Yes.

Q. And without profit to the consumer?

A. Yes.

Mr. Hill: I object to that as a conclusion.

Mr. Moran: No, it is not any conclusion. It is stating the intent of the company, and to carry out that intent they fix certain prices. They could put higher prices on those stoves. They could reduce the number of stoves sold, and consequently keep down the consumption of gas.

Mr. Hill: That is what you want, don't you?

185 The Master: I suggest that you try and get up some sort of a brief statement of the subject, because I think it is a very small item that we are fighting over here.

Mr. Jackson: It is just to see what it is.

The Master: Perhaps we can eliminate the whole thing; because there cannot be more than a few thousand dollars one way or the other on it.

The Witness: I want to get this clear in my *own* mind. Do we want to put in there estimations, your Honor, that are in here? For instance, one bookkeeper there takes care of billing appliances and other work in the office. Do I want to split that up arbitrarily on my own basis? Will that be accepted? In other words, how much latitude am I going to have in this? The two businesses run together so closely that it is a hard task.

The Master: Mr. Jackson will probably be satisfied with simply the same analyzation that you made of $9,433.25—that that be made of the amount under promotion expense. Would it not?

Mr. Jackson: I have not gone over that to say where the expense of gas appliances might occur in other parts. You have mentioned the matter of labor and the allocation of labor to it. If there be some statement or if you would state your best judgment as

186 to what the proportion would be, we could consider it even in that light.

The Witness: Yes, I have already gone over the matter and worked up such a statement as that, I have been familiar with it and it showed about a $1,500 profit.

Mr. Jackson: As to what the books show, if your books do show a separation we would like to have it as the books do show it.

The Witness: Yes, I will follow up that plan.

The Master: I suggest that you get up such a statement of that and then they can go into cross examination on it if they are not satisfied.

Mr. Moran: I would offer this Exhibit No. 6 for Identification in evidence. I went on to explain Exhibit No. 6 a little more before I put it in.

Mr. Hill: The same objection.

The Master: Same ruling.

Mr. Jackson: Same objection.

Mr. Hill: Exception.

The Master: Same ruling and exception.

Marked Plaintiff's Exhibit No. 6 in evidence.

Q. You have brought here the books of 1919 and they have been received in evidence. The testimony you gave here this morning, I take it, about your system of keeping books and ordering
187 coal and oil and everything like that, applies to 1920 as well as 1919?

A. It does.

Q. You have a set of books for 1920 in all respects the same as the books for 1919?

A. I have.

Q. And you did not bring them here for some reason?

A. Because they are current books and we need them in the office.

Q. They are used every day?

A. Yes, for current entries.

Q. Have you prepared from those books of 1920 a statement for the first six months of the year, on the same lines as the statements we have been talking about for 1919?

A. Yes.

Q. Have you got here such a statement?

A. I have.

Q. I show you a statement entitled "Kings County Lighting Company Operating Expenses, Six Months ended June 30, 1920," and I ask you if that is a statement taken from the books of the company for that year, similar in every respect to Exhibit No. 2 of 1919?

Mr. Hill: I object to that.

The Master: He is just showing it to him.

A. Yes, this is.

Mr. Hill: I want to object to any evidence after the date of their complaint, as immaterial.

188 Mr. Moran: The books, the witness says, Mr. Master, are in current use.

Mr. Hill: I object to it on that ground.

Mr. Moran: That is why he has not brought it here. I want to find out now will we consider those books in evidence and this as a statement taken from them, without bringing that here?

Mr. Hill: I raise no objection on account of the fact that the books are not physically here.

Mr. Moran: Then I offer in evidence the books of 1920, coupled with the explanation that I intend to follow that immediately with transcripts from the books, similar to the transcripts which have been made and received in evidence from the books of 1919.

Mr. Hill: The Attorney General makes no objection because the books of 1920 are not physically in this building and room, but objects to their reception upon all the grounds stated in the objection to the books of 1919, and further objects to the books after the date of the complaint, which was what—what was the date of bringing the action?

Mr. Moran: May 24th was the day we got in court. We verified the complaint about the 20th of May.

Mr. Hill: And the same objection to the schedules, that date particularly.

189 The Master: Mr. Moran, I have a good deal of doubt as to whether any evidence after the date of the complaint is admissible.

Mr. Moran: Your Honor, as I said in the opening, the whole thing is perspective; we are dealing with the future absolutely, not with the past, only as it throws light on the future. All the authorities deal with the future.

The Master: I understand that, of course, what you are asking for is relief for the future. But you must stop some place or other, and I do not know where you are going to stop. I do not know a more appropriate place to stop than the date of filing of the complaint.

Mr. Moran: We are fortunate enough to have a full six months' experience, operating expenses for a full six months. We are down to June 30, 1920. Why, we could even call a witness, and we will, to show our expenses for the whole year of 1920, even 1921 and maybe for 1922. We are dealing with the future, we have nothing to do with the past at all. The objection is entirely out of order, entirely out of order; there is no merit in it at all.

Mr. Hill: They file a complaint here that says that prior to this date in May the price is confiscatory. Now they have got to stand or fall on something that happened in the past. When they

190 have filed their bill of complaint that in 1921 this statute is going to be confiscatory, could they have filed a bill of complaint saying that commencing with May 30, 1920, it was going to be confiscatory, and would they have had any cause of action, or can they sue on a cause of action which accrues after the date of their complaint. Does not the note have to be dated for the summons and complaint?

Mr. Moran: Why, we could bring the action before this statute went into effect at all. It all deals with the future. The question for the court is to find out whether the statute at the time and henceforth, its enforcement, operates and deprives the plaintiff of his property without due process of law. Now, that is it.

Mr. Hill: If that is true, then the Greenbaum decision is res adjudica at this time.

Mr. Moran: But they are changing all the time; these things are changing all the time. Here Judge Cardoza laid the whole law down on all the cases in his Municipal Gas case decision. He says "The statute prescribing rates is one of continuing operation in an attempt to predict the future." We come in here predicting

191 that this statute from the time of filing this complaint on—and we cannot get any retroactive judgment—is confiscatory. We say in aid of that allegation that these figures are offered here, all of them, are only in allegation as to the future. This is not an accounting as to 1919, and to give relief for that year at all, or as to 1920. Why, we are going to put in evidence here of our oil contracts that we are obliged to operate under now, and are obliged to operate under for the rest of the year, and we are going to give you an idea of our labor expense this year. We have been fortunate enough to

have the experience for the first six months, and in addition to what is in here for 1919 I would like to put that in.

The Master: Your order of proof at any rate would take up the first three months, would it not?

Mr. Moran: Yes.

The Master: I mean that is the way you have got it alleged in your complaint.

Mr. Moran: That is an evidentiary fact. We have the statements here for three months. The later the period of the year you get into the less valuable your statement is, because the nearer you
192 approach the whole year the better can you estimate the cost. We have the statement for six months, which includes, of course, the three months' statement. I have no objection to putting in the three months. I would be glad to do it. I will put in the six months' statement and the three monts' statement will be—I have it right here.

The Master: I tell you, you go ahead and put in your three months' statement this afternoon, and tomorrow I will pass on the six months. I want to think that over during the night. Of course, you have to put those in anyway under your complaint.

Mr. Moran: No, I do not like to put them in either, your Honor, because they are going to be confusing.

The Master: You have a whole lot of allegations in your complaint about what happened in those first three months.

Mr. Moran: And that is all covered by what we show in our six months' statement.

The Master: But you would have to support it after you had it in.

Mr. Moran: No, it is all in there. I hate to put in a three months' statement and then follow with a six months' statement, or even stand on a three months' statement, because it is going to
193 confuse the record. You see, the complaint was verified in May and we could have had a four months' statement by that time. The reason we did not do it was that we were crowded with work and could only have a three months' statement. let us get the authorities on the subject. Judge Hand in his decision dealt with the future altogether. I take it your Honor has seen Judge Hand's opinion in the Consolidated case.

The Master: No, I have not. I have not seen it; I would like to have it.

Mr. Moran: We have a copy of it here. It all deals with the future, entirely.

The Master: But without passing on that, I do not see why you have to put in your three months, anyway. I mean I do not see how I can figure out on these allegations. For instance, you say in your complaint the actual and necessary expenses of the plaintiff to manufacture and distribute the gas in said three calendar months was such and such a sum.

Mr. Moran: I won't prove that; I will give you something better. I will give you the six months now, which brings it down to a later

date. I will give you better proof than that, more convincing for for the purposes of this case.

194 Mr. Jackson: The Master means that he won't have any facts before him which sustain definitely those figures.

Mr. Moran: Yes, and I say I offer better proof for six months, I offer something higher. It is the cost per thousand anyway which is alleged there. Well, I am offering the books. Now they will go down to the very day that we are here, the books. We cannot chop them up into three months' books, and that is the question before the Court, the books for the present year.

Mr. Hill: I make the same objection to the books.

Mr. Moran: That is a question for the Court. I get the Court's point about the allegation there. I will offer the three months' statement.

The Master: You go ahead and offer the three months and let me look at Judge Hand's opinion. Of course, I do not see any reason why the plaintiff should not amend his complaint so far as that goes.

Mr. Jackson: I think that that would be the only way he could figure on offering the subsequent months in evidence. He would first have to amend his complaint, and then offer the books down to the date of the commencement of the action, and we make the same objection to the offer that we made to the offer of the

195 books that we made for the year 1919.

The Master: I sympathize with Mr. Moran's point of view, that in a case of this sort you ought to get just as much evidence as you possibly can right down to the present time as to what the cost of the operation of this company is; but what I was thinking of a little bit was the technical side of it. I am not sure I am right on that, so far as that goes, but I would like to know how you are going to meet that end of it. Ordinarily it would be by an amendment, would it not?

Mr. Moran: No, the whole gravamen of my complaint is a prediction for the future. I am predicting for the present and the future.

Mr. Jackson: But you set out exactly what happens.

Mr. Moran: That is in aid of my allegations for the future. It is a supporting allegation. If I came in with a complaint saying that at the present time the company cannot make gas, it is costing them more than 80 cents, and in the years to come it will cost them more than 80 cents, they will say why don't they allege their actual experience for a year or two in the complaint, this is

196 only a conclusion of what it is going to cost. Then I allege the actual experience of the company for a year or two.

Mr. Jackson: Would it be proved separate?

Mr. Moran: Separate how?

Mr. Jackson: For three months.

Mr. Moran: Why, we have got the three months right here; then we have got the six months. The only objection I have to the three months is that we will have something in that we are not going to look at, because we are going to get the latest figures.

You see, Judge Cardoza said in their gas case; "Bills to annul rates have been dismissed without prejudice while the outcome remained uncertain. Bills to annul the same rates have been sustained when the vision of results have been clarified by the wisdom which follows the event." We are making a prediction here and we are bringing to support our prediction the experience of the company down to date. We are bringing down the results, we are giving you the vision of results down to the present minute. In 241 United States the court——

The Master: Let me just ask you, in the old Consolidated case where did they stop, or where did they start from?

197 Mr. Moran: In the Consolidated case they just took one year, the year 1905, in the old Consolidated case—just one year, that is all they had.

Mr. Jackson: In the Consolidated they had not operated under the law at all.

Mr. Moran: No.

The Master: In the present Consolidated case?

Mr. Moran: They started their action in the present Consolidated case about the 1st of the year 1919. They started it then. In December, 1918. They got to trial in July of 1919. They took their expenses for 1918 and they added to that their experience for eight months of 1919—added to it. It was not alleged in the complaint, it could not have been alleged in the complaint, because it was drawn before a single day of 1919 had come about. They put in 8 months of 1919. Not only that, but the Master in his report and the Judge in his decision carried the thing down right to the time that each of them acted, and what fragmentary evidence there was in the record as to the precise figures, the precise figures were for the full twelve months of 1918 and eight months of 1919—that is, as to the actual result. As they were trying the case in the latter part of 1919 and the forepart of 1920, they knew what

198 they were paying for coal, oil and labor, they knew what had happened, but they did not know how it would affect the whole result as it might be higher or lower than what they had used. In our case I have a three months' statement and a six months' statement: The three months' statement includes oil at 10 cents a gallon and the rest will be more or less for the balance of the time. I am going to prove by the witnesses that that is all 10 cent oil, and our whole expenses for the year 1920 will be more than the unit cost for the first six months. The whole thing is the future and, as I say, Judge Hand has taken it all in.

The Master: I am willing to follow any precedent followed in the Consolidated case, which has just been finished.

Mr. Moran: Right in that opinion it will be found.

The Master: Is that your understanding of what happened in the Consolidated case?

Mr. Jackson: I have not really read the decision or opinion.

Mr. Moran: Take the first page of our opinion. The suit was started in January, 1919; the Master was appointed May 16, 1919. That appears on the first page. We have got Judge Hand's word for it.

Mr. Jackson: You do not want to take all this down, do
199 you?

Mr. Moran: Why, yes, we want to see what it is. The record does not look very well if you leave out some of these important things. On Page 43 he tells what they considered.

The Master: You go ahead and put in your six months, Mr. Moran. I will overrule that objection.

Mr. Jackson: Exception.

Mr. Hill: Exception.

Mr. Moran: I have offered the books.

Mr. Hill: And our general objection also to them?

The Master: Yes, the same ruling, and exception.

Mr. Moran: I have offered the books, and they are considered in evidence subject to all the infirmities of the books of 1919.

Mr. Hill: Yes, and exception, of course, to the ruling admitting the books.

The Master: Yes.

By Mr. Moran:

Q. The statement you have handed me, Mr. Gonnoud, for the six months of 1920, was prepared by you?

A. Yes sir.

Q. And correctly states the amounts appearing under the several accounts?

A. They do.

Mr. Moran: I offer that in evidence.

200 Mr. Hill: I object to that, with the same objections as to the 1919 books.

The Master: Overruled.

Mr. Hill: And specifically a further objection as to the period after May 20, 1920. Exception.

Marked Plaintiff's Exhibit No. 12.

Q. You have also prepared a statement grouping these expenses appearing on Exhibit No. 12 in the same fashion that you grouped the expenses for the year 1919 on Exhibit 6 for Identification?

A. I have.

Q. The one you hand me here is such statement entitled Cost of Production and Distribution for the Six Months ended June 30, 1920?

A. It is.

Mr. Moran: I offer that in evidence.

Marked Plaintiff's Exhibit No. 13.

Q. The sales in this period of six months, what have they amounted to?

A. 804,692,768 cubic feet.

Q. As against how much in last year?

Mr. Hill: Do not the exhibits themselves show that fact?

Mr. Moran: Yes, I just want to call attention to a few of the salient features as the learned counsel says, about those things.

Q. They show what?

A. 1,279,845,244.

Q. Well, it is more than 50 per cent of the output of last
201 year?

A. It is.

Q. Does the output—probably the witness is not qualified on this—does the output in the first six months as a rule about equal that of the second six months?

A. Yes.

Q. So to get this you would have sales of about 1,600,000,000 for this year?

A. Yes.

202 Q. An increase of some three or four hundred million feet?

A. Yes.

Q. Do you expect that?

A. Yes, we expect 25 to 30 per cent.

Q. 25 or 30 per cent increase?

A. Yes.

Q. There was an increase in 1919 over 1918?

A. Yes.

Q. Now, here you have on this exhibit a price of coal, average cost of coal, generating coal, of $8.77?

A. Yes.

Q. And you use, according to this, 33.70 pounds of coal per thousand cubic feet of make?

A. Yes.

Q. And the gallons of oil used here appear to be how much?

A. 3.60.

Mr. Hill: I object to this.

Mr. Moran: I am going through that.

Q. Is there anything about any one of these statements we have had in evidence, that you feel you ought to explain, as it differs from the other one of 1919?

A. You mean it differs in the amount used?

Q. In the method of getting it out?

A. No, there is no difference in the method of getting it out.

Q. You have the assessed valuations here?

A. Yes.

Q. Let us have those 1920 tax bills. Have we got them?

A. Yes, certainly.

Q. We want to put those in?

A. There they are (handing counsel).

203 Q. The tax figures are taken from these bills that you have handed me from 1920?

A. Yes, that is one-half of them, of course.

Mr. Hill: Isn't this tax an estimate anyway?
Mr. Moran: No, it is actual.
Mr. Hill: Is it for the whole year 1920?
Mr. Moran: No, six months.
The Witness: Six months ended June 30th. They render two bills.
Mr. Hill: Two bills each fifty per cent of the total?
Mr. Moran: Yes.
The Witness: Oh, yes, they always do that
Mr. Moran: You begin to pay seven per cent after the 1st of June. Do you want these in evidence?
Mr. Hill: I don't know.
Mr. Moran: Then I will offer the tax bills in evidence.
The Master: Why don't you get up a little schedule and go over the bills with the other side, so you won't have bills, actual bills in evidence.
Mr. Moran: We have the data right here. We put on here the data we thought they would want, which would be the assessed valuation in each instance.
204 Mr. Deegan: The Commission's accountants have checked the amount of these taxes against the bills in the company's office.
Mr. Hill: The one thing I am interested in is that allegation of being used and useful. Outside of that you need not put those in.
The Master: Let us leave out both sets of tax bills, with the understanding that they were admitted as showing the taxes assessed against all the property of the plaintiff company.
Mr. Hill: All right.
Mr. Jackson: That is, it is specified as to what the taxes are, particularly?
Mr. Moran: Yes.
The Master: Then the question of the allocation and that sort of thing is another question.
Mr. Hill: You are going to put in more proof on them?
Mr. Moran: Oh, yes.

By Mr. Moran:

Q. Mr. Gonnoud, you have allocated for 1920 the same as you did for 1919?
A. Yes, the same allocation and the same percentage.
Q. On the basis of area and those percentages are the same?
A. Yes.

Mr. Moran: I am not aware of anything here that needs
205 any particular explanation. I would be glad to do it if any one wants it.
The Master: These papers are made up the same ways as the other papers were made up?
Mr. Moran: Yes.
The Master: I do not think we need go through them, do we?

Mr. Hill: No, unless there is some question about them that we have in mind.

Mr. Hogan: We have here a statement separating our boiler fuel into three different classes of coal, showing the cost of it, and the handling charge, an item that was discussed this morning.

The Master: Is that an analysis of the item boiler fuel in Exhibit 12, second page?

Mr. Moran: Yes, that is right.

The Master: 868,000?

Mr. Moran: And also of the similar statement on Exhibit 6.

Mr. Hill: We do not raise any question but what it is correctly prepared from the books and statement. But we do object to it as being founded on the books which we object to, and therefore object to this.

The Master: The same ruling.

Mr. Hill: Exception.

206 Q. This statement I show you, Mr. Gonnoud, you prepared entitled, "A statement showing the handling costs, purchase costs, of coal for 1919 and 1920"?

A. Yes.

Q. And it is an analysis of the coal expenditures appearing on the exhibits received in evidence?

A. Yes.

Q. That is, it is an analysis to show how much is handling costs, and it separates the boiler fuel into three classes of coal; is that right?

A. Yes.

Mr. Moran: Now, I would like to offer that in evidence as explanatory and for the information of the other side.

Mr. Hill: I objected to it prematurely, not on the ground that it is not correctly taken from the books, but upon the ground that it is founded on the books, and we object to the books as not being properly proved.

Mr. Jackson: Aren't we covered by an objection and exception to all of this?

The Master: I think so.

Mr. Jackson: I thought we had that understood as to all these schedules.

(Marked Plaintiff's Exhibit No. 14.)

Mr. Moran: This is Exhibit 14. I do not know that we need spend any time with it. It shows three kinds of coal.

207 Q. Mr. Gonnoud, on this exhibit we have just put in evidence, Exhibit 14, there are three kinds of boiler fuel—anthracite coal, bituminous coal and blind. The anthracite coal is the screenings from the generator fuel, is it not?

A. Yes, it is.

Q. And it is charged on here at the same cost as the generator coal?

A. Yes.

Q. You have, for instance, in 1919, handling of coal, generator coal, costing how much?

A. $2,251.85.

Q. And the handling of boiler fuel?

A. Cost, $649.12.

Q. Of course, that handling does not include putting the boiler fuel in the boilers?

A. No.

Q. It means taking it from the boat, for instance, and putting it in your pile?

A. Yes.

Q. And the same with the anthracite coal?

A. Yes.

Q. This shows the tons of coal used and the dollars and the dollar costs?

A. Which coincides with the amounts shown on these statements.

Q. There are some statistics in reference to the number of consumers it has and the number of meters. At the date of the verification of the complaint, did you furnish the number of consumers that it had at that time?

A. Yes.

Q. The facts stated in the complaint are as furnished by you?

A. Yes.

Q. Will you just refer to the complaint and state how many consumers it had at that time?

A. Yes.

208 Q. How many?

A. 38,543 meters.

Q. Meters?

A. Meters, which represent that number of consumers.

Q. And how many services?

A. 20,288.

Q. By services you mean the pipe leading from the main into the house?

A. The pipe leading into the house.

Q. Then you have almost twice as many consumers as you have services?

A. Yes, about two to a service.

Q. That means there are a good many family houses?

A. Two family houses, yes.

Q. Some single houses in your district?

A. Yes.

Q. And some apartment houses?

A. Apartment houses, yes.

Q. But the general average is two family houses?

A. Two and one family houses.

Q. Do you sell any gas to large hotels or large consumers of that kind?

A. No, practically none.

Q. Your consumption is practically by private consumers?

A. By private consumers.

Q. Private houses for cooking?

A. Yes, it is a residential section, and it is used by the private consumers for domestic purposes.

Q. Can you tell us the average amount of the bills?

A. The average consumption is about 3,000 cubic feet per month.

Q. 3,000 cubic feet a month?

A. Yes.

209 Mr. Jackson: Per meter?

The Witness: Per meter, yes.

Q. Now, it is scattered over a territory and your records show how many miles of main?

A. About 200 miles of main.

Q. I asked you about the number of meters at the date of the verification of the complaint. Has it increased since that time?

A. No, it has not very materially.

Q. It might have increased a few?

A. Yes, there might be a few.

Q. Has the consumption according to the records—has the number of meters increased from year to year recently?

A. Yes.

Q. How many meters were added in 1919, if you know, approximately?

A. Approximately 1,600 in 1919. And in 1920 up to date——

Q. How many?

A. Not very many in 1920.

Q. And in 1918 did you have an increase?

A. About 3,000.

The Master: I think we will adjourn here until ten o'clock tomorrow.

(Whereupon the further hearing was adjourned to Wednesday, August 11, 1920, at 10.00 o'clock a. m.)

$209\frac{1}{4}$ [Endorsed:] Public Service Commission, First District, Aug. 11, 1920. Bureau of Statistics & Accounts.

$209\frac{1}{2}$ United States District Court, Southern District of New York.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Before Hon. Gordon Auchincloss, Special Master.

Transcript of Reporter's Minutes.

Public Service Commission, First District, Aug. 11, 1920. Bureau of Statistics & Accounts.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York.

Barclay, 8477.

210 KINGS COUNTY LIGHTING CO.

vs.

NEWTON et al.

61 Broadway, New York,
August 11, 1920—10.00 a. m.

(Met pursuant to adjournment.)

Present:

The Master.
Mr. Moran.
Mr. Hill.
Mr. Deegan.

ANDREW J. GOSNOLD resumed the stand.

Mr. Moran: May it please the Court, I told Defendants' counsel that I would produce from the records of the company their record of the candle power tests of the gas made.

The Master: Whose record did you say—the company's record?

Mr. Moran: The company's record and the City's record as reported by the City to the company. I have here produced by the company sheets showing these tests, reports of these tests for 1919 and the first half of 1920. The candle power is taken a number of times every day in each month by the company, in some instances I noticed as many as four tests a day. The City reports to the
211 company the results of its tests once a day. The same tests are taken by the company every day a number of times a day.

The sheets I have here show these tests and also the average. I have spoken to counsel about it, and as I understand it, I can offer these — evidence, and these are accessible to the counsel for the other side and we will have prepared from them such generalization as either party may require. We do not need the hourly tests, we will need probably for the purposes of the case a statement of the average monthly by both, each test. Whatever counsel desires to take from them can be taken. That is what I will present in a convenient form, the average monthly candle power and the units in the 18 months.

I will offer this sheet here, entitled, "Candle power tests, 1919,

Kings County Lighting Company," being the tests made by the company; also the reports furnished the company by the city.

(Paper received in evidence and marked Plaintiff's Exhibit No. 15.)

Mr. Moran: I will offer for 1919 the daily calorimetric tests for 1919, being these units.

(Paper received in evidence and marked Plaintiff's Exhibit No. 16.)

212 Mr. Moran: I now offer the sheet containing the candle-power tests for the first seven months of 1920.

(Paper received in evidence and marked Plaintiff's Exhibit No. 17.)

Mr. Moran: And also the tests for heating value for 1920, being six months.

(The paper was received in evidence and marked Plaintiff's Exhibit No. 18.)

The Master: Are these tests made at the same place?

Mr. Moran: Not by the City and the Company, no. The City makes theirs at a considerable distance from the works, and the testimony will show that the candle will drop as the distance increases from the works.

Mr. Hill: The statutory place for making the tests is a mile.

Mr. Moran: A mile, yes.

Mr. Deegan: The company's tests were made where?

Mr. Moran: At the works. We will have testimony, if the Court please, with reference to those things later, as to their significance and all that sort of thing.

Direct examination (continued).

By Mr. Moran:

Q. Mr. Gonnoud, yesterday we had some discussion about the allocation you made of the assessment on the works land as
213 between used land and land leased. Are you able to tell us this morning the percentage of the assessment, and accordingly the percentage of the tax that has been allocated to the used and, and to the part leased?

A. Yes.

Q. What percentage of the total assessment do you ascribe to the used land?

A. 30 per cent.

Q. 70 per cent of the assessment and 70 per cent of the taxes you ad included in your operating expenses?

A. Yes.

Q. Now, have you got the record of the square feet areas leased nd not leased?

A. Yes.
Q. Will you give those, please?
A. The whole piece is 462,208 square feet.
Q. That is the land under water and upland?
A. This is land under water and upland.
Q. Yes.
A. Now, of that 295,855 feet are upland and 166,353 is land under water.
Q. How much of the upland is leased?
A. 64,474 square feet of the upland, and 111,280 feet of the land under water is leased.
Q. And the total leased land is what area?
A. 175,000.
Q. Hold on, now—the upland not leased is how much?
A. Upland not leased?
Q. Yes.
A. Upland not leased is 231,381 square feet.
Q. Land under water not leased?
A. Land under water not leased is 55,073 square feet.

214 Q. Now, the basis of your allocation is 30 per cent, and what was your guide on that?

A. My guide on that was the valuation made by Mr. Porter for the company, and the valuation made by a witness for the Public Service Commission, Mr. Hovenden. They split the valuation on the land leased and the valuation of the land used by the company, and Mr. Porter's split was about 29 per cent and Mr. Hovenden's was 29.75 per cent, and in order to facilitate matters, I used 30 per cent.

Q. That is, although Mr. Hovenden and Mr. Porter differed on the value of the whole property, each one of them gave about 29 per cent of their total value to the leased land?

A. Yes.
Q. Both land under water and upland?
A. Yes.
Q. And 29 per cent—and yet you have taken it at 30 per cent?
A. 30 per cent.
Q. In other words, you have included a larger percentage of the assessment than their value of the leased land?
A. Yes.

Mr. Deegan. You mean the valuation as fixed by them in the proceeding in the State Court?

The Witness. Yes, it is the proportions there.

Mr. Deegan. I wanted to get in the record just where these valuations were had.

Mr. Morgan. That is where Mr. Hovenden's valuation was

215 given. Mr. Porter, of course, gave that to us long before he gave his testimony in court, but he gave the same testimony in court.

Q. Yesterday, Mr. Gonmond, we spoke about the different items that went into operating expenses, and your allocation of your total

expenses to the different accounts, and I inquired particularly about the company's expenses for labor and services in the year, and asked you if you knew how much the company expended for labor and services, that is, for employes, and you were not able to give any figures but you told me you could. Can you give it to me this morning?

A. Yes. It is shown on page 70 of the report to the Public Service Commission.

Q. I did not look at it. Tell us what it is.

A. $290,975.77.

Q. Is that the amount that was paid out in the year to the employes of the company?

A. It is.

Q. Including everybody?

A. Yes.

Q. General Manager, Vice-President, Secretary and all?

A. Yes.

Q. Labor of every kind?

A. Yes.

Q. Now, was that all charged to the operating expense accounts?

A. No, it was not.

Q. Can you give me the total of that that was charged to the operating expense account—well, if you can't give me——

216 A. (Interrupting.) I can give you the charges directly to the operating expense accounts.

Q. All right; give us the amounts charged to the different operating accounts?

A. The total amount charged directly to the operating accounts was $252,058.23; segregated as follows——

Mr. Hill: What was the total amount of salaries?

The Witness: $290,975.77. Production expenses, $94,997.64; transmission and distribution expenses, $35,800.01; municipal street lighting expenses, $1,269.36; commercial expenses, $78,536.31; general and miscellaneous expenses, $41,454.91.

Besides this we charged into storeroom suspense and trucking suspense—these are the clearing accounts spoken of yesterday where we take care of handling of stores, etc., these get into the operating accounts indirectly, that is, they get through material and supplies and so forth. Storeroom suspense was $7,279.90, trucking suspense was $5,258.15. We have two other items, accruals, $2,598.50, and other suspense of $50.

Q. Now, those suspense charges ultimately got into the different expense accounts appearing on your exhibit here?

A. Yes, the storeroom suspense and trucking suspense.

Q. Yes, and how much of your labor, of your payroll, so to speak, went to fixed capital in 1919?

A. Fixed capital, $23,730.99.

217 Q. Just a moment now, when the labor or the expenses for labor and services was the difference between $290,975.77 and $23,730.99?

A. Yes.

Q. Or how much—about $267,240?

A. Approximately.

Q. That is all, it is just that except the odd cents. There was, however, services rendered in and about the works by men who were not on the company's payrolls?

A. Oh, yes, under contract.

Q. Under contract. Some mains probably were laid under contract?

A. Yes, mains laid under contract, and repairs to mains done under contract, repair work.

Q. But the contract payments do appear in your expense accounts that we have already got in evidence here?

A. Yes.

Q. Now, then, these payrolls or this expense that we have just mentioned is vouchered, I understand?

A. Yes, it is vouchered.

Q. Your payrolls, I understand you draw a check to the order of your treasurer or somebody for that?

A. To the order of the assistant treasurer, yes.

Q. And it is paid out through what account?

A. Paid right out through the accounts payable.

Q. That is what I mean, accounts payable—made out to accounts payable?

A. Just the same as an ordinary bill would be, a bill from

218 a dealer.

Q. You have not got like data here for the six months of 1920?

A. No, I have not.

Q. But you can——

A. I can accumulate that, yes.

Q. You can accumulate it. Now, Mr. Gonnoud, under whose direction are the payments, actual payments, made by the company made?

A. Under my direction and the assistant treasurer's direction jointly.

Q. Now, in the year 1919, and the six months of 1920 you disbursed a certain amount of money for operating expenses and other expenses. Are you cognizant of the actual payments of those accounts?

A. Yes, sir.

Q. To what extent? Please explain to the Court what you have to do with that.

A. Whenever we pay—when we pay our bills, the bill is attached to a voucher form. This voucher form is made up with a voucher and a check together, two separate sheets of paper; one is a check and one is a voucher form. The voucher form contains the dealer's invoice, and on this invoice we stamp on that with a rubber stamp—we provide spaces for signatures of the different employes handling it through the records, and we assign a number to each invoice that comes in. This voucher comes to me and I examine the dealer's

invoice, and I see that it has been received there by the purchasing—it has been signed here by the purchasing department as having checked the extensions as being correct, and the re-
219 ceipt of the goods signed for; and then it is signed to show that the material and supplies record clerk has taken care of it, and that the man who takes care of the distribution of the accounts payable has taken care of it; and then any entries in any other sub-books that are made are stamped right on the back, and the signature of the man doing that made right on there, and also the charge number, that is, the account number to which the amount is charged, is placed on there. I examine these and audit them, see that they are charged—that the charge, in my opinion, is correct. If any question comes up, I immediately call for the records, and examine closely into it to see that the charge is correct. Having checked that, I check the amount shown on the invoice against the amount shown on the voucher; then I check the amount shown on the voucher against the amount shown on the check, and I then sign the voucher and send the check and voucher to the Assistant Treasurer. He signs the check. Of course, he examines the check and voucher, too, and he signs the check as Assistant Treasurer, and then the check and voucher come back to me again, and then I countersign the check as assistant secretary, and then the check is sent out to the dealer.

Q. Now, then, was all the money, or the expenses of the company, money paid for those expenses, paid out upon checks
220 and vouchers approved by you in this way?

A. For the year 1919?

Q. Yes.

A. Practically all. There was probably something less than $100 that has not been paid as yet, bills of 1919.

Q. But whatever was paid was paid under—you draw the check for it?

A. Yes.

Q. And all that expense that we see there for 1914 has actually been paid, except $100?

A. Yes, excepting approximately $100, and, of course, that $100 appears in the account payable here, as a liability of the company.

Q. Excepting the taxes?

A. Excepting the taxes, of course.

Q. And that item there of plant withdrawn from service?

A. That is not paid because that is an accrual.

Q. Accrual; all the rest is paid out?

A. Yes.

Q. And paid by you?

A. Yes.

Q. And where it represents the purchase of material, do I understand you to say that before you make the payment, the voucher has to be signed by the person in charge of the storeroom who receives that goods—those goods?

A. No, it is signed by the purchasing department for the man in the storeroom. He has a signature on the order, you see.

Q. I see.

A. He has the receipt of the storeroom keeper, and he signs his name per his name.

221 Q. And that is evidence to you of its receipts by the company?

A. Yes. Of course, in the case of coal and oil, the large items—in the case of coal and oil the large items, we forward to the Vice-President and General Manager the bills themselves showing the amount, and we show on a memorandum showing the different charges therein; and he initials that as being O. K., so that he knows just how much we are paying for, and that the oil has been received.

Q. Then during the course of the year you use this material or a large part of it?

A. Yes.

Q. And keep account of what you use?

A. Yes.

Q. And took an inventory at the end of the year?

A. Yes.

Q. An that inventory and the record of what you used checked up with the amounts you purchased according to those bills?

A. Yes.

Q. So then you have a check, actually a check upon the amounts that you buy, by reason of the records of your consumption, so to speak?

A. Yes, we have a check thereon, certainly.

Q. And then on the labor, you told us yesterday how the man's name gets on the payroll?

A. Yes.

Q. It has got to be authorized and passed through a number of different——

A. Channels.

Q. Channels before he gets on there and is paid?

A. Yes.

Q. Who makes the payments actually to the employes of the company?

222 A. They are made by the paymaster. He receives the payroll, and he receives the check from the assistant treasurer and cashes this check. The payroll department makes up receipts for each man, showing the amount of money he is to receive for the services rendered. The paymaster then takes the payroll and the amounts of money, and he inserts those in envelopes which have already been prepared, and he pays each man. As soon as the man receives the money he signs this receipt. These receipts are sent then back by the paymaster to the payroll department who checks these receipts against the payrolls to make certain that every payment shown on the payroll has been made, and that a receipt has been obtained for that payment.

Q. Now, what you said about 1919—I take it you are speaking particularly about 1919—applies to the six months of 1920?

A. It does.

Q. I want to ask if in checking through the process of inventory

at the end of a period, you have ever found that you have paid for material which was not received?

A. No.

Q. How is that?

A. No, I have not.

Q. You have never discovered that you have made any payment for material that was not received?

A. No.

Q. Have you, in your checking, ever found that anybody was carried on your payroll who was not rendering service?

A. No.

223 Q. Never did?

A. No. That would be almost impossible under our system.

Q. The system you have over there is one devised by you?

A. Yes; the routine of it is devised by me.

Q. And under whose direction was it compiled or built up?

A. Under the direction of W. A. Freeman.

Q. And he is a certified public account-?

A. Certified public accountant.

Q. And the theory of it is, the process of it is, to prevent the company being cheated, either through paying for goods that were not received, or by paying persons who were not in its service?

A. Exactly; that is exactly the idea.

Q. Is it your opinion, is it proof against any such loss by the company?

A. Yes, in my opinion, it is proof.

Q. It is positively?

A. Absolutely.

Q. It works automatically—it will test out and detect any loss in that direction?

A. Yes; that is, what we call foolproof. We make it as foolproof as possible, and then in outlining the system I go down to the man who is going to carry it out, and I go down, for instance, in the measuring of oil—I spend whole mornings of each—several mornings each week for a number of weeks down in the production department there and go out and actually measured the oil, read the readings with the man, and then I instruct the man just how to do

224 each thing, and whenever there is any slight change necessary in the routine, to facilitate handling matters or to insure greater accuracy, I take everybody that is affected, and I call them together. We have a dining room over, and I usually call them together in this dining—each man that has anything to do with it. And then I hold a meeting there, a conference, and I state just what the system should be, and then I take any suggestions that are made by the men that are actually doing the work, and together we form instructions. Then I get these instructions out to these men, and then after that I go and see that they are followed out. I go down and watch the man actually doing the work. So that I keep in close touch with every operation of the company. It is not a case of

where I sit in one room and have this information just thrown into me, and I just gather it together in a statistical sort of way, but it is an actual process. I go out, I know these things are going on; I know of my own knowledge because I read these meters—I see these men charging out—I see this man working—I see Tom Jones working there, and I say, "What is his name?" "Tom Jones." "What are you charging his time to?" Then I go to the actual record and I find that that is the case.

The Master: How does the system operate to check on material received and not on hand at the end of the year, as having been used in the business?

225 The Witness: Received and not on hand at the end of——

Mr. Moran: Now, just think about that. You receive it and it is not on hand at the end of the year.

226 The Master: You receive it and you haven't it on hand at the end of the year,—how do you check to be sure that that has been used in the gas making business?

The Witness: Well, it is automatically checked in this way: We have a certain amount of goods, an inventory taken at the beginning of the period of the different classes of goods. You see, material and supplies are classified into the different types, wrought iron pipe, pipe and fittings are subdivided, you see,—meter repair parts and so on. Now, we know how much at the beginning of each of the periods is on hand by this inventory actually taken, physical inventory. Now, we know how much of each of those articles we purchased during the year. That added to that gives us the amount available during the year. The purchases being taken from the purchase invoices, and receipt being shown by the store room keeper. Now, during the year he issues those stores out of there, for each amount he issues out, he signs the ticket as having issued stores out. The man who has received the material to use it in the works signs it as receipt for the material. Now, at the close of the period we again take another inventory, a physical inventory. Subtracting that physical inventory from the amount available, that is the amount at the beginning of the period plus the purchases, gives us the amount we actually use. Now, if our tickets, our charges

227 out, agree with that, it is conclusive evidence that we have not received goods that have not been charged out.

Mr. Moran: Yes, but the Court's points is this: In the course of a year there will be reported by these men in the store room, in connection with the men who used the material, a certain quantity of material used. You take your inventory at the end of the year and it checks up and shows that that is all right, but the Court's question, as I guess it, is: How do you know that that material which was reported to you as being used was not stolen? Those men might have been dishonest and taken the material away and sold it. Is that the point?

The Master: He has explained it, yes. He has explained that. He has answered my question. The only addition I will make is that the same system applied to the coal and oil, is used. How do you check against any leakage there?

The Witness: Well, you see the oil and the coal is a little different, inasmuch as—well, the oil in the first place is connected up with pipe lines, there could not be any—hardly be any leakage there in the oil. There are oil meters on each one of the machines. Now we do have an approximate check by these oil meters. They are not an absolute check, because in the measuring of oil through these
228 meters, on account of the sediment in the oil, the meters do not accurately register the amount used in these machines. There could not be any leakage of oil that I know of. I do not see how it could come.

Q. Well, Mr. Gonnoud, oil and coal go into material and supplies, I think you told us yesterday?

A. Yes.

Q. And it is checked out as used?

A. Yes.

Q. And reported to your office?

A. Yes.

Q. The amount used each day and each month?

A. Yes.

Q. At the end of the year you have inventories taken of those two?

A. Yes.

Q. And oftener, probably?

A. Every month we have inventories taken thereof.

Q. And that inventory checks with the amount that is used?

A. Yes.

The Master: But your real test as to what is used, of the oil and coal used in the making of gas, is these meters?

The Witness: No, they are not the real test. The real test is the difference in the measurement of the tank from day to day, because these meters do not register correctly. Now, the storekeeper in this case goes down—that is, the man in charge of the material
229 and supplies who reads the meter on the tank to show that he has delivered that oil.

The Master: What are these figures made up from? Are they made up from readings of meters or readings of tanks?

The Witness: They are readings of tanks plus the inventory, of course, if there is to be any—readings of tanks would show the inventory, so it automatically is the inventory on hand.

Q. The meter is for a guide to the gas maker running the——

A. Just a guide to the gas maker to see how much gas oil they are using in a particular run. When they are running, they want to know how much oil they are putting in. They know that there is a variance there, and they just simply check in the amount of oil they are going to use at that time.

Q. And they check in at different rates, depending on the condition of the machine, don't they?

A. Yes.

Q. Sometimes they will put oil in faster and more in a run than at other times?

A. Yes. And then there is a difference in degrees of temperature.

Q. In order to ascertain the quantity of oil used in a year, it is tank measurements plus purchases?

A. Yes.

Q. Or tank measurements actually?

A. Yes, that is what it is.

Q. Plus purchases—according to your record there has
230 been so much delivered into the tanks?

A. Yes.

Q. And at the end of the year you have so much left?

A. Yes. But we do check the accuracy of the man who reads the tank. For instance, one man may read the tank at 7 o'clock in the morning, and then later on another man goes down and checks his reading, and he signs that,—that store room man signs the slip showing that he has delivered that oil. Now, on the other hand, somebody has received that oil. Now, the best judge as to that would be the engineer at the works, who signed that slip showing that oil has been used, and he knows how much oil he is using per thousand cubic feet; that is, he knows approximately, and it must check out practically the same, and he signs that as having used the oil, you see.

Q. You have been in the gas business long enough to notice the sort of uniformity in the number of gallons of oil used per thousand cubic feet of gas made, have you not?

A. Per quality, yes.

Q. And that kind of keeps— you keep a check on that?

A. Yes, sir, we know. We could tell right away if an unusually large amount came up that something was wrong. It would stick up like a sore thumb. We would say, "Here, they can't use that much oil, because they have only manufactured so much gas." And that would mean so many gallons.

Q. And the same on generator coal—you run the same
231 on that?

A. Yes, but it runs uniform in all companies,—of course local conditions would change it, but we do know approximately what it ought to be; and of course if it varies from that, why, we know. Now, the coal inventories are taken monthly, they are taken as an actual survey of the coal. It is measured, you see; the coal is measured.

Q. The coal bins are measured by the engineer?

A. By the engineer, and that report is made to me monthly. Now, we don't adjust it monthly, because if there is only a small variance, we do not adjust it.

Q. Have you got any record here that can show us how much you had on hand of different things on July 1st, 1920?

A. I haven't it with me.

Q. You haven't it with you, but you have it in your files?

A. Yes.

Q. And you have it as of July 1, 1920?

A. We have July 1st. We made complete adjustments of all coal as of July 1st.

Mr. Moran: You may ask.

Cross-examination.

By Mr. Hill:

Q. Referring to the special franchise tax, do you know how much of the assessment was for tangible property and how much for intangible property?

A. No, I do not.

Q. Is there anything in your records that would show that?

232 A. No. It is not furnished us by the State Department.

Q. What?

A. It is not furnished us by the State Department.

Q. Well, if it would develop that your franchise tax was one third for tangible property, that is, for pipe lines in the street and other material, and two-thirds was for the value of doing business with the pipe lines—if that should develop as the fact, and the company had made no profit, if the right to do business through those pipe lines was not valuable; would it be your opinion that that tax should be reduced and application made therefor?

Mr. Moran: Objected to, as the witness was not offered for any such legal question.

The Master: I do not think that is competent. I think that if it was the fact that—as stated in your question—it would not make much difference what the witness's opinion is on the subject at all.

Q. Can you obtain from the State Department that information as to how much is tangibles and how much is intangibles?

A. I don't believe so.

Mr. Hill: Will the counsel for the plaintiff seek to obtain that and offer it here?

Mr. Moran: If I could get that information from the Tax Department, I could get very substantial consideration for it from

233 the Public Service Commission in the state. I would be in a position to demand almost any price for it. It is absolutely unobtainable and always has been, and we have always insisted on it and asked for it, and have never been able to get it, for this company or any other company.

Q. What price do you charge per thousand feet for gas served to the consumers, private consumers?

A. 95 cents.

Q. How long have you been with the company?

A. Since January 1919.

Q. And what price have you charged since that time at all times?

A. 95 cents.

Q. Have you examined the books to see what price was charged to consumers prior to that time?

A. I have taken notes, note of what has been charged prior to that time from time to time.

Q. How much was charged?
A. I don't—I haven't the figures here, but 95 cents was charged since 1916, I know.

Mr. Moran: I can state that for you.

Q. Since 1916, it has been 95 cents?
A. Yes.

Mr. Moran: Since 1906—from 1906 to July 1, 1914, the rate was $1.00 and from July 1914 to the present time it has always been 95 cents. Now, it may have been a dollar prior to 1906, but not for any very long time. But it was $1.25 back in years gone by. It has been gradually reduced from 82 voluntarily reduced down
234 to a dollar—95 cents. It has been a voluntary reduction all the way.

Mr. Hill: There is a concession that you have never charged less than 95 cents since the passage of the statute of 1916?
Mr. Moran: Except to the City.
Mr. Hill: Except to the City?
Mr. Moran: Right.
Mr. Hill: That is a concession?
Mr. Moran: Yes. I think we are very foolish we did not carry it out in court.

Q. How much oil, water gas oil, did your company purchase and pay for, according to the measurement of the seller during the year 1919?
A. 5,587,191 gallons.

Mr. Moran: Would you have him tell how many shipments approximately that would make?

Q. How many shipments would this make?
A. 31 shipments.
Q. How much water gas oil did you receive during that period according to the measurements which you took yourself at your tanks—I mean which your company took at the tanks, not personally?
A. I am not in a position to state that, but I can secure the figures.
Q. Will you secure it?
A. Yes, I will do that.

The Master: I do not know what other witnesses Mr.
235 Moran is going to put on the stand, but we must remember that the present witness is the auditor. I mean, I don't assume that the present witness knows the technical gas business. Do you, Judge, I mean?
Mr. Hill: No, but he says——
The Referee: I am not referring to any of your questions, but——
Mr. Hill: But this particular one.
The Master: I mean those particular questions—I am just reminding you of that fact. I think we will have to confine ourselves to these books that he was testified to.

Mr. Hill: This is his information from the books, as to the amount of oil which they received.

The Master: Was that in these compilations?

Mr. Hill: Well, it is in the books which were offered in evidence.

The Master: Oh, yes, that is right.

Q. Is it in the books which were offered in evidence,—the question of the amount which you received according to your measurements, or according to the measurements of the company?

A. It would not be shown separately in the books, no. We accept the billed amount, we show on our receipts we get from the persons reading the oils,—unless of course it actually agreed, which it does in some instances.

236 Q. Now, you say some one measures this oil down at the works?

A. Yes.

Q. In order to know how much is available during the year?

A. Yes.

Q. And the measurement which he makes is reported to you is it not?

A. Yes.

Q. And you enter it on the books which were offered in evidence yesterday somewhere?

A. If there is any adjustment necessary on it. It is already shown in the book, of the amount we have on hand.

Q. So you can obtain the information which I asked for in that question, from the books?

A. From the records, yes.

Q. Now will you also look and see if there is any shortage in your inventory on oil. Is there an entry on your gas oil account of a difference between your book records of the amount of oil which should be on hand and the amount which you had on hand according to your physical inventory between February 28th, 1920, and March 1st, 1920, the difference amounting to a shortage of 18,605 gallons?

A. I don't remember the exact figures, but there is an adjustment. There has been an adjustment made.

Q. What was that occasioned by, if you know?

A. I don't recall the exact nature of it, but it was either by misreading or some such thing as that in reading.

Q. Will you look that up and explain it?

A. Yes.

237 Q. And will you at the same time look up and learn and explain whether there is a shortage of 148,982 pounds of boiler coal, and 35,084 pounds of anthracite coal as of June 30, 1920?

A. These are not shortages, they are merely adjustments of the physical inventory.

Q. These are shortages in the inventory of June 30, 1920, according to my information.

A. I don't get the point of the shortage. I don't undertand that.

Q. Will you look that up?

A. An inventory is taken, and this would be not the shortage on the inventory, but the shortage shown by the books, shortage or overage shown by the books.

Q. Well, I assume that your books showed on hand at that time 500,000 pounds of boiler coal which was not in fact on hand?

A. Not in fact on hand, that would be the case, yes.

Q. And show on hand 35,000 pounds of anthracite coal which was not in fact on hand at that time?

A. Yes.

Q. Is that what your books show as of that date?

A. I would not say positively as to the figures.

Q. But you know there was a shortage as of that time?

A. There was no shortage; the book figures were short.

Q. Well, how do you account for that?

A. Well, we weigh the coal in when it is going into the operations in small—as it is used in small buckets, buggies; and of course weighing a great amount of coal going in in small quantities, there
238 is always a variance between that and the coal weighed as received, because the coal weighed as received is weighed in large quantities. So we try to meet—we merely use the coal as reported, as weighed, weighed going into the operation—we keep that so as to keep the accounts of records from month to month showing the amount of coal used during that time as nearly as possible. But we rely entirely upon the inventories as taken to tell us how much coal we have on hand and how much coal has been used. That is really the controlling factor in the last analysis there, you see.

Q. Then as I understand this shortage, this entry——

A. It is not a shortage.

Q. This entry if it is correct, to which I have called your attention, means that if you purchase and paid for say 3,000,000 pounds of coal during some period prior to June 30, 1920, you had only drawn from that pile containing 3,000,000 pounds, two and a half million pounds according to the weight in those books, and the pile was exhausted. To use an example, is that it?

A. Yes.

Q. And you say that it was not an actual loss, but it resulted because you did not weigh accurately the amount that was taken away in the buggies?

A. It is not a case of weighing accurately, but it is that——

Mr. Moran: Human equation.

A. (Continuing:) Human equation in there. There
239 may be small inaccuracies in weighing, and then of course there are fractions of pounds and so forth coming in. If a man finds the scale reading a half a pound, why, he is going to call it the nearest pound; that is what he is going to do.

Q. I understand. And that is your only explanation for that amount?

A. That is the explanation for it.

Q. Wouldn't it impress you that half a million pounds was rather a large shortage?

A. No, it would not, with the amount of coal we use.

Q. Will you look in your books and ascertain when prior to June 30, 1920, you made another adjustment on account of the shortage—that is, for how long a period did the shortage accumulate?

The Master: Well, ought not that to be worked out during the entire period?

Mr. Hill: Yes.

Q. Will you give us those facts from January 1st, 1919?

Mr. Moran: Judge, those things are shown in the journal that is now in evidence.

Mr. Hill: What?

Mr. Moran: Those adjustments—you see the journal entries, Judge, from week to week charge out of material and supplies into the operation what is reported from day to day and from month to month, and if they take an inventory and find they have
240 not charged out enough, then they make another journal entry to charge it out according to. Is that right?

The Witness: Yes, exactly.

Mr. Moran: Charge it out according to the entry in the journal.

The Master: How often do you do that?

The Witness: We take the inventory once a month and we adjust where there is a big variance—of course where there is not a big variance we do not make any adjustment.

The Master: You say the adjustments appear in the journal that is in evidence for 1919?

The Witness: Yes.

The Master: And the ones we are referring to for 1920?

The Witness: Yes.

The Master: Well, can a compilation be made of that?

Mr. Moran: Surely.

The Witness: Yes.

Mr. Moran: We will have the compilation made from the journals, showing the adjustments in the coal and oil in the period in question, full period in question. If the Public Service Commission accountants have done that, why we will take their
241 figures and just verify them.

Mr. Hill: They just have an item here on that. That one item is all I saw.

Q. On your Exhibit 13, you credit, have in red ink a production of $23,283.27 worth of the residual water gas tar?

A. I see it here, yes.

Q. Is it a fact, and do you know whether you deducted from that figure before entering it here, $12,120 worth of the residual tar during the six months ending June 30, 1920, on account of loss of that amount?

A. Not on account of loss of that amount. We deducted 150,-

000—as I remember it, approximately 150,000 gallons of the tar. It was not a tar, it was an emulsion. On account of the grade of oil we were receiving, we could not produce tar that was burnable, so—that is, we did not produce tar that was burnable, and so 150,000 gallons of that tar had to be discarded as it was not available to burn. So we could not use it in the boilers, it is not tar that was produced; that is, it was not a residual that was worth anything.

Q. But the books disclosed 150,000 gallons more?

A. Oh, that was not it. We had trouble at the works, the engineers had to open up the pipe lines there, and they discovered that there was a great amount of sludge, this emulsion in there as being produced from the operations; and they estimated this
212 amount of sludge or emulsion, whatever you might call it, and it amounted to 150,000 gallons. So therefore that 150,000 gallons was not produced, we did not produce 150,000 gallons of tar. So we estimate the amount of production there on the percentage basis, that the oil will yield so much tar. Now, if some other outside cause, some other outside fact comes in there, such as producing something that is not tar, we must of course deduct that from the amount that we show as having been produced.

Q. Now, didn't you have an accident to your tank down there containing that residual?

A. Not that I know of.

Q. Well, will you inquire and see?

A. Yes. I am quite sure we did not, that we had no accident down at the works regarding the tar tanks.

Mr. Moran: The tar tank broke entirely away this year.

The Witness: I am totally ignorant of anything like that.

The Master: This witness does not know anything of that.

Mr. Hill: All right.

Q. What entry was put on the books touching that 150,000 gallons? Just tell me the entry that was made on the books, or refer to it?

A. Why, in that case we did just the opposite. 150,000 gallons had already, you know—had already been credited to pro-
213 duction as having been produced, so then it was not produced——

Q. Or it was not there?

A. It was there, but it was not usable, the same thing. It was not used——

Q. But do you know that was lost as the result of the accident? Have you knowledge of that?

A. Yes, I have knowledge that this 150,000 was not an accident. It was dug out of the pipe lines, when they discovered this, that they could drive the gas up through.

Q. Your books showed 150,000 gallons more than you reported, than you charged—you credited it with 150,000 gallons which you found was not available for your use, and was not in fact residual?

A. Was not in fact a residual.

Q. But at one time on your books there appeared 150,000 gallons more than you reported here?

A. At one time, yes.

Q. In your miscellaneous general expense of $10,397.02, is there included $3,000 for auditing expenses at the rate of $500 a month?

A. Yes, there is.

Q. To whom is this amount paid?

A. It is paid to W. E. Freeman.

Q. What?

A. W. E. Freeman.

Q. What services does he render for that $500 a month?

A. He renders personal services in conferences regarding the systems, the routine of the work; and he has a man at the office who checks vouchers and so forth, does checking work and
244 checks up the work to see that the work, the routine is being properly carried on.

Q. Who is W. E. Freeman? Where does he live? Where is his office?

A. His office is at 80 Broadway. He is a certified public accountant.

Q. And you pay $500 a month for his services right along?

A. And the services of his assistants.

Q. Right along, at all times?

A. Yes, approximately that.

Q. That is, that is over 1919 as well as 1920?

A. Yes, sir.

Q. He and assistants simply supervise your works?

A. Well, more as a consulting accountant.

Q. Or supervise, and you consult him as an expert on keeping accounts?

A. Yes, we consult him.

Q. In the formulation of a system?

A. Yes.

Q. How much of the time is his representative at your office?

A. Practically all the time he keeps a representative there at the office. It is on and off, because sometimes he is not there; but most of the time he is at the office.

Q. What is the necessity for that?

A. Well, it insures greater accuracy in the carrying on of the work, and wherever there is anything affecting the system, you see, the routine of system, it is necessary to have him.

Q. Aren't you qualified as an auditor to perfect the system
245 and see that matters are accurate?

A. I am qualified, yes, but in my position there, on account of the great number of my duties, I have that assistant from him. I have him to call upon to help in any kind of work, you see. My duties there as auditor and assistant secretary not only take in that phase of the situation, the accounting phase, but I also have supervision over the application department and over the works and branch offices, so that my time is occupied fully during the day.

Q. And your salary is what?

A. My salary is $4,200 a year at the present time.

Q. In your account, in the account appearing in the books un
the heading, "Repairs of furnaces, boilers and accessories" for
year 1919, was there expended under this heading $14,329.05?

A. I believe so. Yes, that amount was expended for that.

Q. Can you, from any data which you have from the books
the company, ascertain the amount that was spent for this item
1918, and in 1917?

A. Yes, I can.

Q. Well, will you ascertain if there was spent for this item
1918, the sum of $3,895.08, and in 1917, $3,375.27?

Mr. Moran: Just a moment now. I told you to bring all y
annual reports, didn't I?

The Witness: Yes.

Mr. Moran: You have got them right here. Just t
246 and tell him what they are, right now. We have all t
data right here. The annual reports will tell all th
things, and we have them right here. I knew you would wan
go back in prior years, and I had them all brought here.

A. The amount shown in 1917 is correct as quoted by you.

Q. That is, $3,375.27 in 1917?

A. Yes. In 1918 the amount quoted by you is correct, tha
$3,895.08.

The Master: Are we going back to 1917 and 1918?

Mr. Hill: I just wanted to inquire of him why this increas
500 per cent in 1919 over those two years is in that item?

Mr. Moran: If you want for the purpose of comparison—just
the purpose of comparison—if you want for the purpose of c
parison in 1919 with prior years, we will have prepared and bro
in in the same form as we have got for 1919, our 1917 and 191
if you want it.

The Master: You mean these? (Referring to previous exhib

Mr. Moran: Yes, sir, we will have brought in, in just the s
form. That will simplify it, so you can make any comparison
want.

Q. How do you account for that marked increase in 1919
the two previous years?

247 A. More repairs necessary, increased cost of material,
creased cost of labor.

Q. A 500 per cent increase in labor?

A. It was not all labor.

Q. Or materials?

A. Or materials either. But then the cost of repairs in
period is not comparable to the cost of repairs in another pe
because repairs become necessary each day, and because we ha
to take one year rather than another year to make those repai
we can't make the repairs that are actually necessary within
period that they are accounted for, within that period that is to
My be I can make it a little more clear here. Now, as we

machines they become daily more and more in condition wherein they need repairs. When they get to a certain point then we make repairs; for instance, in boilers, the boiler tubes are gradually becoming deteriorated and it is necessary to replace those boiler tubes; but we may replace all the boiler tubes within a certain accounting period, but the deterioration, the wear and tear on that particular boiler or that particular equipment may have taken place during three prior years, or any number of prior periods. But the expense of that is borne within the period where the replacements of those boiler tubes was made necessary.

Q. During the year 1919, was any work done upon
248 furnaces and boilers that was charged to capital account?

A. Yes.

Q. How much in 1919 was charged to capital account?

A. $59,748.80.

Q. That was your new automatic stoker?

A. That covered a part of that. You see it ran from one part of the year into another.

Q. Did some of the expense of the automatic stokers go in to make that $14,000?

Mr. Moran: Of repairs?

A. I don't believe so. It may have. I don't recall now whether it is or not.

Q. That is the fact. You did not during the years 1917 and 1918, permit tubes and just ordinary repairs to accumulate, so that in 1919 you had to spend $15,000, while in the other two years you just spent $5,000, did you, in ordinary repairs?

A. I am not in position to make answer to that because I am not——

Q. All right. Then I will withdraw the question.

A. Because, you see, I do not know how the thing is run down there.

The Master: Of course the witness does not know anything about those repairs. They only come to him through the books, I suppose.

Q. Now, is there an item for 1919, of repairs of water gas sets and accessories?

A. Yes.

Q. Of $17,405.77?

A. Yes.

249 Q. Now, for the purposes of comparison will you ascertain what those items were in 1917 and 1918?

A. $6,408.06.

Q. That is 1917, isn't it?

A. That is 1917. 1918, $7,413.99.

Q. Well, now, there is an increase of 300 per cent since 1917 in that item. How do you explain that, if you know?

A. I think that I can explain—I know that I can explain part of that. In 1919, we enlarged our generators, and part of the cost

of enlarging those generators is chargeable to maintenance and reserves. This is under a ruling in the public Service Commission, by which we are to abide. We must follow this ruling of the Public Service Commission. They say when you enlarge an item, you must charge the difference between the original cost of the item, and the amount which the item would have cost had it been installed there, deducted from the cost of making the change. It is very clearly set forth in their uniform system of accounts. I might read that.

Q. All right. Except for the uniform system of accounts, you would have charged that all, all that expense of enlargment to capital, would you not?

A. No, I would not. I would have followed there ——

Q. Well, whether there was any such rule or no?

A. Yes.

Q. Well, as a matter of fact, the portion of that $17,000 has really gone into structures and permanent betterments down

250 there, *wasn't* it?

A. No.

Q. Well, hasn't it enlarged these gas making machines?

A. That portion of the amount expended that has enlarged those gas making machines has been charged into capital. But only that portion.

Q. What is this, then?

A. That is the portion. I just explained to you, that is the portion.

Q. I did not get it.

A. Well, now, I had better read that ruling there of the Public Service Commission in their pamphlet there. It explains it a little more clearly.

Q. That is in evidence. If the amount which it cost to enlarge that gas making machine has been put into the capital account, tell me what this is, this $17,000?

A. Well, now, here we take an exhibit here ——

Q. Is this a portion of the expense of enlarging that gas machine?

A. A portion of what?

Q. Of the expense of enlarging the valves and pipes on that gas machine?

A. It is not a part of the enlarging, it is the maintenance. It is really the cost of the maintenance of the gas machine.

Mr. Moran: That is all the question that is asked you.

The Master: Why wouldn't it shorten this, simply to put in a transcript of the account showing what the items are?

251 Mr. Hill: All right.

Q. I will ask you to produce a transcript of the account, of the repairs and improvements for the gas making machines during the year 1919, which account will indicate by items what is put into the capital account and what is charged here for repairs and accessories?

A. That is in the case of water gas sets and accessories?
Q. The item of $17,000, water gas sets and accessories?

The Master: I think that procedure would be the easiest, and the simplest, at any rate for the Master, with reference to every item that you wish to go into at any length—very much simpler than having this witness testify rather vaguely from the books and the generalities, to have simply a transcript of that particular part of the account go in.

Q. I also call your attention to repairs of meters, and to make an account, or explain, if you know the facts, why this item of $22,998 for the year 1919 was so large in comparison with the same item for 1918, then being only $11,585?

A. Well, the Public Service Commission have a ruling that meters of the company must be changed every seven years. That is, a meter being out in a district for seven years must be changed, and when — change that meter and replace it, we repair that meter.

So we changed more meters in one year than we changed in
252 another year, and we repaired more meters in one year than we repair- in another.

Q. Will you prepare an account showing the number you prepaired in 1918 and the number repaired in 1919, from your books, and send it here for the Master's consideration?

Mr. Moran: Can't you tell how many meters you prepaired in 1919?

A. I know how many we repaired in 1919. 6,600.

Mr. Moran: What?

The Witness: 6,600 we repaired in 1919, in round figures.

Q. There are uncollectible bills of $10,816.40, mentioning your schedule of 1919. Did all those accounts accrue in that year?

A. No.

Q. How many of them accrued prior to 1919?

A. I don't know.

Mr. Moran: All of them.

The Witness: No. Practically all of them.

Mr. Moran: All of them, certainly, all of them. You do not write off in 1919 any gas you sell in 1919; you did not write off in 1919, did you?

The Witness: In some cases, yes.

Mr. Moran: If a fellow dies or something?

The Witness: Yes. If we can't collect the bill, or up to——

253 Q. Back over how long a period does that $10,000 extend?

A. Different periods. I can't tell. The account becomes uncollectible within a certain period, and the Commission says when an account becomes uncollectible within that period it should be charged off at that particular time.

Q. Here you have charged that in as an expense of manufacturing gas in 1919?

A. In accordance with the Public Service Commission's ruling on it.

Q. That is a very wise rule, probably, for the Public Service Commission. But I would like you to tell me if you can and will, how much of that indebtedness accrued prior to 1919?

A. I can't tell.

Mr. Moran: Well, the greater part of it did, didn't it?

The Witness: The greater part of it did, yes.

Q. In 1920, you have an item of $5,542.13 for uncollectible accounts. When did that accrue?

A. We accrue that amount from month to month. That amount there we set up, we take 75 100 of a cent for every thousand cubic feet sold to private consumers; we estimate the amount on that basis, and that gives us the amount of uncollectible bills. That basis is figured on past performances.

Q. Your $10,816 is not then a footing of accounts which were actually charged off in 1919?

A. It is, in 1919.

Q. It is?

A. Because we adjust that at the close of the year when
254 we write off the accounts, then we adjust it at the close of year.

Q. That $10,816.14 is an amount which you arrived at arbitrarily by some system of percentages?

A. No, it is not.

Q. Tell me how you do arrive at it then?

A. Well, the actual amounts we wrote off were—the actual amounts we write off we accrue at the actual percentage from month to month in order to get the expense within that monthly period. At the close of the year when we write off the accounts, as we write off the accounts, we adjust the difference at the close of the year. In this case, you will note there the cents per thousand is different in one year than it is in another year, because one is an actual accrual and the other is an actual amount.

Q. Yes. $5,000 for 1920 is an estimate then?

A. That is an estimate, yes.

Q. And the $10,000 all accrued prior to 1919, substantially?

A. Substantially, yes.

The Master: Well, how much accrued during 1919? How much did you charge off of the 1919 bills in 1919?

The Witness: It is hard to tell, your Honor. You see, a man may have a bill extending—when the man closes his account, we endeavor to collect the bill. Now, his bill may extend from December, 1918 to some period in 1919. Evidently we can't take
255 each individual bill and find out how much of that money was due in 1918 and how much was due in 1919. The account becomes uncollectible during that year.

The Master: No, but you do not charge off as uncollectible bills for gas sold during 1919 in 1919, do you?

The Witness: We do, when we can't collect the bill. When a party moves, if he moves away and we can't locate him, we make every endeavor we can to collect. But in some cases the man died. But in most cases we hold it for a year, and we endeavor to collect

during that year, and failing to do it in that year, why, then, we write it off.

Q. What are your efforts to collect?

A. I beg your pardon.

Q. What is your system of seeking to collect from delinquent debtors?

A. We endeavor to collect a current account by notifying the consumer that the gas service will be discontinued if the money is not forthcoming within a certain time. Where a consumer moves out of the district—where a consumer moves within the district from one premise to another we follow him through the former address. Where he moves out of the district, we attempt to collect by means of letters, and then where the amount warrants it we put it in the hands of an attorney.

256 Mr. Moran: Collection agency?

The Witness: Collection agency or an attorney.

Q. Now, there appears in 1919 an item of $12,872.46 for plant withdrawn from service. Do you have personal knowledge whether any of the plant was actually withdrawn from service during that year?

A. Yes.

Q. Was it that amount?

The Master: As I remember, that was testified to as having been one per cent.

Mr. Hill: One per cent.

The Master: One per cent on every thousand cubic feet.

Mr. Moran: One cent.

Mr. Hill: That is the way they arrived at it.

The Master: Well, it is a depreciation account, isn't it?

Mr. Moran: No. We will have to cover that by other witnesses. I tried to bring that out yesterday and counsel would not allow me to.

Mr. Hill: I simply asked him if he knows whether there was anything withdrawn.

Mr. Moran: Well, there was, but is was not that—probably less, but it ought to be more.

The Witness: Cost of equipment retired was $8,363.23.

Q. But this amount was simply one cent on each thou-
257 sand cubic feet of gas manufactured, that $12,000?

A. Yes.

Q. That is, $4,000 more, in round figures, than the amount actually withdrawn?

A. Yes.

Mr. Moran: Than the cost of plant. What difference does it make, Mr. Gonmond? It is the cost of the plant withdrawn from service?

The Witness: Yes.

Mr. Deegan: That is based on a thousand cubic feet of gas sold, isn't it, in a month?

The Witness: Sold.

Q. Now, as to the item of $8,079.40, under the same heading of six months ending June 30, 1920, do you know whether there was any plant actually withdrawn during that period?

A. Yes. I don't know the amount, however. I can furnish it.

Q. Can you furnish me that?

A. Yes.

Q. You haven't it in these books?

A. No.

Q. Have you had any experience with other gas companies?

A. No.

Q. In 1919 under the heading "Works superintendence," there is an expenditure of $15,866.43?

A. Yes.

Q. In the six months of 1920, there is $11,639.36, or an increase of about 50 per cent. Do you know the cause of that increase?

A. Increase of fifty per cent—I don't follow that.

Q. For six months it is $23,000 as against—for a year
278 the 1920 rate would be $23,000, as against $15,000 in 1919?

A. There is not a fifty per cent increase there, Judge, or anywheres near that.

Q. Well, $11,000 is the amount in 1920?

The Master: He means at the rate of fifty per cent?

A. There is $11,000 there.

Q. Yes, but that is for six months.

A. I see.

Q. *Twice* that?

A. Well, that would be due, of course to increase in wages and increase in the amount of supervision necessary in the increased business. You see, that is reflected in the cost per thousand cubic feet made, you see. We have, if you will note there, besides the amount of $15,866.43, we show .0101 cents per thousand cubic feet made, while the cost in June of 1920 shows .0123.

Mr. Moran: A difference of how much?

The Witness: A difference of .22 of a cent

Q. Whose salaries went into that $15,866.43 in 1919?

A. Engineer of the works, while engaged in the operations, the clerks, that is, the clerks in the works office, the draughtsmen—well, the draughtsmen would be under the—not the draughtsmen *by* the chemical—two chemists.

Q. Wouldn't the account show——

A. Yes, but the account won't show every individual that is charged in there. The chemists—well, it would be the clerks
and the chemists and the engineer at the works, and the
279 for-men, night for-man and day foreman.

Q. Is the increase in 1920, the result of an increased salary or an increased force?

A. Why, the increase is not due to any one of those items entirely. The increase in salary, the increase in the amount of time of engineer to operations, rather than to production would have an effect on there.

Mr. Moran: To operation?

The Witness: To operation and to—not production, but to new capital, the installation of new capital. For instance, our engineer at the works there, part of his time is charged into new capital, where we put in new capital. It is necessary for him to go down and examine the new capital to see that the amount is correctly entered, or to supervise the installation of it.

The Master: I do not think this inquiry would be helpful unless you take into account the increase production also. Do you, Judge? Because, I mean, I do not see how you could get any possible ratio there that would be at all interesting, unless you take that into consideration also.

Mr. Hill: Well, the percentage, the amount per thousand appears. The cost per thousand cubic feet appears right there as to both of them.

The Witness: But even there on individual items like this, we can't——

260 The Master: According to these figures, if they kept up at the rate they went for the first six months in 1920, their gas sales would be in the neighborhood of 1,600,000,000, while last year was 1,287,000,000. Of course, that has to be taken in in figuring out these expense accounts. Let me ask a question: For the six months in 1920, your production was at a greater ratio, a greater rate, higher rate, than it was in 1919, wasn't it?

The Witness: Yes.

The Master: According to these statements. And I suppose you claim—although it is not very clear in the evidence here—that the expenses were greater during 1920, during the first six months of 1920, than they were in 1919, the expenses of production?

The Witness: Were greater, yes.

The Master: Well, now, is there any way of working out on these charts—I should think there would be——

Mr. Moran: Comparison?

The Master: Comparison based on production?

Mr. Moran: Yes.

The Master: Of 1920, with the prices of 1919?

The Witness: Well, it is shown there in the major items.

Mr. Moran: That is shown there first in the number of
261 cents per thousand that it cost to—now, we are talking about works superintendence. There is another exhibit.

The Master: Well, I mean anything—I mean any of these items.

Mr. Moran: Yes. Coal, for instance, is 8.77 a ton in 1920, and it is 8.407 in 1919.

The Master: Yes, but what I am getting at is this: Supposing in 1919, your production were at the same ratio as it was in 1920, that is, supposing it was; can you work out these figures the same way?

The Witness: Yes, we could take the same production and mul-

tively it out, but it would not mean—it would not explain everything. We have different operating conditions in 1920 than in 1919.

The Master: I know you have different operating conditions.

The Witness: There are different seasons. For instance, we had a mild winter in 1919, while in 1920, we had a severe winter, you see.

The Master: I do not want to interfere with the presentation of the case, but this seemed to me as if it might be helpful.

The Witness: I do not think it will help. It might in some particular cases.

262 The Master: For instance, there was one item here appearing on Plaintiff's Exhibits 6 and 13, these residuals, water gas tar. Now, in the six months of 1920, there was a smaller production ratio of that residuals, than there was in 1919, very much smaller, though you were producing gas at a greater rate?

The Witness: I explained that in the testimony this morning.

The Master: Did you explain that? I guess I did not hear it.

The Witness: We figured that a gallon of oil will yield a certain amount of tar and we go ahead and we put that amount on the books; and of course, then that is checked up with the amount used, the tar as it is used, which is pumped up into tanks of a known capacity, and then the tar is used out of these tanks. Now, in 1920, we got a poor quality of oil, but we continued to use this same percentage and credit the operation; but we found that 150,000 gallons of that tar was unusable, we could not burn it; it was not a residual, in other words, we could not burn it so therefore it was not a residual. The tar produced by this number of gallons of oil in 1920 was less by this number of gallons than in 1919, due to the difference in the quality of the oil. Those are the difficulties we are going

263 to run into.

The Master: At any rate, so far as the books are concerned that is all that you—that was the amount that was passed up to you to credit to that account?

The Witness: Yes. Well, of course, more than that, 150,000 had already been passed up to me, and I had already credited it. Then I made the adjusting the journal entry when this 150,000 was discovered to be unavailable for use in the operations.

The Master: I see.

The Witness: Those are the difficulties we are going to run into if we try to analyse any more clearly than is shown on those items.

Mr. Deegan: May I ask what did you do with the 150,000 gallons of tar, when you found that it was unavailable for fuel purposes?

The Witness: It was thrown away.

Mr. Deegan: You did not make any attempt to get anything for it?

The Witness: Why, it was not worth anything. No one would buy it. It was not tar, it was just an emulsion. Of course, I don't know just what its consistency was, but in the minds of the engineers it was not worth anything, they could not sell it.

Mr. Deegan: The engineers told you that it was not usable

264 for any purpose?

The Witness: Yes.

Mr. Moran: Did you see it yourself?

The Witness: I don't——

Mr. Moran: Didn't you see some of it yourself?

The Witness: I don't remember seeing any.

Mr. Moran: I saw it. It is down in the yard now, as a matter of fact. We saw it the other day when we were down there. It is black, thick.

The Witness: Oh, I did see—I remember now having seen some of that. Of course, I could not tell from the appearance of it whether it was not burnable or not, from my standpoint.

Mr. Moran: If you saw a pile of mud, you would know it would not burn?

The Witness: Yes, I imagine it would not.

Mr. Moran: We have engineers—the manager will cover all those things.

Mr. Hill: The works superintendence, you mean?

Mr. Moran: What do you mean—the cost of works superintendence?

Mr. Hill: Yes. Carrying out his Honor's theory in part, is it a fact that the cost per thousand cubic feet in 1919 for works superintendence was 1.01 cents; that is, was it .0101.

265 The Witness: Yes.

Q. And for the six months ending June 30, 1920, was it .0145?

A. No, in 1920 it was .0123.

Q. That is, on the amount made, yes. Boiler house labor, how did that compare in cents per thousand cubic feet between 1919 and 1920?

A. In 1919 it shows .0155, in 1920, it shows .0220.

Q. Now, this was increase of wages or employes?

A. It was both increase of wages and increase of employes. We had trouble down there for a number of months with our Clark stokers, the automatic feed stokers, and it was necessary to employ about 18 more men, that is, six men to a shift, to shovel the coal, and fire the boilers; where in 1919, we did not have that trouble, and it was automatically fed. We fed more coal per thousand in 1920, than we did in 1919. That is shown on the reports, and there was an increase in wages also that would be reflected in that.

Q. Is there any account here showing payments to superannuated employes or employes?

A. No, because we haven't any such payments—made no such payments.

Q. Are there any accounts for advertising in any of the publications or magazines?

A. They go right into the general accounts, yes.

Q. What account does that appear in, what is the title?

A. That would appear in miscellaneous general expense.

266 Q. What is the amount of it for 1919 and 1920?

A. Now, do you want the net amount?

Q. What did it cost to publish this magazine?

A. The net amount? You see, we published the magazine and it cost us so much to print the magazine, but we are compensated partly by the advertising.

Q. In that advertisement you charge the time of the men that get the advertisements?

A. The time of the men——

Q. That go out and solicit the copy?

A. Why, we don't employ anybody to go out and solicit those advertisements.

Q. Well, does somebody go out and solicit them?

A. Not to my knowledge. They are solicited, I suppose in correspondence about other business. We can't possibly say—the matter is so—the growth in 1920—I haven't the 1919—for 1920 the cost of publishing was $400.55, less the return from advertising of $270.30, leaving a net cost to the company of $130.25.

Q. What is this magazine?

A. Why, it is a magazine that is published.

Mr. Moran: Records the important events in the company's daily practices.

The Witness: For the use of the employes, for their education and for greater cooperation between the employes. It mentions different employes' names in there, and in some instances I have written articles there outlining the routine of systems that are carried
267 on in the office; and this gets to the employe, and they read that at home, and they get more acquainted with their work that way than they would by just merely telling them.

Q. What was the amount in 1919?

A. I don't know, I haven't it right here. But $130 was six months, and it would be——

Q. $260 for the year?

A. Yes, it would be about that.

Q. About that?

A. Yes, it was a negligible quantity, a negligible amount it would be.

Q. Now, do you know the number of employes you have in your commercial department now?

A. I have about 112. I don't know exactly. I can give the figures for you.

Q. Do you know the amount of wages to this 112 salaries?

A. I know the salaries paid to the different individuals, yes.

Q. Can you make a computation and give that to me later on?

A. Yes.

Mr. Moran: Don't undertake something that you can't do this summer. You know—you want the name of each man working there?

Mr. Hill: No, I will tell you. It appears—that is, I was going to follow it up if he knew—that you have 48 employes in the commercial department in 1916 and you had 57 in 1917 and you had 88 in 1918, and you have 112 now.

The Witness: About 112 is what I figure we have.

268 Q. That is what you say?
A. Yes.

Mr. Moran: That has a bearing upon the economy of labor and wise management of that commercial department. That is my thought.

The Witness: Then, of course, the cents per thousand there; and then if you take the employes, you have got to find out, yes, have got to know whether they are seasoned employes, or whether they are men or women.

Mr. Hill: All right. Will you ascertain for me and state whether it is a fact that in 1916, there were 48 employes of the Commercial Department, and if their salary was $41,000, their aggregate salaries, and if in 1917, there were 57 employes and their aggregate salaries was $49,000, and in 1918 if there were 88 employes receiving an aggregate salary of $85,000; and you say there are 112 employes, and I would like to know what their aggregate salary is. This is just in the commercial department.

The Witness: Aggregate salary for what period?

Q. For a year?

A. 112 is now as of today. We haven't a year—you don't want me to go back to June, 1919 and June 1920?

Q. I would like to have it—what I would like is the number you had in 1919 and their aggregate salary?

A. Yes.

Q. The number you are carrying so far in 1920, and what
269 their aggregate salary for a year would be?

A. Yes.

Mr. Hill: It has a bearing upon ——

Mr. Moran: Oh, now, right on that, as bearing on economy of management, if the defendants will indicate any employe that is in the commercial department or any other department that they think is a supernumerary we will scratch his name off if we can't justify his employment. And we would like to establish the fact on any contest here in reference to any employe. But we can't—it is difficult to prepare statistics to meet every thought that runs into a man's mind. Now, the number of employes in the commercial department will vary, first with meter readers, first with the number of meters you will need more meter readers. If you got more meters you will need more meter readers, if you have got green hands than if you have seasoned men; you will need more bookkeepers to take care of the commercial—to take care of the customers' ledgers, when you have more commercial customers' ledgers. They change the number of customers' ledgers every two years, I think.

270 The Witness: Yes.

Mr. Moran: There are more customers' ledgers now than there ever were before, I think. There are how many now?

The Witness: Seventy-six.

Mr. Moran: Seventy-six, requiring how many bookkeepers?

The Witness: Eleven bookkeepers.

Mr. Moran: Eleven bookkeepers. Now, number of employees is not important because they will take in two girls to do the work of one man, so there is the number. And aggregate of salaries will vary regardless of number, on account of the rate of wages; and if we begin to make comparisons we are going to just absolutely get into a statistical absurdity here.

Mr. Hill: All right, but here you have got an increase in number of employees, if my assumption is correct, from 1916 of a hundred and some per cent.

Mr. Moran: Yes.

Mr. Hill: In your commercial department since 1916.

Mr. Moran: Yes, 100 per cent.

Mr. Hill: 100, and that is an increase from 18 to 112.

Mr. Moran: Yes, and we have increased our production 100 per cent. We are selling 100 per cent more gas now in this year
271 than we did in 1916. That is a fact. We sold 800,000,000 of gas then, and we will sell 1,600,000,000 this year.

Mr. Hill: In 1919 you had not increased it that, you had only increased it 50 per cent, because you only sold 1,200,000, and your 112——

Q. How many did you have last year?

A. I don't recall now what we had last year.

Mr. Hill: I would like the question answered unless it is objected to.

Mr. Moran: I am afraid we can't get up what you want now,—the number of employees that we had in that department in a year. What does it mean,—the total aggregate number of different persons?

Mr. Hill: I have framed this question solely from Judge Greenbaum's opinion.

Mr. Moran: Well, if you followed Judge Greenbaum——

Mr. Hill: According to his findings, at that time you had 18 employees in 1916, and so on.

Mr. Moran: And that does not mean anything. We told Judge Greenbaum at the time it did not mean anything.

Mr. Hill: All right.

The Master: Now, the plaintiff has said that he would at your request prepare for 1917 and 1918, I believe, similar state-
272 ments to these. It is very difficult to get ratios except in the way, as far as I can see; and if we have those here, won't that answer your question?

Mr. Hill: But it would seem to me, your Honor, that the increase of employees and of wages,—now, I can understand how salaries would increase—but it does not seem that the employees of the commercial department ought to increase as rapidly even as their sales in thousand feet, in thousand cubic feet increase. In their commercial department, that would seem to me to be a fact. It would seem that their increase in number shows inefficiency, bad management. It would appear from that schedule for 1917 and 1918——

Mr. Moran: I don't think we had enough in 1916; I think we were undermanned in 1916, and in 1917 too.

Mr. Hill: You made money in 1916, being undermanned then.

Mr. Moran: We never made money, this company has never made money.

The Master: Well, I think that we would be wasting time until these schedules are in. I think that if you wish to go back and show that there have been enormous increases since 1917,—1916 and 1917 and 1918—if you do it in one thing, if you take out isolated
273 cases, you don't get the real picture.

Mr. Hill: I think that is true.

The Master: Now, it does not mean anything to me that the number of employees has increased.

Mr. Hill: In one department?

The Master: In one department; or that the salaries have increased, unless I know what the business of the company is during that time.

Mr. Hill: I think those are very helpful.

The Master: I don't know any better way of getting the picture before you than those schedules which they have offered to furnish.

Mr. Hill: I think that is fine, but I want to inquire as to some of the increases as shown by those schedules; and if the schedules are in evidence, the general picture is there of the business, and you can view the isolated cases in connection with the whole picture.

Mr. Moran: I am opposed now, and will be all the time, to having the witness undertake to prepare something that won't be any good when we get it, and will only take his time away from the essential parts of the case. It is not necessary to be prepared. We will show it in cents per thousand. I will make that statement once more for you, but that is all. Do you want those state-
274 ments for 1917 and 1918, Judge Hill?

Mr. Hill: Why, certainly.

Mr. Moran: Do you want them in the form of the uniform system of accounts?

Mr. Hill: Why, yes, I think they would be very helpful.

Mr. Moran: We have them. I think we have copies of them already done.

Mr. Hill: Is there an objection to my question asking for that, or may I get an answer later on, or what is the——

The Master: I think Mr. Moran agrees to give you the number of employees, but he states—and I think he is perfectly justified in stating—that what he should present here if you wish to go into this, is cents per thousand.

Mr. Hill: And also I am to be permitted to have the number.

The Master: Yes.

Mr. Hill: That is simply held in abeyance?

The Master: Yes, in cents per thousand feet. That is all that means anything to me.

Mr. Hill: Now, I don't want to spend much time on this, but it was gone into a bit yesterday as to 1919; but as to 1920 will
275 you tell me if there is not a deficit, an actual deficit in the matter of the sale of appliances in the first six months of

1920, when you consider a gross profit as reported of $11,778.40, and consider that the work on consumers' premises for that six months amounted to $7,264.36, and that promotion expenses, which is on account of appliances, amounted to $78,018.75——

Mr. Moran: Not $79,000.

Mr. Hill: $7,918.75; making an aggregate of more than $15,000 expenditures to earn $11,000 gross profit.

Q. Do your figures for the month of 1920, reflect that?

A. The figures on those statements do not reflect that.

Q. For 1920?

A. For 1920, because you have taken a gross amount there for the work on consumers' premises, and you have not segregated the amount due to the appliance business and the amount due to the other business.

Q. Will you tell me how much——

A. We are preparing the statements requested yesterday.

Q. I see, all right.

A. Which will show those things, and just as soon as I have them I will present them here.

Mr. Hill: All right. That is all.

Mr. Deegan: I would like to ask a few questions, and I would like to reserve the right for Mr. Jackson, in case he desires to come into this examination further. I am just assisting him.

276 The Master: Yes. I understand Mr. Jackson said he would not be prepared to cross-examine today.

Cross-examination.

By Mr. Deegan:

Q. Mr. Gomoud, you personally have not kept any of the books of the company which were received in evidence yesterday?

A. I have made entries in them at different times.

Q. What kind of entries have you made,—just general?

A. I have prepared some of the journal entries, for instance.

Q. How often do you make entries, or have you made entries in them?

A. Very seldom.

Q. About how often?

A. Oh, very rarely. I don't know how often. I can't state how often I have made them. But they are all done under my immediate supervision.

Q. Yes. How many men or how many assistants have made the entries in the books which were offered yesterday?

A. Approximately three.

Q. Are they now in the employ of the company?

A. Three of them are in the employ of the company, that has made entries in those books, but they did not make the complete entries for any year. Some of the entries made on there were——

Q. That is, there are three that made entries in 1919, in the 1919 books, and also in the 1920 books?

A. Yes.

Q. Were there more than three that made entries in 1919?

A. Yes; that is, men have been replaced since then who have made entries in there.

277 Q. But at the present time there are now three available?

A. Yes.

Q. Who made entries in the 1919 and the 1920 books?

A. Yes.

Q. Have you personally checked any of the entries in the books against original vouchers?

A. Yes, I have.

Q. How often have you done that?

A. I can't state how many times I have done it. My assurance——

Q. Well, you make a few entries every few months?

A. Occasionally I go over——

Q. Or every six months, or what is your practice? Have you any set practice?

A. I haven't any set practice in checking entries in there, my check being of course that the books are in balance. Being kept in the double entry system as prescribed by the Public Service Commission, we obtain a balance each month, and I have compared those balances with the balances taken off and were sure that the books were in balance. Now, being sure that the books are in balance, we know that the entries are all made.

Q. But it is not your practice to check vouchers against the book entries?

A. Not vouchers.

Q. Except in isolated cases?

A. Except in isolated cases.

Q. You were formally an assistant to Mr. Freeman who was referred to here today?

A. Yes.

278 Q. And you worked upon the books of the Kings County Lighting Company before going into its employ?

A. Yes.

Q. Did you revise the accounting system for the company?

A. Yes, we did—I did.

Q. And that is the system which is now followed?

A. Yes.

Q. Now, I understood you to say that Mr. Freeman has an assistant that works a good deal down in the office upon the books?

A. Yes.

Q. What does he do?

A. He does exactly what—he checks the entries made in the books from the original papers.

Q. Did you do that kind of work when you were an assistant to Mr. Freeman; in other words, are the duties performed by him now substantially the same as those which you performed when you were in Mr. Freeman's employ?

A. No, they are not. I did not do any checking like that; that is, I did not do it systematically, as is being done now.

Q. Do you confer with this assistant?

A. Yes.

Q. How frequently?

A. Well, I keep in touch with what he is doing all the time.

Q. You confer with him?

A. Oh, yes, I confer with him and keep in touch with him.

Q. Does he make suggestions to you as to keeping the accounts?

A. Yes, he does make suggestions.

279 Q. Do you follow those suggestions?

A. Well, where I think they are an improvement, I take it up with Mr. Freeman and the assistant, and we go over the matter and then we decide.

Q. You also consult with Mr. Freeman?

A. Oh, yes.

Q. How often do you consult with him?

A. Well, as occasion arises.

Q. Well, about how often on an average?

A. Oh, I should say about—why, personal consultation?

Q. Yes.

A. About, I should say, three times a month, two or three times a month.

Q. Does he visit the office?

A. Yes.

Q. Did I understand you to testify yesterday that you now have Mr. Hobson working on the books or doing something in connection with the books?

A. Mr. Hobson made a complete audit for 1919-1920.

Q. And how long has Mr. Hobson been engaged on this work?

A. I haven't the exact date.

The Master. Who is Mr. Hobson?

Mr. Moran. He is here. Mr. H. C. Hobson.

The Witness. Mr. H. C. Hobson, certified public accountant.

Q. I understand, Mr. Gonnoud, you spoke about him in your testimony yesterday?

A. And he was engaged some time in the spring of this year—I don't know what time it was, it might have been before Christmas.

280 Q. To what account has that compensation been charged?

A. It is not charged to any yet. We have not received any bill for it.

Q. How does his work differ from the work which Mr. Freeman, or Mr. Freeman's assistant does?

Mr. Moran: I will tell you.—Mr. Hobson——

Mr. Hill: Now, just a minute. Let the witness answer, if he can.

Mr. Moran: No, now——

Mr. Hill: If he can. It is a perfectly proper question.

Mr. Moran: I object to the question.
Mr. Hill: It is a perfectly proper question.
Mr. Moran: I object to the question.
The Master: I will let him answer.

A. To my mind it is not so much the difference in the method of the work he does, but for that which he was employed.
Q. I do not quite follow you there, Mr. Gonnoud.
A. Mr. Hobson, as I understand it——

Mr. Moran: Well, now, I object to any understanding of the of the witnes. If he knows, then he can tell it.

Q. Do you know whether Mr. Hobson is engaged, has been engaged upon the books of this company?

A. May I ask you what you mean by engaged on the
281 books? Has he been doing the work?

Q. Has he done anything with the books of the company?
A. Yes.
Q. What has he done, if you know?
A. He has audited them for 1919, and the six months ending 1920, June 30th.
Q. Well, doesn't this assistant to Mr. Freeman do substantially the same thing?
A. Yes, part of the time.
Q. And Mr. Freeman is engaged for the purpose of what—auditing the books?
A. Auditing and consulting.
Q. Now, on Exhibit No. 2, page 4, under the account of insurance, you give 86,829.68?
A. Yes.
Q. Does that include the premiums paid on all kinds of insurance?
A. Yes.
Q. What are those insurances?
A. No, it does not; for 1919 it does not include the premiums paid for compensation insurance.
Q. But for all other classes of insurance?
A. For any other class of insurance.
Q. What are the classes of insurance that you carry?
A. Fire insurance, fidelity insurance, automobile insurance; I think their is some boiler insurance. Boiler insurance, that would be carried separately, boiler insurance. Those are about all the insurance items.
Q. Now, in what account do you carry the premium for this compensation insurance?

A. Well, during the year 1919 in that account there, until
282 the close of the year, when we spread, we allocated the amounts of the compensation over all the other operating accounts affected thereby; that is we took the amount, where a man worked a certain amount of time on a certain job, the amount representing his compensation insurance was charged to that particular job.

Q. And it is your interpretation that that is in accordance with the uniform system of accounts?

A. Yes, it is according to the uniform system of accounts. They permit that, I understand.

Q. That is your understanding of the provision?

A. Yes.

Q. Now, what is your practice as to 1920, in regard to insurance—the same?

A. No, we have not charged it—it has all been charged into insurance here.

Q. That is, covering all classes?

A. Yes, including the compensation.

Mr. Deegan: I think that is all I care to ask now your Honor. As I understand, Mr. Jackson may want to go into further questions.

The Master: Yes, Mr. Jackson may want to cross-examine later.

Mr. Deegan: He was called suddenly to another court matter this morning, and could not be here.

Mr. Moran: That is all. Mr. Hobson.

The Master: We had better adjourn until 2 o'clock.

Mr. Moran: All right.

(Whereupon, a recess was taken until 2 p. m.)

283 Afternoon Session.

HOWARD C. HOBSON, called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

(The witness stated that his address was 61 Broadway, New York City.)

Direct examination.

By Mr. Moran:

Q. Mr. Hopson, what is your business?

A. I am an accountant.

Q. Are you engaged in that work?

A. Yes sir.

Q. Where?

A. At 61 Broadway, New York.

Q. Are you a certified public accountant?

A. Yes sir.

Q. In what jurisdiction?

A. Wisconsin.

Q. What is a certified public accountant?

A. A certified public accountant is an accountant who has been examined or passed upon by a board appointed by a State, to pass on his qualifications to examine accounts, construct systems of accounts, and generally handle matters that require experience and training in relation to accounting and figures of that sort.

Q. When were you certified by the State of Wisconsin?

A. Why, it was, I would say, about 1910. I do not recollect the exact time.

Q. Were you in business in the State of Wisconsin at
284 one time?

A. I was.

Q. In what respect, what were you doing?

A. It was a very brief time, but not in connection with accounting matters. All the accounting work that I had in Wisconsin was as an employe of the State.

Q. In what capacity for the State?

A. With the State Tax Commission.

Q. Of Wisconsin?

A. Yes.

Q. When was that?

A. That was from 1901 to about 1907.

Q. What were you doing since that time?

A. In 1907 I went with the Interstate Commerce Commission, in the Bureau of Special Investigation, and I was there about 18 months, and in November, 1908 I went with the Public Service Commission of the Second District in this State. I went there originally as secretary to the Chairman of the Commission, but found that the title of this position was a misnomer, as almost immediately I was called upon to begin examination of accounts of public utility companies for all of the Commissioners, and in about 1910 or 1911 the Commission discovered that I had three or four offices and no particular title that fitted the position, and they created a division which they called the Division of Capitalization, which had charge of all examinations of public utility companies
285 for that Commission. I stayed there until March, 1915. When I left the division had about 15 employes; and I came to New York and opened up an office in this building, where I have been ever since.

Q. Engaged in what business?

A. In financial matters relating to public utilities and corporations generally, but with special reference to public utilities, as might naturally be expected on account of the training and acquaintanceship which I had made in the Commission.

Q. While you were with the up-state Commission you examined and reported upon the different public utilities in the State?

A. Why, I either made or there was made under my supervision, principally the latter, examinations of practically every gas, electric, street railway and about two-thirds of the steam railroads which operate outside of New York City, in the State of New York.

Q. What was the purpose of your examination?

A. The principal purpose, as might be judged from the name of the division, was to ascertain the cost of property chargeable to the fixed asset accounts, known as fixed capital, for which securities might be issued. But as the Commission had no other accounting department which did work in the field, we made examinations, all the examinations which were made, and there were quite a lot of

them, in connection with rate cases, and determining whether or not a company could afford to make extensions, and the
286 work that would naturally be expected to be done by a field accounting force of the Public Service Commission, with the powers and duties that it has in this State.

Q. Did your work bring you in connection with any important rate investigations made by the Commission while you were there?

A. Yes.

Q. What cases?

A. The two most important were those affecting the Buffalo General Electric Company in Buffalo and the Cataract Power and Conduit Company in Buffalo. I made an examination in connection with a three-cent fare in a street railway case in Rochester, the New York State Railways. We made, shortly before I left the Commission, quite an exhaustive investigation of the Telephone Company which operates in and about Gloversville and Johnstown and in that section of the State.

Q. Are you familiar with the uniform system of accounts?

A. I think so.

Q. Do they have the same system of accounts for the up-state district as they have here?

A. They were at the time they were adopted in 1908 identical. Mr. Meyers, Professor Meyers, and Doctor Weber of the First District Commission collaborated with the people representing the companies in the preparation of those systems of accounts. The system that has been in use up-state has remained to the present
287 time unchanged. There have been a few changes in the capital accounts, the rules for capital accounts, made by the First District Commission since the first one was established.

Q. The up-state Commission has jurisdiction of all the utilities doing business outside of the City of New York?

A. Of all the gas and electric companies, the major portion of whose business is done outside of the City of New York, and of all the steam railroads.

Q. In the State?

A. In the State, and all the telephone and telegraph companies in the State, and incidental jurisdiction over service of street railways which operate both within and without the City of New York.

Q. Have they a separate system of accounting for electric corporations?

A. It is a separate pamphlet, but the principles as to separation between items properly chargeable to capital and expense or income are identical, and they are identical so far as it is possible, considering the variations in the character of the business.

Q. You are familiar with the system, I take it, that is here in New York?

A. Yes.

Q. You thought that it differs only in respect of some amendments that have lately been made—differs with the one up-state.

A. Yes.

Q. What is the practice in other states, do they have something approaching that?

288 A. Why, just to cover it very briefly, in a number of the western states they adopted the New York classification verbatim, so much so that they even repeated the name "New York" in some parts of it. In the District of Columbia they made a few changes that were not very important. Wisconsin has a system that varies in some important particulars.

Q. Pennsylvania has one that it recently adopted.

A. Pennsylvania has one recently adopted.

Q. It is very similar?

A. Oh, they are all almost identical. Montana has the one that differs more than any other.

Q. Your business takes you into these other states to investigate companies?

A. Since 1917 I have been in a number of different states, outside of New York, and traveled a good deal of the time.

Q. You have studied accountancy, I presume?

A. Yes, in the American Institute of Accountants, which has its own method of examinations—corresponds, we might say, to the American Bar Association. But some states have very low standards for granting the degree or the certificate as a certified public accountant, and to correct that the American Institute of Accountants give an examination of their own which is accepted in a great many states as being sufficient as an examination for the

289 purpose of a certificate.

Q. You are familiar with the history, probably, of the development of gas and electric accountancy in this state?

A. Yes, generally.

Q. Was there some system prior to this one of 1908?

A. Why, the American Gas Institute, which is composed of companies or employes of companies, had prepared a system of accounts for use by gas companies all over the United States, which was very generally followed prior to the promulgation by the Commission of the uniform system of accounts.

Q. When would you say that the Public Service Commissions' law took effect—at what time?

A. In 1907.

Q. July 1st?

A. July 1st.

Q. And they did not adopt a system of accounts until 1908, taking effect December 31, 1908; is that correct?

A. That is true.

Q. And prior to the Public Service Commissions there was the Commission of Gas and Electricity, was there not?

A. Yes sir.

Q. They were appointed under a statute passed in 1905, I believe.

A. Effective July 1, 1905, I think.

Q. They were in office two years. Now, did they promulgate a system of accounts, do you know?

A. Why, the engineer of that Commission got up and
290 recommended a system of accounts that applied to electric companies, and I cannot recollect whether it applied to gas companies or not, but before it could go into effect, the one I have reference to, the commission was voted out of office and a new Public Service Commission came in.

Q. Prior to the establishment of the commission of gas and electricity in 1905 was there any system of regulation in this State?

A. No system of regulation for gas companies that I know of, except by statute.

Q. There was no commission having authority?

A. No commission.

Q. And there was no public authority and no statute which did prescribe a system of accounts?

A. None that I ever heard of.

Q. Do I understand you to say that New York State was the first state in the Union to establish a system of accounts?

A. Either New York or Wisconsin would be first, and I cannot state which is first in point of time. The Wisconsin Commission—or Massachusetts possibly, ought to be considered also. The Wisconsin Commission was established before the New York Commission.

Q. Shortly before?

A. Not very long before. I was in Wisconsin when it was, but I do not think they prescribed a system of accounts until some time after the New York Commission. What the Massachusetts
291 Commission did—they have been established a good many years before—I am unable to state.

Q. Do the companies, the gas companies in the Second District, keep books and make reports to the up-state Commission according to this system of accounts?

A. Yes, sir.

Q. When you say you examined the reports of the various companies, you examined the books or accounts kept in accordance with the system, or attempted to be kept in accordance with the system?

A. That was one of the principal purposes of the examinations which we made. The Commission followed a regular policy when a company applied for permission to issue securities to take advantage of the examination that was being made for that purpose to also find out whether the accounting system was being observed, and the most of the controversies in which I was more or less of a participant during the time I was with the Commission arose not over the capitalization, but arose from criticisms that were made of the accounting methods which the companies followed.

Q. It is deemed important by the commissions that accounts be kept according to those systems?

A. It is.

Q. Is there some particular purpose to be accomplished by that?

292 A. Well, there are a number of purposes. I thought I could quote from a case that the up-state Commission decided, but I do not think I can.

Q. Why do they have so many different accounts?

A. In order that the Commission may know what various classes of various operations cost in each company, and in order that the officers of the companies and the directors may compare the cost of particular operations from year to year. That affords the best indication of a cause for inquiry as to whether the operation is efficient or otherwise.

Q. Separating them up into so many different groops, if there is a defect in the management, would it be reflected if some particular cost shown in some particular account?

A. An examination of those accounts which show marked changes is more likely to lead to bringing out information that will show marked efficiency or inefficiency than any other method that has been discovered in modern business. This defined separation is not peculiar to the gas and electric business; in manufacturing companies they frequently have as many as a thousand different accounts, where there are a number of processes that have to be gone through. In cost accounting they get the most minute prep-rations and most modern businesses have to have that. Originally everything that was made out—to go away back into accounting—was charged into a single account, disbursements. The next de-

293 velopment was to say well, some things last longer than others, let us put the things that last quite awhile in one account and the things that are going to be used up rather soon in another account, and there arose a separation between capital and expense. Then it was discovered that most of the businesses rotate with the seasons, and therefore we adopted the year, and that is admissible to most of the business. There are some businesses that you can tell just as well from month to month, and there are other businesses that you really have to take two or three years before you get a proper strike-off; but the year is almost universally used and most companies try to close out their operations at the end of the year. Where there is not any particular reason, as is true of the gas business, for selecting any particular parts of the year, the calendar year has been most used. Sugar companies, for example, or the best managed ones, take some month in the summertime after the crop is harvested and the product has been sold.

Q. The year is what is required by the Public Service Commissions Law for gas companies?

A. The calendar year.

Q. Were you employed by the Kings County Lighting Company to render any services in connection with its affairs?

A. Yes, sir.

294 Q. When?

A. It was about the first of the year. I meant to stop and look up the exact date, but it was along about January 1st, or somewhere along there.

Q. Have you done anything for the company?

A. Why, we have been engaged, with a number of assistants, in making as careful a check as we know how of the accuracy of the company's accounts, in respecting its operations, to see whether the accounts as taken from the books correctly show the cost of making gas. That was what we were primarily interested in, because we knew that the figures which we were going to take off might be used in some rate investigation. The case in the State courts had been practically concluded and there had seemed to be great confusion about the figures as they were put in. One side claimed they showed one thing and the other side claimed they showed another. So that we went in with the idea of trying to find out for ourselves what the truth was and what it really did cost to make gas, as nearly as it could be ascertained.

Q. In the year 1919?

A. We started with the year 1919, and when we finished that the year 1920 had gone pretty well along, and we have been going on with the year 1920 and we are still at work on some of the fag ends of 1920.

Q. That is, for the six months of 1920?

295 A. Well, really the month of June.

Q. Have you audited the accounts for 1919?

A. We have, yes sir.

Q. Audited the books of accounts for 1919?

A. We have; yes sir.

Q. Have you examined or seen these statements for 1919 that have been received in evidence here, exhibits 2 and 6, for instance, for 1919?

A. Yes sir.

Q. First do you know whether those two exactly state what the books show?

A. They do.

Q. You have checked them for that purpose?

A. Yes sir, we have checked each item of them for that purpose.

Q. That is regardless of the accuracy of the books, these do show what the books show?

A. Yes sir.

Q. Will you say the same for the 1920 statements, being exhibits 12 and 13?

A. For 1920 the statements agree with the general books.

Q. I will ask you, Mr. Hopson, from your examination if you can say whether the company keeps its books in accordance with the system of accounts prescribed for gas companies of this district?

A. Yes sir.

Q. In 1919?

A. With a single exception.

Q. With a single exception?

A. Yes.

Q. What is that exception?

296 A. They keep no account for general amortization. The Commission requires that an account called General Amorti-

zation be kept, but no such account appears on the company's books.

Q. Is there a sort of substitute account?

A. There is.

Q. What is the name of it?

A. There is an account called Plant withdrawn from service, which, as its name indicates, is intended to include in expenses and create a reserve against which may be charged replacements of property that is properly chargeable to fixed capital when the replacement is made.

Q. Do you know how much they charge in expenses annually for that purpose or to that account?

A. One cent per thousand sold.

Q. And that is credited then to the reserve?

A. Yes sir.

Q. And the property that is withdrawn or taken out of service is charged to that reserve?

A. Yes sir.

Q. Is that the idea?

A. That is the idea.

Q. That differs in some respects from the Commission's accounts?

A. Why, in the practical application of it I do not think there is any difference at all, but the name is different and there are certain implications contained in the definition for the account General Amortization which a great many managers of public utility companies object to, on the ground that it may be interpreted to mean a recognition of the lessening of value due to age, and
297 they feel that in setting up—I am speaking generally of gas companies now, the men I have talked with and the men I have discussed it with, and a great many of them have taken my advice with reference to such a matter, where they wish to avoid the implication which results from setting up such an account. There are other companies which have complied with the accounting system only nominally—that is, set up a ridiculously small amount so that they can say they have complied with the letter of the account. The Court of Appeals has held that the Commission has no right to fix the amount that goes into the account, so it is merely as to the form, anyway, that the Commission has jurisdiction.

Mr. Deegan: I do not like to object and to appear technical, but I do not think this witness ought to be allowed to quote what the law is. He has not been set up here as an expert on the law.

The Master: No, strike it out.

Mr. Deegan: He has done the same thing heretofore and I have not objected, but I do not think that it should be in the record.

The Master: He is not competent to state what the Court of Appeals holds. I will strike it out.

Mr. Moran: How much is stricken out?

298 The Master: Just where he starts in telling about the Court of Appeals.

The Witness: I can state what the Second District Commission did after the decision of the Court of Appeals. That is a fact—with reference to their classifications.

Q. What did they do?

A. They had a draft of a classification in which they required that certain amounts be set up for this item, and when the decision of the Court of Appeals was handed down in the New York Railways case they modified that proposed classification so that the word "required" was taken out and the word "recommended" inserted.

Q. In auditing the accounts for 1919 what was done; what is the nature of the work that was done to ascertain the result?

A. We carefully checked all the vouchers into the general books, we examined all the vouchers to see that they had been properly signed by the various parties who were supposed to sign them under the system which was in use, to make certain that the goods were regularly ordered, properly signed, as received by the storekeepers, and that the extensions and footings had been proved by the bookkeeper, and finally that they had been signed by the treasurer and countersigned by the auditor. And then we checked them to see that they were entered into the cash book. We found that with the exception of the item of taxes all of the amounts that were
299 included on the company's books had been paid—all the amounts charged to expenses, purporting to represent actual payments, had been paid with the exception of about 300 at the time we last checked up. Taxes had not been paid to speak of at all, but everything else had been.

Q. And that expense account, though, for plants withdrawn from service, that is not a——

A. (Interposing.) That account does not represent in the expenses actual disbursements; it is an accrual account. The same thing is true of the item of uncollectible bills. That, as the Commission set it up, is intended to be an accrual account and this company does not keep it quite that way.

Q. We will cover that more particularly later. Then you found that the expenses stated on these exhibits here for 1919 had actually been paid out in cash by the company?

A. Yes sir.

Q. From your examination; is that right?

A. Yes sir. You are speaking now of 1919?

Q. Yes, 1919. What did you do toward ascertaining the amounts entered here in each one of the accounts?

A. We made very careful analyses of a great many of them. We verified all of the so-called direct charges; that is, where the item purchased was charged direct to the expense account, without passing through any intermediate so-called clearing account or
300 suspense account, in which I include, for instance, materials and supplies, that really is a suspense account in the proper sense of the word, the items that went through the——

Q. Let me ask you, does labor go through a suspense account?

A. Well, some items of labor go through a suspense account and some items of labor, the majority of the labor, goes direct from the payroll.

Q. And then you say you examined as to labor?

A. Well, we checked all the payrolls.

Q. That is a direct charge?

A. Yes, we examined them all and looked at the distribution sheets and saw that they were properly gotten up and bore the usual evidences of authenticity and accuracy that we find in any business concern where you examine the books. In fact I might say that I think this company has used more care than most companies that I have had to do with.

Mr. Deegan: I object to that as calling for a conclusion.
Mr. Moran: Of course.
The Master: I will let that stand.
The Witness: I will explain why, if you would like to hear.

Q. Have you finished your answer?
A. Well, I was going to say why I thought that they used more care.
Q. You saw evidence of it?
A. Yes.
301 Q. What evidences did you see?
A. Why, the principal evidences were the particularity with which the employes answered inquiries and preserved the working papers that they used, and things of that kind. And that, of course, results naturally from this rate litigation in which they have to prove these figures.
Q. We were speaking about direct charges to operating expenses. You spoke about labor. Some material is charged direct to operating expenses?
A. Most of it.
Q. What?
A. Most of the labor that goes to operating expenses goes directly.
Q. Yes, you said that, but materials and supplies?
A. Why, the great bulk of materials and supplies goes through the materials and supplies account.
Q. Well, there is some charged directly to operating expenses—something comes in.
A. Any item that comes in, that is ordered for a particular purpose; for instance, a repair part is charged direct to the repair account to which it belongs.
Q. That is proper accounting, is it not?
A. It is.
Q. And proper procedure to follow.
A. Why, it lessens the work. If it goes first to materials and supplies, you first have to charge it to materials and supplies and the storekeeper may never see it under those conditions. He must
302 first see that it is received and then credit it out and charge it to the proper operating expense account.
Q. Is there any reason for putting it in materials and supplies?
A. No, not the repair parts I speak of. They are ordered for a particular purpose, where the requisition or order blank shows the purpose for which it is to be used. There is no occasion for putting that into materials and supplies.
Q. But you say there is a lot of it goes to materials and supplies?

A. Yes, the greater part of it goes to materials and supplies.

Q. That is additional work?

A. Yes sir.

Q. Does the system require that?

A. Oh, the system, of course, makes provision for a materials and supplies account, but that is not the reason it is put through materials and supplies, primarily.

Q. Is there some reason for it?

A. Why, the company gets thousands of dollars' worth of material that has to be kept track of pending its use. Electric light companies have thousands of dollars' worth of copper wire, gas companies have other things that have to be used. That is in charge of a storekeeper. The grouping of those supplies in the materials and supplies account gathers together the materials that the storekeeper is responsible for, to see that they are not stolen or misused or anything of that sort. The materials and supplies account is used
303 by the accounting department to keep proper supervision first of the receipt and disbursement of supplies by the storekeeper and, second, a record of how much capital the company has invested from month to month in that sort of property.

Q. Well, is it necessary to put these things through materials and supplies in order to measure the quantity used in a period, as a year, for instance?

A. What I said heretofore is mostly from the standpoint of showing the financial condition on any given date and keeping track of the company's property. Now, from the standpoint of the income account, to determine whether the company is losing or making money from month to month, when materials like oil or coal, which run into a large amount of money, are purchased in bulk, only a very small part of a particular purchase may be used in the month in which it is purchased, and it is therefore necessary to have a materials and supplies account in which he can keep the unused portion of the materials so purchased.

Q. And what you have said about a month will apply to a year?

A. The same way, or to a day, if you wanted to keep a daily record.

Q. It is necessary, then, to have a store account of materials and supplies in order to measure the quantity you use in the period of a year, your calendar year.

304 A. Yes, sir.

Q. That is, you have got to charge it into that account and keep that account with yourself, as you credit it out and charge it to your other expense account?

A. That is true.

305 Q. That is a general custom of gas companies, is it?

A. All gas companies keep materials and supplies expense accounts.

Q. If I gather what you say, the proof in this case, for instance, that the company purchased and paid for a given quantity of coal or oil the 29th of December, 1919, would not be any proof of its operating expense here?

A. No.

Q. Not at all, would it?

A. No.

Q. If it purchased parts for repairing its machines or repairing its meters on the first of October, 1919, a great quantity of them, and if we should bring here the quantities bills and payments, purchases and payments, it would not help us any in proving the operating expenses of this company for that year, would it?

A. They would not necessarily show the operating expenses. Even oil, the company might purchase a carload of oil, and when they got it on hand sell it to somebody else.

Q. I know, but assuming there was no sale?

A. Yes, but even assuming there was a sale, that would still be true. That is true.

Q. They measure the quantity of gas sold in a year by reading the consumers' meters. Now, if they are to measure the quantity of oil and coal and materials used, they have got to measure them by finding out what was actually used or purchased?

306 A. Yes, sir. The use is what controls.

Q. And the only way you can do that is by using this material and supplies procedure?

A. Account, yes. The inventory, the materials and supplies account, and the inventory, are less important in the gas business in determining the total cost than they are in other business, because the gas business has a large investment in fixed property that is not consumed in the operation of the business, whereas a manufacturing company frequently has nearly its entire investment in materials and supplies, and the Government, recognizing that fact, requires in connection with the income tax that all companies must inventory their materials and supplies on hand at the beginning and the end of the year, as being the only way in which the true profit can be ascertained.

Q. That is the ruling of the Department?

A. The Treasury Department, exactly.

Q. With respect to the income tax of manufacturing corporations?

A. Yes, for all kinds of corporations that have any materials and supplies on hand, that they use in their business.

Q. In examining the records and books of the company for the purpose of auditing, you do not and it is not physically possible to cover the whole year and take up every paper; you would have to do nearly all the work the accountants did.

307 A. We did not examine all the indirect charges in the year 1919 for the reason which you mention. It would have required a considerable force of men and taken a long time, because it takes almost as long to go through with the individual issues, for example, of material and supplies, and check them from one record into another, and then follow the posting of that into a further place, as it does to make the original entry. In other words, after I looked a thing up in a book, I can put the figures down just about as quick as I can find the place to look it up.

Q. What do you do then; what do accountants do as a rule to test the accuracy of a set of books?

A. Well, what we did, and that is the common practice, we selected a month that after some consultation among ourselves we decided was a difficult month, a month that would be about an average and a month in which we knew of no reason why it should not typically reflect the operations of the year, and the instructions to my men were that if they checked that month and found nothing worthy of note in connection with it, that we would not check any more on the indirect charges. If we found something that indicated that the accounts were kept inaccurately or something of that sort, then we would go on and check other months to determine the extent of and the character of the inaccuracy.

Q. Is that the way accountants usually do?

A. That is the way accountants do when they check down
308 or when they are making a really careful check. For instance, if you hire the ordinary form of certified public accountants, of standing, to make an audit of the books of your company, and it is a pretty good sized concern, they usually content themselves with examining the major portion of the vouchers and verifying the footings and postings in the general books, and after that they accept the figures kept by the accountants. The errors which auditors find, other than defalcations—which is a very unimportant element in corporations, are errors of principle which appear from an examination of the general books of the company, and a cross-examination of the employees of the company, as to the way they handle various items.

Q. Now, you say after consultation you picked out a month. You mean consultation with the company's employees?

A. No, with my own staff.

Q. What month?

A. We picked out the month of September.

Q. 1919?

A. Yes, 1919.

Q. And made a complete audit of the books for that month?

A. We checked that just as thoroughly—well, it had the same effect as if we did the work over again.

Q. And what did you find?

A. We found that other than a few little arithmetical errors, a few cents here or a few cents there, such as are always made in
309 handling figures, that the accounts were correct.

Q. Does this system, used by the Kings County Lighting Company, as it is promulgated by the Commission, ensure detection of any waste of material, or dishonestly paying employees, or anything of that sort—such things?

A. No, sir.

Q. It does not ensure against that?

A. No, sir.

Q. What system would?

A. Such a thing as that has not yet been devised.

Q. Well, is there not any test or system of checks in it with reference to materials and supplies, for instance?

A. It is impossible with the system of accounts which the Commission has prescribed, to do what one of the counsel asked about

yesterday, double up on particular items without it showing up some place. For example, if there was entered in the month of September, we will say, or any month, a credit to the materials and supplies account—or let me go back a little further than that. If there was entered up a receipt for the materials and supplies account of twice as much coal as was received, the materials and supplies account would show twice as much money debited to it, but the cash account would not show that that much money had been paid out when that coal was paid for. Your books would get out of balance, one side would be down here and the other up there, and a double entry system—and that is the reason for it—requires a duplicate entry of each transaction and a debit and credit account. Now, going a step further, if you credited twice as much coal in a particular month to materials and supplies account, as was used, when you come to make an inventory of an actual account an inventory of the amount of coal on hand, you would find that you had more coal on hand than the account showed; and the system of accounts of the Commission, provides an account for the adjustments; now in the inventory adjustment, the entry that is required to be made in the inventory adjustment to correct for these errors in the issues, was unduly large, more than would be made or result from the ordinary mistakes which happen, you would immediately know that there had been bad accounting during the year, or some serious mistake had been made. But if the error was in coal, even if you did not hunt back to find out where the mistake occurred, it would not swell or improperly swell the cost of making gas, because any average in the coal account at the end of the year over and above what the books showed, would be deducted from the total operating expenses as a credit in this inventory adjustment account.

Now, the same thing is true the other way, if the materials and supplies account at the end of the year shows that there ought to be so many tons of coal on hand, and when you came to inventory you did not find only half as much as that, you would immediately charge it to the inventory adjustment account, or if the auditor wished to keep his accounts so that they looked a little better, charged into the coal account the amount of coal that appeared as not having been used.

Q. Then the inventory or the taking of an inventory periodically is important?

A. It is absolutely essential.

Q. And taking the inventories and adjusting them with the purchases and deliveries made in the year, is the way to ascertain how much material was used during that year?

A. Yes, sir.

Q. That is the period of the ordinary daily record of accounts that may be kept?

A. Yes, sir. Of course most companies that have a few supplies—that is, a few kinds of supplies like a gas company—an automobile concern has 10,000 parts, and they are all in bins in a great big storehouse, and it is an expensive think to take an inventory of that, but a gas company has two oil tanks, I think it is testified this

one had. Well, the engineer at the works who makes out the slips he can go out and check himself up every so often by just looking at it, and if he discovers that there is less oil on hand than
312 the auditor has him charged with, or more, he goes right back through his records and hunts and finds his mistakes so that he does not have a big adjustment at the end of the year which results, if the company is being strictly run, and he is hauled in on the carpet and asked why he does not keep his records straight. The same thing is true of coal. You can look at a coal pile and make a rather simple survey of it, which will give a very good idea of the amount of coal that is on hand, especially if they have a level place to store it. If the ground is uneven, on which it is stored, it is rather difficult.

Q. What is the best and the simplest way—not the simplest exactly, but what is the way of establishing the expenses of the Kings County Lighting Company for the year 1919, we will say, for the manufacturing and distribution of gas? I think you said it would not help us any by bringing in the vouchers of the purchases?

A. Why, there are two things in my opinion that represent the best method. One is the method that is always used in such matters, to have a very careful examination of the company's books, with the drawing off of quantities used to secure particular results, that they may be compared with quantities that are used generally by other companies similarly situated, and known to be well managed.
And then having ascertained what those quantities are for
313 the particular results, to call in experts in the particular line of business to testify as to whether those are proper and necessary quantities under the circumstances which exist. The examination of the accounts is also very much helped by a comparison with the same items of expense in preceding periods. All financial statements that are gotten up nowadays by well regulated companies, compare the expense of the operation in one month with the corresponding month of the preceding year, and customarily the man in charge of the operations is required to explain to his superior what the causes of the variations are, and when it is an improvement he always tells them. By comparing in that manner, an increase does not necessarily indicate decreasing efficiency, nor does a decrease indicate an improvement, but it indicates a change, and on inquiring into what those changes are and the causes of them, you get an opportunity to find out whether the thing is being managed and run as well as it can be, by calling in the men who know the detail of those changes, and asking them why it happened.

Q. Mr. Hopson, I was not interested directly about it being efficiently handled; what I wanted to find out was in reference to the actual payments made by the company, be they extravagant or otherwise, the actual expenses of the company for that year.
314 A. By the examination of the accounts, supplemented—of the general accounts supplemented by an examination of the vouchers, a study of the company's system, to find out whether they have proper methods for preventing the stealing or wasting of materials that might run into money.

Q. So far as the actual payments are concerned, there are vouchers in the office of the company showing the payment of all this money?

A. Yes, sir. In 1920 a lot of the money has not been paid, but all of the amounts that are shown in this six months' statement for 1920, have been vouchered and entered for payment, and I presume will be paid as fast as the company gets the money to pay it.

Q. Could you bring into court here and take these vouchers and lay them out one after another, and demonstrate that these are correct, or is that a piece of work that must be done by an accountant in the office?

A. You cannot prove an account in court or in a hearing or by discussion. You have got to actually go where all the accounting and subsidiary records are, and if the man must see by ocular demonstration, he has actually got to do the work. He has got to foot all the columns to see that they add correctly, and then he has got to see that they are posted in the book at the place where they are supposed to be posted, and then after he gets through
315 with that he has got to balance that and see if they have been entered twice in any particular place, because if they have been, the books will be out of balance, and there are other checks that accountants customarily employ that have to be made, where all the records and facilities are, and including new adding machines and things of that sort to hurry the work.

To illustrate that clearly, the company keep practically all of their books by machine, with these Hollerith machines. If eleven poles are purchased at an expense of $10 apiece, $110, a girl takes a card and she punches certain holes in that card, and then that card is run through an electric accumulating machine. Certain totals appear on it, which are drawn off by the person who operates it. They run through a thousand cards in a few minutes. Now, nobody could look at those cards with the Hollerith machine and tell a thing about it unless he had the code. The machine may be used ten minutes later to tell how many telephone calls were made from a certain exchange in a certain length of time. The only way it is possible to check up those references, is by actually verifying the punching of the cards from the record from which they are punched, and then running them through the machine again. And of course, nobody actually does all the work over. They segregate it down to
316 a self selected period and check that.

Q. You spoke about the uncollectible bills. And it appears on these statements here not as a—it appears under operating expenses, but it is an item all by itself, is it not?

A. Yes, sir.

Q. Uncollectible bills. Do you know what the system of accounts requires in that respect?

A. The system of accounts requires that uncollectible bills shall be handled as an accrual. In other words, the auditor of the company is expected to exercise his best judgment as to the amount of uncollectible bills which there are likely to be, and he accrues that amount from month to month and credits the amount to a reserve.

Q. Just a moment, let me ask you right there. That is for instance in the year 1919, the auditor estimates the amount of the charges that have been made prior to that time to consumers, that they will not be able to collect, or that they ascertain in 1919 that they will not be able to collect, and write them off; is that correct?

A. Well, his operation is not quite like that.

Q. Let me ask you another question. Then is it an estimate of the amount of sales of 1919, that he won't be able to collect later?

A. That is what the accounting system intends that it shall be.

Q. An estimate of the 1919, that you won't be able to
317 collect later; is that the idea?

A. Yes, sir. They have before them the experience of the company in five years. They know the class of public which they serve. They know who is in charge of the bill collecting and whether he is a better man than the last man they had at it, or whether he is not quite as good. And then taking into account all those factors, they set a certain percentage of the revenue which they set up monthly. That is the theory of the Commission's classification.

Q. That is a certain percentage of the bills or charges made against consumers in that year?

A. Yes, sir.

Q. That they feel they will not be able to collect on account of their experience before?

A. Yes. Now, the up-State Commission, I do not know what the New York City Commission does—had a method of checking that. They ascertained how many bills are more than three months old, and if there is not some very good reason, such as the illness of the bill collector, or a very hostile public sentiment perhaps, or something of that sort, they require the company to increase the amount or decrease the amount, so that it will be ample to take care of all the bills,—that is the reserve will be sufficient to cover all the bills that are three months or more old. And as a rule they require—
this is in capitalization cases, in determining how much
318 assets the company have—if the bill is more than a year old, unless the treasurer can give a very good explanation of why it should be kept, they require it to be charged off absolutely.

Q. Take the Kings County Lighting Company for 1919, are they estimated figures or are they actual?

A. The 1919 figures represent an actual survey of the accounts of the company by the auditor who is in intimate touch with the bill collector, and a charging off of the amounts which, in his opinion it would be impossible for the company to collect.

Q. Are they the amounts billed to consumers in 1919, or billed in prior years?

A. That you could not tell without an examination, but they are the current loss that is going on. They probably are less, a good deal, due to the fact that this company's business is increasing, than a percentage would be, arrived at by the method which I have described, which the Commission had in mind. That gave what its revenue was in 1905, and then how many of the 1905 charges it did

not collect, and figured a percentage, and did the same for 1906 and 1907 and on down, and then taking that as an average applied it to the 1919 business, it should result in a larger sum other things being equal, than the method which was followed by the auditor of the company. Because what he did was to take the accounts receivable that stood on the books and go over them and pick out the ones that he did not think they could collect, and my experience is that these auditors think they can collect a pile of bills that never get paid. The Commission and certified public accountants generally, will almost uniformly increase the amount that the company estimate is the proper amount to reserve or charge off for bad debts.

Q. Well, we can get at the same result here, when we charge this as an expense of operation for 1919, or turn around and make an estimate of that portion of the revenue, that percentage of the revenue for 1919, which we will not be able to collect?

A. And the figures as far as the total operating expenses of this company are concerned would not affect the thing you are trying to drive at so you could notice it. But I think the other method would produce a somewhat larger sum.

Q. Did you say that the 1920 figures are correct from the books, that appear on these exhibits?

A. Yes, sir, we checked them all back to the books.

Q. You have not completed an audit of that six months?

A. We have not gone into the six months as completely as we did into the year.

Q. But you know that for the six months the books are being kept in the same general way?

A. They are being kept in the same general way, and there has been a continual improvement in the bookkeeping methods of the company since Mr. Gonnoud went there. The system that was followed prior to that was not calculated to be suitable to the size of the business which the company is now doing.

Q. Changes had to be made on account of the increase of business?

A. Why, the business has doubled, and as nearly as I can find out from such records and what I have learned at the office of the company, they had a typical system for a small gas company there until within the last two or three years, when Mr. Gonnoud went there and have installed a modern system. For example, a good illustration of the difference between a system that is calculated to handle a lot of business, and the old fashioned kind, is the separation of those books into two parts, one for odd months and one for even months, that enables you to have the odd months, the months that are not in use, being worked on by people to hunt little errors and so forth, while the other month is in current use, and it practically cuts down the amount of time that it requires to get out the monthly report for any particular month—oh, I would say 33⅓ per cent at least. No small company would have such a thing.

Q. You have heard it stated here this morning that Mr. Freeman, a certified public accountant has some supervision over these books?

A. Yes, sir, I met Mr. Freeman over there.

Q. Do you know what he does?

A. Yes.

Q. What does he do?

A. His assistant makes what might be called a continuous audit, which is supplemented by a periodic cash audit at the end of the year. A cash audit, now, is entirely distinct from the sort of audit we make. The cash audit is primarily to discover losses of cash. For instance, this company has 76 consumers' ledgers. It is impossible with the class of help that you have to have to keep those consumers' ledgers, to keep them the way they ought to be. There are inevitably going to be mistakes in them. Now, if they are not properly kept the company is either going to lose revenue or overcharge consumers, and those consumers' ledgers ought to be checked right into the cash records. In other words, in a well regulated
322 company the auditor in the consumers' ledger department has for his duty the ascertainment of what the customers owe the company, to make certain that it is collected on the books, and then such supervision of the cashier's records as will make certain that the customer gets credit for that amount on his books.

Now, the difference represents the amount that is uncollectible. The amount that is collected the treasurer is responsible for. He ought not to have any access to the books of account of the company and, vice versa, the auditor ought not to have much, if any, access to the cashier's books. Because they are supposed to be a check on each other. Now, you take a man like Mr. Freeman, he comes in as an absolute outsider, and he makes the check of the whole business. I do not know whether Mr. Gonnoud does have any supervision over the cashier's books or not; we did not look into that feature of it very extensively.

Q. Is that practice, that is, having a constant audit and supervision like Mr. Freeman's assistant gives here, desirable?

A. It is a very common practice, and I think it is very desirable. A great many of the larger corporations have now divided their accounting departments into two parts, one which does the regular bookkeeping and accounting and another which is called an auditing department. This auditing department makes the special
323 investigations and checks up the financial people in the company who do the routine work.

Q. Would you say that the company's facilities are proper over there for handling their accountancy?

A. They are as proper as can be in the building which the company has, but they are very much crowded for room, and the building was one that was formerly sort of a flat building, which would be all right, but I think it could be considerably improved for the purpose for which it was being used, if they spent some money.

Q. To keep their books over there they require quite a staff of employes, do they not, to keep these accounts and follow the system right through?

A. Why, since the war it seems that no public utilities company could get enough employes to do it, because particularly people like consumers' ledger bookkeepers, more of them seem to put down

figures wrong than they put down right, and they do not work only half, they only work half the time. That is, even though you dock them for the time off, which practically all companies do if they take much time off—they are girls and they work a week, then they stay away a week.

Q. Well, you are familiar, and you have had considerable
324 experience with accounting staffs and the size of staff necessary for work of this kind, have you?

A. Yes, I have made quite a study of two or three companies of about the size of this one, and larger, in connection with that. I have particularly in mind the Buffalo General Electric Company which has——

Q. I have not mentioned this to you, but the question was raised here this morning that perhaps this company has too many employes over there. Perhaps you can throw some light on that.

A. Why, I have seen no idleness or lack of industry in the company's offices. Most of the employes around the books there are now girls; they are not old enough to be what you would call settled, and they are just about the sort of help that most other companies get for that kind of work. They do not intend to make it their life occupation; most of them probably expect that perhaps six months from now, they won't be there.

Q. Mr. Hopson, is there anything that you can say about these accounts, that will add further clarity to them, than what you have already said?

Mr. Deegan: I object to that as too indefinite.

Mr. Moran: It is rather indefinite, but it is a special subject that I do not pretend to know anything about. For instance, this witness
325 may know something here that will be very convincing to the Court as to the reliability of these figures, that does not occur to me, in order to frame a direct question. I think the question is proper, and I ask the permission of the Court to ask it in that general fashion.

The Master: I will let him answer.

Mr. Deegan: Exception.

A. Why, we have in the last month also—since it was known that this case was going to be tried, discussed with the auditing department of the company, more or less, the form in which figures should be gotten up, and these figures showing quantities used, that is, the tons of coal used and things of that sort, we have assisted in preparing, and I am just as prepared to verify the accuracy of it as Mr. Gonnoud is, because it was done under our joint supervision. The red figures were so large that the sole aim in getting it up was to get it up in the form in which it would most clearly show what the facts were.

Q. What do you mean by the red figures?

A. Why, the deficit here at the bottom.

Q. Mr. Hopson, in your experience at the present time, you say you are engaged in public utility enterprises and the capitalization

of companies that have proceedings before the Public Service Commission?

A. Yes, sir.

Q. And are you familiar with the new issues?

A. Yes, sir.

326 Q. And the number of them, gas and electric?

A. A large number of them. A good many companies——

Mr. Deegan: May I just hear that question, the last question?

Q. Are you familiar with the new issues of securities by the different companies?

A. A good many of the companies have us associated with our counsel and financial officers in preparing applications to the Public Service Commissions, and we have also, particularly myself, participated for some large companies in the negotiations with bankers for the sale of the bonds of companies in this State.

Q. Is it the practice of the Commissions when they authorize an issue to include in their order a rate of interest which that issue may bear?

Mr. Deegan: I will object to that. This witness has not been shown to have been qualified or to be familiar with the orders of the commission. You ask a very general question.

The Witness: Will you ask me if I ever drew any?

Mr. Moran: We will leave it to the Court.

The Master: I think he can answer that question.

Mr. Deegan: I except.

The Master: I think this witness has been qualified as a man who is at least familiar with these matters. I do not know what value there is to this evidence, though.

327 Mr. Deegan: We do not know what commission it is, either.

The Witness: I am talking about the up State New York Commission.

Mr. Deegan: If it had been limited to that I might not have objected to it.

The Master: I doubt if it is material. It is only the up State New York Commission. What has that got to do with this case, Mr. Moran?

Mr. Moran: I will ask the witness generally, then.

Q. Do you know what rate of interest or rate of income it is necessary for utilities to offer to investors in order to secure capital at the present time?

A. I think I did.

Q. What is the rate that is asked?

A. Why, it could not be answered as general as that. It depends, of course, upon the earnings of the company and upon the sort of security which is offered.

Q. Assuming the security is good, what rate of return does an investor desire from such an investment—what rate does he command and get at the present time?

A. Well, for a gas company which is not nearly as favorably

situated as an electric company, because many investment bankers will not — gas bonds any more, they have absolutely re-
328 fused—the very best security in my opinion could not be sold on a better basis, that is a first mortgage bond, on a better basis than 8½ per cent at the present time. And, of course, that would be a bond which had a very substantial equity in addition, and the company must be earning a rate which would show at least twice the bond interest on the bonds outstanding than those proposed to be issued on that particular issue. In fact, no public utility company at the present time can get bankers to consider their securities unless they earn twice the bond interest.

Q. Then the investor in the bond desires a return of 8 to 8½ per cent?

A. It is not 8 to 8½, it is more like 9 per cent. One of the largest companies in the central part of New York, earning over two and a half times bond interest, paid with the approval of the Up State Commission 9 1/3 per cent within the last month. Another company operating in the heart of the industrial section of New York paid over 8 per cent for an absolute first mortgage bond, earning 2 1/3 times bond interest.

Q. On stock issues?

A. Why, stock cannot be sold, Mr. Moran at all at any price, of a public utility company.

The Master: Of course, I do not think this witness is an expert on that banking question. I will let it go in for what it is worth, though.

Mr. Moran: It is just what I am showing now. I do not
329 know who he is, but if this gentleman has been engaged in that business, employed by public utilities companies before Public Service Commissions, getting authority to issue securities, why, this man would know what the state of the market was in that respect. I do not know why he would not. I think he is superior to a banker, because a banker's mind will run in a particular line, but this gentleman's experience goes to the gas, electricity and public utility enterprises.

Mr. Hill: How is the selling price of stock, of public utilities, and the basis of return on which it is now sold material here?

Mr. Moran: To show the rate of return that the company is entitled to.

The Master: It is the current rate of interest on a public utility's securities, I suppose, stock and bonds.

Mr. Moran: I beg pardon?

The Master: I suppose that is what you want to prove, the current rate of return?

Mr. Moran: Yes.

The Master: On stock and bond securities of public utilities?

Mr. Moran: Yes. You see we have got to——

The Master: Of course, it is very general testimony. The
330 present state of the money market is such that no matter whether you are earning five or six times your bond interest, you cannot get money.

Mr. Moran: If you are earning it, you can get money, if you pay the proper rate of return on it.

The Master: You have got beyond that almost down here now.

The Witness: These upstate companies, your Honor, when they were earning twice bond interest, they had no difficulty in selling them. Those two companies that I mentioned had both of their issues of bonds sold within a week after the bankers advertised them. The bankers said that they weren't fair, that is about it, that they were not purchased in an hour, and, on the other hand, they were not a drug on the market.

I would like to say on this point of qualifications, however, that as the head of the Division of Capitalization of the Commission I have had the sole and complete jurisdiction over millions and millions of securities that the upstate New York authorized, including issues running up to forty and fifty million dollars for the New York Central Railroad. While I was there the $100,000,000 issue of the New York Central came out, and the Commission frequently held hearings upon the question as to the proper rate of in-
331 terest, and we made inquiries into the books of the company and we called bankers to discuss with them, and one of the commonest things that I am called upon to do since I left the Commission is to advise with the officers of companies as to what price they ought to get for their securities and what sort of security they ought to put out. Not from a legal standpoint or from an accounting standpoint, but from a financial standpoint, because naturally the banker who buys the securities wants to buy them as cheap as he can, and the officers of these companies do not sell securities every day and they do not know very much about what the prevailing — is. But on account of the work which we do, both in handling cases before the Commission and advising with other companies, we get to have a pretty good knowledge of what these securities go for.

Q. Is it not a fact that millions and millions are being invested right along at this time in gas and utility properties?

A. Yes, sir.

Q. And is it not a fact that it must be so in order to keep up the service?

A. Why, it could not be otherwise. There is no business that has a continual unfillable maw for capital like the Public utility business. That is the thing that deceives so many investors, that they see that a public utility company is earning, we will say
332 15 per cent on the stock, and they say that is a fine stock to buy, and then they discover that it is only paying five per cent dividends. If they do not know something about the public utility business they think that is only temporary, yet as a matter of fact, if it is not able to keep on selling bonds right along it may have to stop all dividends.

Q. Is it not a fact that practically every public utility—I will confine it more particularly to gas and electricity—in this State needs to increase its facilities from year to year?

Mr. Hill: I object to it as immaterial.

The Master: I think you are getting a little far afield.

Mr. Moran: Well, the Court made a remark that you could not get any money now, anyway.

The Master: Why not stick to the company and companies down here that are selling bonds, or something like that? I mean you can establish the current rate of interest without going so far afield, don't you think?

Mr. Moran: Yes, sir, but I did not see that there would be much dispute about it.

The Master: I do not think there is much. I think you ought to have it in the record, though.

333 Mr. Moran: Yes, I think we should.

Mr. Hill: I think Judge Hand said six or even in the Consolidated.

Mr. Moran: A proper rate of return.

Mr. Deegan: Not less than six.

Mr. Hill: And the master recommended it was six per cent.

The Master: In certificates of indebtedness it is over six. Get some evidence in about that, about the general rate of interest.

Mr. Moran: He was just speaking about that, to enlarge upon his qualifications.

The Master: Yes, I think it is very desirable to get some evidence in about the thing—in the record.

Q. Do you know of any issues of New York utilities that were sold recently?

A. New York City?

Q. Yes. Do you recall an issue of the Consolidated Gas debentures that were sold this spring?

A. I do, but I could not name the rate of interest, and all I would know about that would be the newspaper advertisement, which, of course is the issue price to the public, and the Consolidated did not get as good a price as the public had to pay.

Q. Well, the price that the public has to pay is what the public has to figure on?

A. The Nassau & Suffolk Lighting Company which operates just outside the territory of this company, have just filed an application with the Public Service Commisison to issue five year debentures bearing 9 per cent interest, to be sold at 90, to yield 11 per cent.

Mr. Hill: I object to that. It does not appear that is an analogy to the case of the plaintiff, or that the securities are good or as good as securities of the plaintiff; it is not a proper measure for estimating the returns.

The Master: What does that company show on its bond interest?

The Witness: They at present are earning somewhat less than their bond interest, and I have had an intimate knowledge of their accounts and the cost of their property as I have of this property, and the ratio of bonds to valuation I would say is about the same.

That is, it is not far different. They are both exclusively gas companies and do no other business.

Q. Of course, when we are talking about a rate of return we are talking about what you have to be paid—what you have to pay to an investor in order to get them in. We must assume that the security is good, we cannot take the gamble, we are not talking about the gambling investor, are we?

A. No, I am not talking about the gambling investor.

335 Q. Or the speculator?

A. Except to this extent, that in the gas business at present, where the companies are limited by franchises and statutes and by an almost undying opposition on the part of the public to allowing the rate for gas to increase the way charges for everything else have gone up, investors are very much afraid of gas companies' securities, and the rate of interest is therefore higher.

Mr. Hill: One moment. I object and move to strike that out. In the case at bar the plaintiff is not limited by a statute that is confiscatory or that is shown to be confiscatory and the assumption that the price at which it must sell its commodity is inadequate is unfounded in this case.

The Master: I will let the evidence stand for what it is worth in connection with all the testimony.

Mr. Hill: Upon the further ground that this is simply an application filed with a public body and does not appear from the witness' testimony that the issuance has been authorized.

The Witness: If I were connected with the Public Service Commission at the present time, in the same capacity as I was——

Mr. Hill: I think you are getting far afield.

The Witness: I would not say eleven per cent for this com-

336 pany.

The Master: Strike that out. I think we better stick as close as we can to the issues.

Q. Mr. Hopson, assuming this company over here, the Kings County Lighting Company, would need to secure a million dollars that we are now talking about to make additions and extensions to its plant, and assuming also that it will be able to charge a rate enabling it to meet all its obligations, what would it have to pay in order to get that new capital?

Mr. Hill: I object to that as a subject upon which the witness is not qualified as an expert to testify, and it is incompetent and inadmissible.

The Master: I think the question is simply meant to elicit the witness' opinion as to the rate of interest which gas companies situated as this gas company is situated would have to pay if they were to try to borrow a million dollars. I will let him answer.

Mr. Hill: Exception.

Mr. Deegan: Just a moment. I would ask what is meant by the word "obligations", that is used in the question. Do you mean bond interest and also dividends upon stock?

Mr. Moran: Oh, no, its obligations would mean particularly the obligation to pay the money it had borrowed with the interest on it.

Mr. Deegan: I simply wanted to get it clear.

337 Mr. Moran: Surely.

Mr. Deegan: That that was all he included when he answered the question.

The Witness: I think between 9½ and 10%.

Q. They would have to issue a short term bond to get it, probably?

A. Yes, they would have to issue securities in precisely the same form that the bankers wanted it, whatever they thought was most advantageous.

The Master: That is generally the way.

The Witness: Well, in other words, what I mean to imply is that they could not sell their present long term first mortgage bonds if they had some available to sell, at that rate of interest. They would have to get at something that was of a shorter term and with all the conditions and so forth in it that the bankers and their lawyers could think of.

Q. Can't you leave bankers out of it and get at it by ascertaining the exchange value that is put upon old issues that are now out? They are *being* on the bond issues, 6% bonds and 5% bonds, are they not, Mr. Hopson?

A. Yes sir.

Q. A 6% bond issued seven years ago is selling on a basis of seven or eight per cent., is it not?

Mr. Hill: I object to it.

The Master: He is not specifying any special 6% bond. I will let it in for what it is worth. He is trying to establish a current rate of interest here.

338 Mr. Hill: Exception.

A. The established issues unfortunately do not sell as well as some of the new issues, due to the lack of the advertising campaign behind them and the desire of the people for something newer. But the range is not sufficient so that I would change my answer, between 9½ and 10%, on that account. I think Mr. Moran's question was a little too general to be able to give more than a general reply to it.

The Master: I do not get much help out of that question of Mr. Moran's. I think everyone admits that you want to get into this case some evidence of the current rate of interest for borrowing by a company situated in somewhat of the same position this company is. The plaintiff is claiming here that it loses a lot of money every year, that it does not make its bond interest, does not make any interest on its capital. Well, on account of the stringency in the money market today, if it went to a banker with the sort of a statement it would have great difficulty in getting it on any terms.

Mr. Moran: That is what we say. We have proved we cannot get it on any terms.

The Master. What I think we ought to have is some sort
339 of a statement, get it up and submit it to the other side, showing securities of light and power companies or gas companies that have been sold, as follows—during the last six months; a little bit of a summary of the financial situation of that company, that it is earning two and a half times the bond interest, earning one and a half times the bond interest, or something like that, which will establish, so far as you can establish it, the current rate of interest for a company that can meet its obligations. Something like that I think we should all agree on.

Mr. Hill. I think it would be well to have that.

Mr. Moran. The witness could give us some of those.

The Master. His testimony is very general though.

Mr. Moran. I know, because he is an expert, and an expert has to give general testimony and we have to bring out particular instances. He can give us some definite ones.

Q. Give us some definite ones.

A. I have been attempting to generalize from some definite ones I know.

The Master. Why don't you get up a statement for us?

Mr. Moran. That is all right. I have to depend on the other side accepting that.

340 Mr. Hill. Here is a thought that I had in mind. The ability to sell at the rate which is required to be earned on a security to make it saleable, just in this month or these two or three months, right now—is that the true measure of the term which a public utility——

Mr. Moran. No.

The Master. It may not be, but it is the only evidence that we have got at the present time.

Mr. Hill. There is no reference that there is going to be any million dollar issue.

Mr. Moran. I did not state that was the fact. Assume that—and that is the fact, we are going to prove it in the case.

The Master. The mere fact that time money is quoted today at nine or ten per cent. does not mean that it is going to stay at that amount or that rate, but you have got to have some evidence here, and undoubtedly the court on considering the—the District Court, takes into account the usual financial situation at this time.

Mr. Hill. I was figuring that this evidence might be offered in part as showing the return which should be computed upon their rate base, as proven or as stipulated. As stipulated, it is pretty near investment.

341 Mr. Moran. It is the same thing. I shall contend in this case, and I think it is the law, that a return of the present investment must be the same as will attract new capital at the particular time. Anything else is confiscation. This case is a living example of the truth of that statement, because unless it is a growing concern—and they are all growing in the state of New York; it is not a moribund community in the state, everything is growing and

you have to get new capital—unless you pay the current rates of interest and the current rate of return, you have to get new capital. You cannot make fish of one and fowl of the other, you have to provide for the whole thing or you have confiscation. And the idea of saying that the investor can get along in hard times, during an abnormal period, as they call it, with a six per cent return or a five per cent return, is not sound, because this gas company and every other gas company and every other public utility company in those so-called abnormal times has got to interest the investing public and get capital and the more abnormal the time is, so to speak, the more capital it needs. Consequently, you have got
342 to have, in order to avoid confiscation—you have got to give, the same rate of return for the capital already invested as will be able to attract new capital. That is my position in this case.

Mr. Hill: I believe from a reading of Judge Hand's opinion that the average over a matter of two or three years will apply particularly to the return which should be allowed upon the present capitalization, the present stock issue and the present bond issue, and on the present capital account of the company. That is because right here in two or three months there is a nine and ten per cent return on certain issues that must be issued now. But that does not establish that upon the present capitalization of this plaintiff, it should be averaged over a period of two or three years past, for they are not now *entated*——

Mr. Moran: That might be a legal question, but I submit that the Master is correct when he says we must ascertain the present rate of return. We may need the rate of return six months or a year ago, or more, we may need a rate of return of a year ago for the application of the legal principles.

The Master: My point is this: It is a matter of common knowledge, though I do not know the figures, that concerns like
343 the Standard Oil Company a few months ago went into the market and paid something over 7% for short term notes. I think they were Ten-year notes. Now, of course that company has splendid credit. If it was necessary for it to pay 7% for ten years, that is some evidence of the current rate of return for an oil company, at any rate—the current rate of interest for an oil company. All that we can do here is to get some evidence about this subject to present to the District Court for its consideration—get it in the record. Of course, the District court knew and it is a matter of common knowledge generally speaking, what the rate of interest is.

Mr. Moran: We will get up a list of those specific instances. I know myself and have taken out issues myself. I know what they have paid in the last year. I am applying now to the Commission for another issue, and the question is whether we will issue bonds or issue stock. I do not believe we will issue stock because I do not believe we can sell stock at any price.

Mr. Hill: Mr. Deegan suggests that this treatise on bookkeeping—

that he would like to have it after it is written out and have the experts go over it.

Mr. Deegan: I think we ought to have a chance after we see the minutes.

344 The Master: Let me ask one question. I think Mr. Hopson's statement about the adjustments of inventory was very clear, and I would suggest that you get him to point out in the books or from the books one instance of that adjustment which was made during the year. Could you do that?

Mr. Hill: Take the c two I mention, the coal and the oil.

The Master: I think the statement was very clear, but it is fairly close reading and it might be easier to understand it by his pointing out one instance of it. Proceed to an instance where you have made an adjustment of inventory.

The Witness: The Public Service Commission account that provides for that is called Undistributed adjustments-balance, and it is numbered G-862, Undistributed adjustments-balance. The classification provides that "At least once a year"—it is on page 52 of this pamphlet that was introduced here, for identification, and I think it was exhibit 1—"At least once a year an inventory of materials and supplies shall be taken, and the difference (in respect of any particular class of materials and supplies) between the ledger and inventory balances debited or credited to this account

345 in case it cannot be assigned to a specific account. Credit to this account all discounts recovered through the prompt payment of bills for materials and supplies consumed in operations, unless the discounts are applied to the particular bills."

Then it says: "Where materials and supplies have been used in construction as well as in operation, a suitable proportion of the shortage or overages disclosed by the inventory may be debited or credited to the account (No. G-286), 'Miscellaneous Construction Expenditures.'"

Customarily where the amount is small the companies do not disturb, but they like to have an exact and a particular record of the capital accounts by putting an inventory adjustment into capital, or put the whole amount into expense. Now, at the end of the year 1919 the company made their inventory of materials and supplies, and according to this entry they found that the inventory showed $515.72 less property in the materials and supplies account than the inventory showed. The inventory, I might say, is required by the Commission to be taken at cost. Everything in these public utility companies under the Commission's classification is at cost. Market value does not enter into it. They therefore made a

346 journal entry in plaintiff's exhibit 5, at page or journal voucher No. 556, in the month of December, 1919, in which they charged General and Miscellaneous Expenses and credited materials and supplies. In other words, there was a shortage in the inventory as compared with the ledger account which was supposed to show the amount they had, and they credited to materials and supplies account and charged general miscellaneous expenses with $515.72. Now, that was posted in plaintiff's exhibit 4, book 1,

to undistributed adjustments, which is the name of the stub account in expenses under general and miscellaneous expenses at No. 130. There it is right there, $515.72. That is unusually close. In companies of this size it would not be surprising even where it is well run if it were two or three thousand dollars.

347 Q. Mr. Hopson, this would not necessarily represent the discrepancy between the inventory——

A. (Interposing.) No.

Q. For the whole year?

A. It does not state here whether it does or not. It says to write off difference in inventory. Under this classification if there was a shortage or an average of a particular kind of property; for instance, oil, gas oil, it would be more correct and result in being able to use the accounts for a purpose like this, to get a more accurate result as to the amount of oil used per thousand consumed, if you made the adjustment direct in the gas oil account.

Q. There was an adjustment during the year?

A. That adjustment during the year was what I talked about when I was testifying, that the engineer at the works keeps an eye on the oil tank, I assume, and he found that that had gotten a little out of balance with the account, and he made the adjustment or probably may have looked back and found the error.

Mr. Deegan: I think we ought to have an opportunity of reading over Mr. Hopson's testimony before cross examining.

The Master: That will necessitate bringing Mr. Hopson back here. Very well.

348 RALPH ELSMAN, called as a witness in behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Moran:

Q. Mr. Elsman, what is your business?

A. Vice President and General Manager of the Kings County Lighting Company.

Q. How long have you been occupying that position as General Manager?

A. Since February 1st, 1917.

Q. And of Vice-President?

A. Since January 1st, 1919, or December, 1918. I have forgotten which.

Q. Were you engaged in the utility management before that?

A. Possibly 18 years.

Q. Of gas and electric companies?

A. Yes, continuously.

Q. The Kings County Lighting Company during the time you have been with it has been manufacturing gas exclusively?

A. Yes, sir.

Q. In what territory?

A. In the territory comprising all of the 30th Ward and part of the 31st Ward in the Borough of Brooklyn.

Q. Has it any extensive distribution in the 31st Ward?

A. Not very much.

Q. And its plant, its manufacturing plant, is located where?

A. On First Avenue between 54th and 56th streets.

Q. And it owns the land there and buildings and so forth?

A. It does.

Q. And its gas holders and shops are located where?

A. At 65th street and 9th avenue.

Q. What kind of gas does it make?

A. It manufactures what is called carburetted water gas.

Q. In that process oil and coal are used?

A. Yes.

Q. The oil, I understand, is used to enrich the gas?

A. Simply to enrich the gas.

Q. Who has charge of the purchases by the company and the employment of its labor?

A. I have charge of the purchases and the employment of labor indirectly.

Q. Do you purchase the oil for instance that is used?

A. I purchase the oil that is used.

Q. Have you with you the contracts that the company has made for 1919, 1920, and 1918, for instance?

A. Yes, sir.

Q. Will you bring them out, please—bring all of the contracts that you have there?

A. This is the contract——

Q. Never mind which one it is; just hand them out, Mr. Elsman, in their order.

A. I have them all here (handing counsel).

Q. Under what contract were your oil deliveries for 1919 made?

A. That contract was made on the 16th of December, 1918, for the period from January to July, with the Standard Oil Company of New York.

Q. That would only cover part of the year. Now, I want the contract or contracts that gave you oil for 1919?

A. There was one contract made on the 16th of December, 1918, for 4,125,000 gallons to be supplied between the period from January 1st, 1919 and ending July 31st, 1919, and there was another contract made on the 31st day of July, 1919, for 2,000,000 gallons of oil, to be supplied during the period from August 1, 1919, to December 31, 1919.

Q. Have you those contracts with you?

A. Yes, sir. I have the original contract signed by myself and the other is a copy. The 1918 contract is in evidence in the other trial.

Q. You have the contract here?

A. Yes, sir.

Q. Let me have them, please (witness hands counsel papers).

Mr. Moran: I will offer those in evidence; that is, contract dated December 16, 1918, with the Standard Oil Company of New York.

(Marked Plaintiff's Exhibit No. 19.)

Mr. Moran: Also the contract dated July 31st, 1919, with the Standard Oil Company of New York.

Mr. Hill: No Objection.

Mr. Deegan: No objection.

(Marked Plaintiff's Exhibit No. 20.)

71 The Master: I suggest that we have copies of those made, so we won't be charged with the original documents.

Mr. Moran: Yes.

The Master: I do not want to put in original documents.

Q. Under this contracts how much oil was received by the company and paid for by the company, if you know?

A. Why, under the contract made in December, 1918, there was received of that 4,125,000 gallon contract, all the oil except 1,152,467 gallons.

Q. And that was not received at all?

A. No, the contract expired before all that oil was received. In other words, I overestimated the amount of oil that was required.

Q. And under the second contract how much oil was received?

A. All that oil was received. Not in that year, some of it ran over until the next year, and we got the benefit of it.

Q. Did you negotiate these contracts?

A. I did, yes.

Q. Take, for instance, the first contract here, Exhibit No. 19, which is for 4,125,000 gallons. That is a rate of 7.495 cents per gallon?

A. Yes.

Q. Did you, before making that contract, canvass the market to find out what was the best price?

A. Yes, indeed.

72 Q. Did you invite bids?

A. Yes, I can give you the names of the companies.

Q. Well, you invited bids from a number of companies; we do not want that detail.

A. Yes.

Q. How many?

A. All the companies that would supply the oil in this Metropolitan district—who could supply oil in this metropolitan district by tank boats.

Q. Did you accept the bid of the lowest company?

A. Yes.

Q. Your oil is delivered by barge, is it not?

A. By tank boats alongside.

Q. And that is the only way it can be delivered?

A. That is the only way we can receive it.

Q. You have no rail connections?

A. No rail connections that we could work at all.

Q. I mean, there are no rail connections that run to your property?

A. No rail connections to our property, no.

Q. That is what I mean, the oil has got to come in by barge, by boat; is that right?

A. Yes.

Q. That is the way all oil is delivered in this district, is it not?

A. All oil that is received in such large quantities as we receive it.

Q. All gas companies take their oil here in the harbor, do they not?

A. Yes, sir.

353 Q. Did other companies bid higher than the Standard Oil Company on that contract of which we have not had the bids?

A. Yes, we were only able to get a bid from one other company. That price on that contract was 7.495 cents per gallon, and the Texas Company bid 7½ cents, I believe. (Witness consults paper.) 7½ cents per gallon.

Q. On the second contract, Exhibit 20, which is 5.96 cents per gallon, did you negotiate that contract?

A. I did.

Q. Did you likewise invite bids on that?

A. Yes, indeed, the two contracts were sort of negotiated together. There was a change in the price of oil which really affected the second contract.

Q. You did not negotiate the July contract in December of the prior year, did you?

A. Oh, no, we negotiated the July contract at the expiration of the contract that was made in December of the previous year.

Q. You said that they were negotiated together?

A. No, I said I had an opportunity with the Standard Oil Company before negotiating the second contract to extend that contract from July 31st to the end of the year at a price which I did not accept.

Q. The best price you could obtain in July, 1919?

A. Yes.

Q. Was there a reduction on that price of the first

354 contract?

A. There was first an increase. The contract originally called for 7.49 cents per gallon. According to the provisions of the contract, which is in all contracts, it is subject to the freight increases, either by lighterage or the point from the wells to the point of shipment by water, and there was an increase in that price on February 1st.

Q. You mean increases in transportation charges?

A. Transportation charges, which raised the rate from 7.49 cents a gallon to 7.595 cents a gallon. That price was subsequently reduced at April 1, 1919 to 6.08 cents per gallon. At that time I had the opportunity of getting the price of 6.08 per gallon, if I would accept a contract to the end of the year. I did not want to

accept that in view of the fact that I thought that there was a falling off of the market.

The Master: That was in April?

The Witness: That was in April. And that is subsequently borne out in my negotiations afterwards, that for once in my life I guessed right.

Q. That is, you guessed right before you were able to get a contract in July for 5.96 cents a gallon?

A. In July I negotiated a contract which took me to the end of the year at the price of 5.96 cents a gallon.

Q. Then paid part of the time, from April to July this
355 6.08 cents, was it?

A. 6.08 cents per gallon.

Q. And your average price for oil used in 1919, what did it turn out to be?

Mr. Hill: 6.46 you have got on this paper.

A. The average price of gas oil used for the year 1919 was .0646 cents per gallon.

Q. No, that would not be right.

A. No, 6.46 cents per gallon.

Q. Yes, 6.46. What did you do following that for oil?

A. Well, that brought us down to the end of the year of 1919. Then we ran into what we call a closed market. There was absolutely no oil for sale at the end of the year. I tried to negotiate contracts with practically every oil company that had any oil at all, or knew that they sold oil. The names of them were the Tidewater Oil Company, the Standard Oil of New Jersey.

Q. What were you able to get; let us find that out first?

A. I was not able to get any long term contract at all.

Q. Well, did you make a contract?

A. I made a contract.

Q. Let us have it; have you got it here?

A. I made a contract for a quantity of 2,000,000 gallons of oil from January to April, with the Standard Oil Company of New York at a price of 8.08 cents a gallon (handing counsel paper).

356 Q. And that is the paper you produce here?

A. That is the paper that I produce there.

Mr. Moran: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 21.)

Q. This is a contract, Plaintiff's Exhibit 21, that gave you oil that lasted you how long?

A. From January until—it is supposed to cover the period up to April, but I think it ran a little over that.

Q. You negotiated this Exhibit 21?

A. I did, yes.

Q. Was that the best price you could obtain?

A. It was the only price I could obtain.

Q. Did you solicit bids?
A. Yes.
Q. From everybody?
A. From everybody and everyone.
Q. And only the Standard Oil Company of New York bid?
A. They did not want to bid but they were the only one that would give me the oil.
Q. You exhausted the supply under this contract?
A. Yes, we did.
Q. Then did you make another contract?
A. Yes, sir.
Q. Have you get it here?
A. Yes, a contract for a quantity of oil made on the 17th of March, 1920, for 3,500,000 gallons of oil at ten cents a gallon.
Q. And this contract that you are now——
A. (Interposing.) Under which we are now operating.
357 Q. And you negotiated this one?
A. I did.

Mr. Moran. I offer it in evidence. It is dated the 17th day of March, 1920.

(Marked Plaintiff's Exhibit No. 22.)

Q. Did you try to get bids on this oil?
A. I interviewed practically every oil executive who supply oil in our district a good many times, and begged him for it.
Q. The oil that you had used up to this time, or for the first six months of this year, I take it, would be oil under the contract made in July, 1919, and there was some runover that, I think you said?
A. Yes.
Q. Also under the contract made on the 14th of January, 1920, Exhibit No. 21, and this present contract made on the 17th of March, 1920?
A. Yes.
Q. The three?
A. Yes.
Q. And the quantity used in the six months, as shown on our exhibits here, is the quantity received under those three contracts?
A. Yes.
Q. And gives an average price of how much?
A. Gives the average price of 598,808 and ten cents, made up of those three.
Q. But it gives an average of how much?
A. Of 7.97 cents per gallon.
Q. And some of that is ten cent oil?
A. A very small portion, one month, I believe.
358 Q. Your average price for oil, I take it then, for the rest of the year, will be more than 7.97 cents?
A. Oh, yes, this contract I estimate will take us up to some point in the first part or around the first part of December. We will have to negotiate a new contract after the 1st of December.

Q. You are satisfied that you obtained the best prices possible for the company for this oil?

A. I know I did.

Q. Do you know any companies that paid as much or more?

A. Yes, and a great deal more.

Q. Do you know any companies paying more than ten cents at the present time?

A. Yes, a lot of them. The Bronx Gas and Electric Company, who had no contract at all, are getting their oil at 14 cents a gallon, and the Brooklyn Borough Gas Company are paying 14 cents a gallon and have a contract for the period of one year.

Q. The Brooklyn Borough just below you, that is in the 31st Ward of the Borough of Brooklyn?

A. Yes, sir, to whom we supply some service.

Q. That is in the Coney Island district?

A. Yes.

Mr. Moran: I do not know that there is any contest on this oil. I do not assume there is.

Q. Who buys the coal?

A. I do.

The Master: We will adjourn now until ten o'clock in the morning.

(Whereupon, further hearing was adjourned to Thursday, August 12, 1920, at ten o'clock a. m.)

358½ United States District Court, Southern District of New York.

Before Hon. Gordon Auchincloss, Special Master.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Transcript of Reporter's Minutes.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York.

Barclay, 8477.

359 KINGS COUNTY LIGHTING CO.

vs.

NEWTON et al.

61 Broadway, New York,
August 12, 1920—10.00 a. m.

Met pursuant to adjournment.

Present:

The Master.
Mr. Moran.
Mr. Hill.
Mr. Deegan.

RALPH ELSMAN resumed the stand.

Direct examination.

By Mr. Moran:

Q. You stated that you purchased the coal for the company during the period in question.

A. I purchased the anthracite coal.

Q. You did not purchase all the coal, then?

A. Oh, there are small quantities of coal which are purchased directly through the purchasing agent.

Q. By anthracite coal, what do you refer to?

A. That is all the coal which we use in generators.

Q. And by that you mean the gas making machines?

A. The gas making machines.

Q. And that is anthracite coal, a large grade of coal, that is, large chunks?

A. Well, it is technically called broken coal.

Q. You purchased that?

360 A. I purchased that, and I also purchased the large quantities that are used of barley, a cheaper grade of anthracite.

Q. Now, taking that anthracite coal in 1919, did you have a contract for the purchase of that coal, a written contract?

A. In 1919, we had no contract for broken coal. The war was on at that time and the basis of supplying that, or of getting anthracite coal—it had to be handled through the fuel administration. The Fuel administration issued an order, or instructions, rather, that the company necessarily appoint the dealer from whom they were getting the coal the previous year as a purchasing agent, and then that purchasing agent was given instructions or was given orders by the Fuel Administration to supply the company with the amount of coal that the company said they required, or which was agreed on by the Fuel Administration that we could have.

Q. You are speaking now of 1919?
A. I am speaking of 1919, the year of 1918 to 1919.
Q. That regulation you spoke about ran from the year 1918 within the year of 1919?
A. Into the year of 1918, but we made a contract——
Q. (Interrupting.) No; we must be careful about our years—— ran from the year 1918 into the year 1919?
A. From April to April.

Q. Now, we do not care so much about the details of
361 it. What company supplied you with anthracite coal—— what firm or company supplied you with anthracite coal?

A. Williams & Peters.
Q. Large coal dealers in this city?
A. Yes, one of the largest.
Q. Can you tell us, Mr. Elsman, what you paid for that coal? Was it a uniform price?
A. Yes, I can tell you what we paid for that coal. I have before me the contract.
Q. Well, proceed. Tell us what it was?
A. For coal for the year 1919, beginning April.
Q. You mean beginning April, 1918, and running over to 1919?
A. No, I am speaking now of the contract made in the year 1919.
Q. Mr. Elsman, we want to work according to time. Let us keep to the first part of the year. You are speaking about the situation that lapped over from the year 1918 into the year 1919. Let us confine ourselves to that and we will clear it up.
A. All right. That coal was supplied us by Williams & Peters; they were appointed purchasing agent in the year 1918. Now, the price that we paid for the coal at that time was $7.85 alongside our dock, to which was added the war tax and insurance, which brought it up to $8.39 alongside our dock.
Q. Now, just a moment. A long ton?
A. A long ton.

Q. That is, you paid $8.39 a long ton for coal at your
362 dock? That included everything, did it?

A. Yes.
Q. Towage and everything?
A. Yes.
Q. That was the price paid until April, 1919, was it?
A. That was the price paid until April, 1919.
Q. And that was not an agreement by Williams & Peters, a written agreement to furnish it at that price, but it was the result of the transaction which you already had?
A. Oh, yes, it was the result of the appointment of Williams & Peters as purchasing agent, and then the notification of the Fuel Administration to Williams & Peters to supply us with a certain quantity of coal at the price fixed by the Government.
Q. Now, Mr. Elsman, starting from April, 1918, did you make a written contract?

Mr. Deegan: Let me just interrupt a minute. Have you got the correspondence on that?

The Witness: Yes.

Mr. Deegan: Do you want to offer it? Is it very voluminous?

Mr. Moran: It is very voluminous.

The Witness: Yes, there is a whole lot of it there.

Mr. Moran: You can cross examine on it.

The Witness: I can read you the letters.

763 Mr. Moran: We will never get through if you read all the correspondence on coal and oil—never get through this case.

Mr. Deegan: I thought it was rather short.

Mr. Moran: No, it is not. I worked days trying to line it up, and it is so long that you can never get any place on it. But you can examine on it, cross examine on it.

Q. Now, that brought us to April, 1919?

A. Yes.

Q. Mr. Elsman, from that time on did you make a contract for another year?

A. I made a contract from that time on.

Q. Now, Mr. Elsman, let me ask you a question. Is it a fact that coal dealers, the coal year, so to speak, contractual year, for some considerable time in the past, is from April to April?

A. Oh, yes, that is the year.

Q. That is right, it is April to April, is it?

A. Yes.

Q. Now, oil—is there any period for that?

A. No.

Q. Was there ever any sort of practice that it ran from January to January? I rather had an idea there was.

Q. Why, in times gone, in normal times, it was the usual practice for companies to make a contract the first of the year to carry them through to the end of the year. Most contracts expired around the end of the year.

Q. At the end of the calendar year?

A. At the end of the calendar year.

764 Q. In coal, that practice, so far as you know, never prevailed?

A. No, coal was April to April.

Q. April to April is the coal year, is that right?

A. Yes.

Q. Now, taking up April, 1919, to April, 1920, did you have a written contract?

A. I did.

Q. To furnish you coal?

A. Yes.

Q. Have you got it here?

A. I have.

Q. Let us have it.

A. (Witness produces paper.)

Q. This is with Williams & Peters?

A. That is with Williams & Peters.

Mr. Moran: I offer it in evidence.

(Paper received in evidence and marked Plaintiff's Exhibit No. 253)

Q. And this contract was negotiated by you?
A. It was.
Q. Which provides for 40,000 tons of grade anthracite at the price of $8.15?
A. That is $8.15 without—yes.
Q. $8.15, the grade of coal you speak of here, is the broken coal used in the generators?
A. Broken coal.
Q. Did you get deliveries under that contract for the whole year?
A. Yes, we got it up until the end of April of 1920.
Q. Now, the $8.15 did not measure the entire cost to you at your works, did it?
A. No.
Q. There were additions?
A. Yes.
365 Q. Of insurance?
A. And war tax and transportation charges.
Q. Can you tell us what that coal cost you at your works?
A. $8.25 along side.
Q. And that was carried down to April, 1920?
A. 1920.
Q. Now, Mr. Elsman, you received vast quantities of coal under that, I presume?
A. Yes.
Q. That is, the quantities specified for instance, on the exhibits already received in evidence?
A. Yes.
Q. Are that sort of anthracite coal?
A. Yes.
Q. Now, taking 1920, Mr. Elsman: in April, 1920, did you enter into another contract?
A. We entered into an agreement but no definite contract—a letter.
Q. Well, lawyers consider an agreement and a contract pretty nearly the same thing. You will have to explain it.
A. I mean we have no formal contract. This is a letter contract.
Q. Well, that may make a contract. Have you got that here?
A. Yes.

The Master: This is all on generator coal, isn't it?
Mr. Moran: Still on generator coal, yes.
The Witness: There are a number of letters. It is a combination deal, so to speak; it involves two coals; two parcels of coal.

366 Q. Never mind, if it involves this coal. Had they written you a letter saying that they would furnish you with anthracite coal?
A. Yes.

Q. On any basis?
A. Yes.
Q. Where is the letter?
A. Here are the letters.
Q. There are a whole lot of them?
A. Yes, there are a whole lot of them.
Q. Tell us what arrangements you are getting coal under now?
A. There has been in the year 1920, a tremendous shortage of coal, and I solicited bids from—oh, many coal companies throughout——

Mr. Hill: I move to strike out the "tremendous shortage of coal."
The Witness: No; I want to prove that, if you don't mind.
Mr. Hill: Well, I mean strike out your statement of a tremendous shortage of coal as a conclusion.
The Witness: All right.
The Master: Well, he has had experience as a purchaser of coal. His opinion——
Mr. Hill: I think he should state facts, and the Court should decide——
The Master: I think he can state it for what it is worth. It is his experience, it is based on his experience, I suppose. I think, Mr. Moran, if there is an arrangement contained in the line of
367 letters, you had better put them in. There are not very many here—rather than have it described.
The Witness: I can just take these out, Mr. Moran; there are only a few of them that will be involved here.
The Master: Because I understand your position is that this coal arrangement that you have here will continue on until April, 1921, that you will be buying coal at those rates. Now, if it is not a fixed contract, if it is a varying rate, I think it would be a pretty good idea to have it fairly definitely stated.
The Witness: This will take it in, all that (Producing letters).

Q. You have handed me three letters?
A. Yes.
Q. One dated March 12, 1920, from the Lehigh Valley Coal Sales Company, to your company; another one dated March 24th from the same company to your company; and one carbon copy of your reply of March 27th?
A. Accepting it.
Q. Accepting it. That is, these, you say, constitute your arrangements at the present time?
A. Yes, sir.

Mr. Moran: I will offer these in evidence.

(Letters received in evidence and marked Plaintiff's Exhibits 24, 25 and 26, respectively.)

Mr. Hill: Let me look at them for a moment. All right,
368 I have no objection.

Q. Now, under the arrangement that is provided for in these letters you have just put in evidence, have you received coal?

A. We have received all our anthracite coal.

Q. You have the data with you to show the cost of that coal to you?

A. Yes, sir.

Q. What prices do you pay? What does the coal cost you? Is there any uniform price since April down to the present time?

A. No.

Q. It has varied, has it?

A. Yes.

Q. It consists of various charges, does it not?

A. Yes.

Q. By that I mean, you pay one price for the coal at the mine, you pay freight charges and you pay various things?

A. Yes.

Q. Is that the idea?

A. Yes.

Q. Now, have you got a list of your deliveries and the cost of them?

A. Yes, sir.

Q. Will you read them off?

A. Beginning on April 12th, we received 838 tons, approximately and 19 hundredweight, $5.95, costing $4,991.75. To that add for rail freight $1,552.06; the tax on rail freight, $46.56, water freight, $111.09, the tax on water freight, $12.33; insurance, $16.65; bringing the total cost to $7,030.44, making the total cost of the coal, $8.38.

369 The next shipment—I can read them all off, if you want?

Q. You have a list of them there?

A. Yes, I have a list of them.

Q. You have had how many shipments? Just name the number of shipments.

A. Ten shipments to the 13th of June.

Q. The first one cost you, at your works $8.38 a ton?

A. $8.38 a ton.

Q. What did the second cost you?

A. $8.33 a ton.

Q. And what did the third cost you?

A. $8.30.

Q. And what did the fourth?

A. $8.82.

Q. And the fifth?

A. $10.09.

Q. And the sixth?

A. $9.85.

Q. And the seventh?

A. $9.84.

Q. And the eighth?

A. $9.89.

Q. And the ninth?

A. $9.91.

Q. And the tenth?

A. $9.96.

Q. Is that the last shipment of which you have a record?

A. That is the last shipment of which I have a record before me.

Q. And probably is pretty nearly the last one, is it not?

A. Oh, no; this is to the 13th of June. We have been getting coal every week.

Q. Well, that is down to the 13th of June, is it?

A. Yes.

Q. Then you have been getting more since. Do you know
370 whether it has gone higher?

A. Oh, yes, it has cost something over $10 now.

Q. This is $9.96; that is pretty near that. Has there been a very great rise?

A. Not very much.

Q. This is the final you have. Has it increased from the mine, from $5.95 from the shipment?

A. It is $5.95 to $7.30, and it is now rising at the rate of about 20 cents a month.

Q. These last shipments were at $7.30, the last two?

A. Yes.

Q. It has risen from April to June, from $5.35 to $7.30 at the mine?

A. Yes.

Q. Have there been increases in any other of the charges?

A. Yes, there is an increase in towage.

Q. Increase in towage?

A. Yes, we have had to pay additional towage.

Q. Now, on that first shipment, you did not pay any towage?

A. No, you see the Harbor strike took place about the—oh, around the 10th of March.

Q. Yes.

A. And it commenced to tie up all the coal companies and transportation, towing companies just about that time.

Q. Yes.

A. That meant that there was an embargo all along the water front on towing coal from the Jersey side over to the New York side, and it meant that we had to go out and get independent
371 towing people to bring our coal from the other side of the water over to our dock, from Perth Amboy. To do that we had to pay premiums, many times as high as $500 a boatload of coal, a dollar a ton premium. It had to be moved by an independent man, one who was willing to go over there and take the chance to bring it over, coal having to be unloaded by volunteers from the cars onto the boats.

Q. Does that situation still prevail?

A. I believe the strike is called off this morning.

The Master. How much did that amount to—a dollar a ton?

The Witness: A dollar a ton.

The Master: Well, does that figure in on the price of your coal from April until the present time?

The Witness: Yes.

Q. Well, Mr. Elsman, I note on this statement that has been furnished by your office, that there is a list of towing charges?

A. Yes.

Q. $475, $200 and so forth; that is what you refer to?

A. That is what I refer to. I say we have paid as high as a dollar a ton.

Q. But not often?

A. Not on this record here.

The Master: Well, supposing you do not have to go out
372 and get the towers, these independent towers, what is your average rate on towage? Have you worked that out?

The Witness: Oh, yes. It is about 45 or 55 cents, the old rate. I can give you that in just a moment.

The Master: Of course, that is an extraordinary expense in order to prove cost, but no one expects it will continue indefinitely at that rate?

The Witness: No.

The Master: I was wondering if you could establish—the price of your coal at a——

Mr. Moran: Without that?

The Master: Well, without that, or at an average for your coal.

Mr. Moran: We have a list of all those deliveries here that he referred to. Maybe it would be just as well to put that in evidence. And that shows that, towing charges separately.

The Master: Yes.

The Witness: Here it is, right here.

The Master: Why don't you put that in evidence?

The Witness: It is right here, Mr. Moran, for 1920.

Q. The statement that you hand me contains these shipments that you have just spoken about, of anthracite coal in 1920?
373 A. Yes, sir.

Q. And the prices you have just given?

A. Yes, sir.

Q. It also contains the anthracite coal deliveries in the earlier part of the year?

A. Yes, sir.

Q. Under that old contract that you also spoke of, $8.15?

A. Yes, sir.

Q. And under the heading "towing" is this extra charge you have paid?

A. Yes, sir.

Q. The figures under the heading towing?

A. Yes.

Mr. Moran: I would offer that in evidence for explanation and to aid the testimony given.

The Master: Yes.

(The paper was received in evidence and marked Plaintiff's Exhibit No. 27.)

Mr. Hull—Now, let me see—the towing that was prior to the strike?

The Witness—No, that was on the old contract, Judge.

Mr. Hull—I see.

The Witness—That was called alongside.

Mr. Hull—And all this towing here is under the—

The Witness—New contract.

Mr. Hull—And all the towing here is under the conditions which obtained during the strike period?

The Witness—Yes.

374 Q. Won't you have to pay towing charges anyway, whether there is a strike or not?

A. Yes, but we won't have to—just a moment now—on this contract, I am sure that contract calls for alongside. (Referring to paper.)

Q. But you have to pay all the expense, whether it is alongside or what it is?

A. Oh, yes, we have to pay that. I was trying to find out what the rate was for towing.

The Master—I don't quite understand. Did you pay towage under the old contract?

The Witness—Yes.

Mr. Moran—No.

The Witness—Yes, we did.

Mr. Moran—I asked you that question. The dealer paid that and charged it to you, and it came in at $8 Ld. because it was alongside.

The Master—The old contract was alongside and the new contract in Jersey?

Mr. Moran—No, they deliver it alongside, but their prices are F.O.B. the coal at the coal at the mine, the market price of the coal at the mine, plus freight charges, towing, plus insurance, plus war tax and everything else.

The Master—Yes, I see.

Mr. Moran—So they put it there and they pay the bill 375 and charge it to you, don't they?

The Witness—Yes. They just happened to segregate the amounts in this contract, whereas the other one called for alongside delivery, and we simply paid insurance.

Mr. Deegan—Mr. Elsmon, where do you show on this statement the amounts which you had to pay because of the strike conditions? I carry the coal from Perth Amboy to your dock?

The Witness—It is shown there (indicating). I think it is the amount in here.

Q. What?

A. I think it is this amount in here, that is under towing. There is an item here called towing.

Mr. Deegan: That is what I understand.

The Witness: Yes.

Mr. Deegan: That is what I understood Judge Hill to ask you about, and I thought you were not quite sure.

The Witness: Oh, yes.

Mr. Deegan: That includes it?

The Witness: Yes.

Mr. Deegan: Does it include anything else? That is just the towing charge from Perth Amboy over to your dock?

The Witness: Yes, $413.40.

Mr. Moran: I am not clear. I am getting more confused
376 all the time. When the strike is over and the men are back, and willing to work an hour a day at least, will you have a charge for towing?

The Witness: No. We will have a charge but it will be in the cost of the coal.

Q. It will be a freight charge?

A. It will be a freight charge.

Q. Is this item here, towing, something that you paid to somebody else besides the coal dealer?

A. Yes, we paid this to an independent man; we paid some of this to the Morse Company, who went over and got our coal.

Q. Now, when the strike is over, you will make all your payments to the coal dealer?

A. To the Lehigh Valley Coal Sales Company.

Q. And he will pay the towing charge, the freight and everything?

A. Yes.

Q. This was an emergency in which you had to make an additional charge which you paid yourself?

A. Yes.

Q. You had to pay a premium, a bonus, to somebody else to pull it over for you?

A. Yes.

Q. And this will probably disappear today if the strike is over?

A. We had word today that the strike is off this morning.

Q. This never ran as high as a dollar a ton here, as I see on one shipment here, where you paid $475 for 612 tons?

377 A. Well, that is pretty near a dollar a ton.

Q. That is pretty near a dollar a ton, but that is the highest. There is another here where you paid $456 for 731 tons?

A. Yes; that was done by one of our neighbors, the Morse Company.

Q. There is another one here of 744 tons for $454?

A. Yes, that is another one to Morse.

Q. I want to be sure now, because the Court said this is an emergency and you paid a dollar a ton, and he will be knocking off a dollar from your $8.33?

A. He can't knock off any more than we paid for the additional towage at that rate there.

Q. It does not amount to a dollar a ton except on one occasion?
A. In my testimony I said as much as a dollar a ton.
Q. Have you sought to get a coal contract for anthracite coal for the balance of the year?
A. Well, this is for the balance of year. We have it for the whole year. It goes to April, 1921.
Q. Well, at the time you made this contract in 1919, was this the best for 1920, did you canvass the different coal companies?
A. Yes, we canvassed the entire field.
Q. Never mind the letters now. You canvassed the entire field?
A. Yes.
Q. And was this the best arrangement you could make?
378 A. The very best we could make.
Q. Did you endeavor to secure a firm contract for the year? By firm contract, I mean to find someone who would agree to sell you coal at a certain price?
A. Oh, yes.
Q. And were unable to obtain it?
A. Yes. They limited us as to the quantities. Our old dealer cut our quantity down to two thirds.
Q. Referring again to the coal year directly, April, 1918 to April, 1919—April to April—did you canvass the whole situation before you made that contract?
A. Yes, sir.
Q. The entire field?
A. The entire field.
Q. Was that the best you could do?
A. The very best.
Q. Now, we will take up some other coal. Do you need some other coal besides anthracite coal?
A. Yes, we use a large quantity of barley coal.
Q. As to anthracite coal, you said it was a coal used in the generators?
A. Yes, sir.
Q. Is there a sort of by-product of that coal—probably that term is not apt—which you do not use in the generators?
A. Yes. It is not a by-product, it is a ——
Q. Well, call it what you will?
A. It is a coal we call No. 3 buckwheat or barley coal.
Q. No; now, you are getting into something else. Is all this generator coal that you bought, is all this tonnage absolutely
379 the same?
A. Oh, no.
Q. That is what I am getting at.
A. The coal that is too small to go into the generators passing from the screens and forms what we call anthracite screenings.
Q. What do you do with that?
A. That we use in our boilers, generating steam.
Q. I understand this large broken coal is delivered to you, and it is screened before you put it in the generators, and there is a small dust like from it that you put in the boilers?

A. Yes.

Q. And when you figure that cost of that coal that goes in the boilers, in figuring your cost expense, what prices do you charge in the expense for it?

A. The price of the anthracite coal.

Q. The same price as the anthracite coal?

A. Yes.

Q. I see. Now, you use other coal besides that used in the generators?

A. Yes.

Q. And you use it in the boilers?

A. Yes.

Q. What coal do you buy for boiler use?

A. We buy principally what we call barley coal or No. 3 buckwheat.

Q. No. 3 buckwheat coal?

A. Yes.

Q. And do you use anything else?

A. Yes, we use bituminous coal, and we also use a cheap form of screenings.

Q. Yes. Now, let me ask you something. Is this coal, this other coal, screenings, or whatever it is, steam coal; is that dealt
380 in as a rule from April to April?

A. Which coal do you refer to?

Q. I am referring to the——

A. Steam coal is bituminous coal, Mr. Moran.

Q. All right. But the coal you use in the boilers, is that an April to April——

A. Oh, yes.

Q. The same thing?

A. The usual procedure.

Q. Did you have a contract from 1918 to 1919 for that sort of coal?

A. I had a contract in 1919 for some of that coal, yes.

Q. Contract made in April, 1918?

A. Contract made in 1919, contract made in June, 1919, contracts made in June 1919.

Q. How did you get along up to that time?

A. We bought it in the open market.

Q. Have you furnished me a statement of your purchases of different kinds of coal in 1919?

A. Yes.

Q. Will you produce it, please.

A. (Witness produces paper). I hand you here one called bituminous coal. This is the 1920. Here is 1919.

Q. Now, the statement you produced here, Mr. Elsman, entitled, "Kings County Lighting Company, Anthracite Coal Purchases"——

A. For the year 1919.

Q. Well, is this—this is broken coal?

A. Yes. The other I haven't in the form of that.

381 Q. Here it is right here?

A. No, I haven't it in that form. This is the form.

Q. Well, here; this has been furnished me. (Handing paper to witness).

A. Well, that is the same as I have in here, yes. I haven't a copy of that.

Q. Well, now, the statement you hold in your hand, entitled "Kings County Lighting Company, Steam Coal Purchased, year 1919," does that contain a statement of the different kind of coal and the prices paid?

A. Yes.

Q. Does it show the different—I mean the quantity of coal received on different deliveries?

A. Yes.

Q. The cost of the coal per ton?

A. Yes.

Q. And what it was—whether it was the screenings?

A. Yes.

Q. Buckwheat and the different number, 2, 3 or 4 buckwheat?

A. Yes.

Q. And the tax you paid?

A. Yes.

Q. And the total cost of the coal?

A. Yes.

Mr. Moran: I offer that in evidence.

(Paper received in evidence and marked Plaintiff's Exhibit No. 28.)

Mr. Hill: I would like to see it, please.

Mr. Moran: Yes.

The Master: Mr. Moran, is it your contention that Plaintiff's Exhibits 24 and 26 that you were required to purchase coal
382 from this company on these terms from April, 1920 to April, 1921?

Mr. Moran: You mean that we might go some place else?

The Master: Yes.

Mr. Moran: As I read those, they offered to stand by and furnish us coal, and we accepted their proposition.

The Master: I mean, supposing there was a change in the situation, and you could get a contract, would the company be at liberty to do that?

Mr. Moran: Well, I have not thought of that. I presume the coal company would not object a bit.

Q. Would they, Mr. Elsman?

A. Well, they would release us from that contract immediately.

Q. They would do it at any time?

A. Yes.

The Master: So that at any time that you had a more advantageous situation that you could take advantage of, you would not have to go along with that contract?

The Witness: Oh, yes; but the developments since the contract has been in effect, your Honor, are such that we could not possibly get coal from any other dealer.

Mr. Hill: Well, I object to that as a conclusion of the wit-
83 ness.

The Witness: Well, I just had not finished, Judge.

Mr. Hill: Well, you can't possibly tell what you might be able to get from some other dealer.

The Witness: At the price, I am trying ——

Mr. Moran: If the defendants or any of them, either their lawyers or the principles, can assure us coal and oil or anything else, cheaper, we will be very glad to get it and take it if they have any proof ——

Mr. Hill: The Attorney General is not selling coal just now, but the theory that everything is going up all the time, and continues to go up, is not founded on fact; that is, there was more coal mined in the month of July, 1920, than there was in the month of July, 1919, and the car shortage is not so great. There was more exportation, and simply preventing the exportation would put the price of coal down.

The Witness: There are more mines shut down today than there ever was.

Mr. Moran: There is going to be an increase of 40 per cent in freight rates, as I read the public press.

Mr. Hill: There was more coal mined, according to the
84 United States Geological Survey in July, 1920, than in July, 1919.

The Witness: Not broken coal. There is a vast difference.

The Master: All I wanted to bring out was that ——

Mr. Hill: I think there was more broken coal.

The Master: —— this is not a fixed contract, this is a contract they are buying under, from hand to mouth.

The Witness: No.

The Master: At certain rates —— isn't it?

The Witness: We are paying the market price, but they agree to stand by that contract to the 1st of next April, 1921.

The Master: They agree to furnish you any amount of coal you ask for?

The Witness: 35,000 tons and 15,000 tons of barley.

Mr. Moran: It all gets down to what will be the current market price of coal for the year, because this company agrees to sell us coal at the market price, plus the charges and so forth. Now, I do not think we should waste any time speculating on whether the company will be able, next October, to get better terms than that, because I do not see how anybody will agree to sell us coal at
85 less than the then market price of coal, and that is what we get here.

The Witness: There is a condition involved in this anthracite coal contract, which I think will clear up the whole situation in your minds.

Q. What is it?

A. And that is that before I was able to close a contract for my anthracite coal for the year 1920, I had to agree to take a certain quantity of barley; in other words, there was a great quantity of barley coal on the market, which the coal people wanted to move and could move, but there was a tremendous shortage of anthracite coal. Therefore, the price of anthracite coal was more or less governed by what we were able to do with our barley coal. Now, I had to solicit bids for the two kinds of coal, in order to get a price on anthracite coal. There was no dealer in the country that I was able to get in touch with, who would give me a straight price on anthracite coal alone; I had to consider the two kinds of coal.

Mr. Hill: I move to strike out the statement of the witness that there is or was a tremendous shortage of anthracite coal.

The Witness: I am speaking of broken coal, Judge. There is a difference, I admit, in your mind that anthracite and broken coal——

Mr. Hill: I move to strike out the explanation.

386 Mr. Moran: Let me ask the witness——

The Master: I will let that stand.

Mr. Hill: Exception.

The Master: He is a purchaser of coal and ought to know something about it.

Q. Now, looking at Exhibit 28, I want to inquire whether the coal called here steam coal and spoken of as screenings—those screenings are not the screenings from your own anthracite?

A. No, these are purchased screenings.

Q. These are purchased screenings?

A. Yes.

Q. And were they purchased now under a written contract running over a period of time?

A. Why, part of them were and some of them were purchased in the open market from local dealers, or the screenings of the yard which we had delivered right into our coal hopper. I can pick them out for you right here.

Q. And the buckwheat coal?

A. This here, this buckwheat No. 3 seems to be but two items.

Q. Yes.

A. That was purchased under a contract with the Lehigh Valley Coal Sales Company. The balance of the coal is purchased from the local dealers, we buying this coal as the accumulation of screenings occur in the yards. We get them at a very reasonable price and we get all qualities of coal.

Q. Now, the coal spoken of there is hard coal, it is not

387 bituminous coal, is it?

A. Oh, no, this is hard coal.

Q. Well, now, were those the best prices you were able to obtain during that period?

A. Oh, yes, indeed.

Q. Well, of that coal, that hard coal, you purchased in the year how many tons all told?
A. 11,644 tons and 405 pounds.
Q. And what was the average cost?
A. $3.67.
Q. That is the cost to you at your works?
A. That is the cost to us at our works, yes.
Q. Now, you purchased bituminous coal in the same period?
A. Yes.
Q. Were your purchases of bituminous coal large?
A. No; very small.
Q. How many tons did you buy?
A. 1,880 tons.
Q. What did you pay for it?
A. Total amount of $11,504.84.
Q. An average of how much a ton?
A. $6.12.
Q. Was that the cost to the company at the works?
A. Yes.
Q. And did you buy that under contract?
A. No, only three cargoes.
Q. And where did you get it?
A. We got two cargoes from the George M. Ross Company and one cargo from H. B. W. Haff Company.
Q. The bituminous coal is used in any particular boilers?
388 A. Yes, it is used in the hand fired boilers.
Q. Is your anthracite breeze—is that what you call it—from your own anthracite—is that what you call it, breeze?
A. Yes.
Q. Your breeze, where is that used?
A. That is used in the hand fired boilers, principally, and some of it used in the stoker boilers.
Q. But the buckwheat and the screenings you use in the hand fired boilers?
A. The buckwheat coal that we purchased, what we call No. 3 bukwheat, we use that principally in the stoker boilers.
Q. Where do you use the screenings that you got on this exhibit you just had marked here?
A. We use that in both boilers.
Q. Both? That is what I want to find out. Don't bother. You use it in both boilers.
A. Yes.
Q. Can you use the coal interchangeably between the boilers? Will the stoker boilers take the same kind of coal as the hand fed boilers?
A. No. We use the barley coal in that altogether.
Q. Well, you said you used the screenings?
A. The anthracite screenings, but we get better efficiency by using straight barley coal, one grade of coal.
Q. Is that cheaper than bituminous coal?
A. Oh, yes.

Q. Much cheaper?

A. Yes.

389 Q. Have you got a schedule showing your purchases of boiler fuel, boiler coal for 1920?

A. Yes, but I haven't it here.

Q. Well, I will supply mine.

A. I did not know that you wanted these schedules. You are speaking of boiler coal now, Mr. Moran. What kind of coal do you want?

Q. I call your attention to a statement for 1920, similar to 1919.

A. This is the barley coal. I have a statement here of the barley coal that was purchased for the first six months of 1920.

Q. Showing deliveries and prices paid?

A. Yes.

Mr. Moran: I will offer it in evidence.

(Paper received in evidence and marked Plaintiff's Exhibit No. 29.)

Mr. Hill: Is it a fact that the purchases lower down on the schedule are the more recent ones?

The Witness: I would like to see that. (Referring to paper, Exhibit 29.) Those are local purchases, those are not under contract. You see, I would like to explain this system of local purchases and contracts.

Q. Go ahead and explain it.

Mr. Hill: If I do not cross examine him on that now, it will wander away.

The Witness: Go ahead. I can answer just the question.

390 I know what is in the Judge's mind, I think. I was going to explain the purchases of barley coal or anthracite screenings by contract, and what I mean by local purchases.

Mr. Hill: All right.

The Master: All the Judge wants to know is whether these should go down chronologically.

The Witness: Those are local purchases. Yes, they probably were purchased——

The Master: You see, there is no date on the purchases.

The Witness: No.

Q. You say those are local purchases. You mean all on that sheet are local purchases?

A. No, I mean all that are shown——

Mr. Hill: You mean the cheap ones, it is obvious further down it is cheaper.

The Witness: Those which—the coal shown on this exhibit——

Q. Number?

A. No. 29, Plaintiff's Exhibit 29, to which there is added no rail freight, rail tax, water freight, water freight tax, insurance, is coal

which is purchased from the local dealers at any price that we are able to get it.

Q. And the others?

A. The other is coal which is purchased according to a contract. Now, there is also shown on this sheet, the coal which was
391 purchased for the six months ending June, and it will include part of the coal which is purchased under contract made in 1919 extending over into April, 1920, and in this there is also one shipment, or probably more than one shipment of coal—no, I guess there is more than that—there are probably five shipments of coal which were purchased on that contract, which included the cost of the coal alongside of the dock, and will not show the rail freight, water tax and so forth. But then the odd prices of coal shown hereon are coal that is bought from the local dealers, the screenings in their yard. I would like to tell you what is the reason we make two contracts and buy from local dealers.

Q. All right. Will you tell us why you buy from local dealers? I presume you can buy it from the local dealer probably to better advantage?

A. No. All coal yards have a screen. When they get the coal there is a certain amount of the coal that is broken up and becomes dust, and it can't be sold or can't be used by others than large manufacturers who have boiler plants. Now, we are able to buy that coal dust very cheaply when they have it, but we can't depend on it throughout the entire year for the reason that when they commence to deliver small sizes of chestnut and stove coals to retail on the retail sale, they use all their trucks in selling and disposing of the coal to householders. Then it is impossible to get any of this dust,
392 and the fact is a great amount of the dust goes out with the coal in the retail sales, and they don't seem to have the dust, and they don't want to bother with it. Therefore, we have to go out and protect ourselves by a contract for barley coal or screenings to tide us over that period. Indeed, it was a sort of an experimentation on my part to buy this dust. I am still in doubt as to whether we made any great profit in buying this dust from these local dealers, because the grades of coal run so differently, and I feel that it is better for us to buy our coal of one grade under one contract, because then we know exactly what we are doing. That is the reason we buy this coal from local dealers, and we buy it under contract.

Q. You have made some purchases of bituminous coal in 1920, similar to what you made in 1919?

A. Yes, sir.

Q. Have you a statement there showing it?

A. Yes, sir, I have a statement here.

Mr. Moran: I will offer that in evidence.

(Paper received in evidence and marked Plaintiff's Exhibit No. 30.)

Q. These schedules are really the details of the quantities and average prices appearing on the other exhibits. That is all they are for?

A. One is a coal received and the other is coal used.
393 There is a difference, Mr. Moran. That is the coal received.

Q. Oh, of course, I know it is the coal purchased, but it comes to the same thing.

A. No; that is the coal used.

Q. Is your bituminous for 1920 under contract?

A. No.

Q. That is an open market proposition?

A. It is an open market. Our requirements for bituminous are so small that we could get anybody to contract for it.

Q. Now, let us see again. You use that bituminous coal—we use that in the hand-fired boilers at the works, we also use it at the hobler station boilers, and we use it in the boilers at the dock.

Q. Can you tell us, Mr. Elman, what part of your fuel requirements is made—is met by your breeze, your own screenings, your own dust? A small percentage of it, or a substantial percentage?

A. No, a very, very small percentage.

Q. And your principal need is to buy what you call screenings, anthracite screenings, from large dealers?

A. Yes.

Q. That is in your idea—what you meant to say a moment ago—probably the best way to handle the coal situation?

A. I am becoming convinced that way, yes.

Q. Well, now, you have no contract for that now?

A. Yes, I have a contract for that. That was in the con-
394 tract with the anthracite coal.

Q. With William—— Potter?

A. No, with the——

Q. With the Lehigh?

A. Lehigh Valley Coal Sales Company.

Q. That is it, it is covered in that?

A. It is two contracts for 1920.

Q. Does it set a specified price there?

A. Yes.

Q. What is it?

A. At $2.00 at the mine.

Q. Plus the charges and so forth?

A. Plus the freight rate and water freight and taxes, etc.

Q. What that is actually costing you at the present time would appear on Exhibit 29?

A. Yes. I can tell you that. This shows the average price of purchases. I can tell you what it costs at the present time.

Q. All right.

A. That does not tell us what it costs at the present time. At the present time we have received but 1147 tons of that under that contract this year, one price being $4.88 a ton, and the last shipment being $4.59 a ton.

Q. At the mine?

A. No, alongside.

Q. Alongside?

A. It is $2.00 at the mine, the contract price holds good, but the transportation charges fluctuate as the rates increase or decrease.

Q. I see. Mr. Elsman, who employes the labor and the help in the plant?

A. Why, the various heads of the department employ it

395 directly.

Q. Have you got any written contract for coal now in force besides the ones put in evidence already?

A. Not in force at the present time. I have a contract for the year 1919 for a certain amount of barley coal.

Q. That is covered in these exhibits? Deliveries under that are?

A. Yes.

Q. Will you produce the contract, please?

A. (Witness produces papers.)

Q. It consists of letters?

A. Yes.

Q. With the Lehigh Valley Coal Sales Company?

A. Yes.

Q. There seem to be three letters, two from the company and one from you?

A. Yes.

Mr. Moran: I will offer them in evidence as one exhibit.

(Letters received in evidence and marked Plaintiff's Exhibit No. 31.)

Q. Taking up the matter of labor, you say it is employed by the heads of the departments?

A. Yes, under my direction, so to speak.

Q. Under your supervision?

A. Supervision, yes.

Q. Do you know the rates that are being paid from time to time?

A. Yes, I approve every employe that is employed.

Q. You approve——

A. The employment of every employe employed

396 Q. Is approved by you?

A. Yes.

Q. And the rate to be paid?

A. Yes.

Q. Is there a prevailing rate of wages, so to speak, for men in the gas business, laborers in the gas business?

A. There is a prevailing rate of wage for the men in the physical end of the business, associated with the works and distribution department.

Q. Well, gas makers and gas makers' helpers, boiler men?

A. Yes, that class of wage.

Q. That is what I mean?

A. Yes.

Q. There is a prevailing rate?

A. Yes, yes, indeed.

Q. Do you pay the prevailing rate?

A. We have to.

Q. Well, you do, then?
A. Yes.
Q. You pay the prevailing rate of wages?
A. Yes.
Q. Do you pay more than the prevailing rate of wages?
A. No, we pay less.
Q. Since you have been there that has been the practice to keep——
A. (Interrupting.) Yes, we are always behind the prevailing rate; have been always.
Q. Have you had occasion since you have been there to increase the wages paid?
A. Yes, many times.
Q. Were they voluntary increases?
A. No, they were demands on the part of the men.
Q. Gas makers and gas makers' helpers and so forth?
A. Yes, sir.
397 Q. Demand?
A. Yes.
Q. Threatened to strike?
A. Have struck.
Q. You allowed the increases only when it is necessary?
A. Only after all forms of arbitration have failed.
Q. Do you keep in touch with the prices paid by other gas companies for similar work?
A. Yes.
Q. And are your prices not above those?
A. No.
Q. Mr. Elsman, can you tell us the wage now paid to the principal classes of employes?
A. I believe so. We will take the work——
Q. You have taken a statement out here.
A. This is merely a compilation of mine, that is——
Q. I understand.
A. That I had in my pocket during the strike last Saturday night.
Q. Yes, but have you got today's wages, contrasted with some prior time there?
A. Yes, I have a schedule here. We will take the work. Gas makers now receive 73⅛ cents per hour, in January, 1919, they received 57½ cents per hour. Gas makers' helpers receive now 69⅝ cents per hours, versus 51¼ cents per hour in January, 1919. Do you want me to go through this?
Q. Yes, I wish you would.
A. Some of these I will have to give you in rates per day, as I have not the hours here. (Referring to paper:) This rate did not go into effect yet. The watchmen received 32 7 21 cents
398 versus 28⅛ cents in January, and are demanding an increase which will very likely go into effect this week. I can give you this information——
Q. Well, give it to us.

A. In effect this week, of 36 11 24 cents. I might say here that I have, in order to prevent a strike, occurring last Saturday night—I had to increase two classes of labor Saturday night, in order to have them go to work, and I am still negotiating the increases of the other classes of labor throughout the works, and I have the demands which we are going to put into effect. It will be the scale of wage paid to all classes of labor by the end of this coming week. So while it had not really gone into effect on Saturday night, it will be in effect this week. So that is why I want to separate that.

Mr. Deegan: I do not think this amount ought to appear in the record until they have actually gone into effect. There is no objection, of course, to showing what the rates are.

The Witness: I was able to arbitrate long enough with the other classes of labor to hold the strike off on that part of the labor until I was able to give them an answer this week.

Mr. Deegan: You have not given them the answer yet?

The Witness: No. I have not given them the final answer,
399 not yet; although I have made up my own——

The Master: Go ahead. Give the present rates and the rates you are going to put into effect.

The Witness: That is what I wanted to know, if I could give that. Coal weighers are getting $43\frac{3}{4}$ cents; in January they got 25 cents per hour.

Mr. Hill: What are they getting now?

The Witness: $43\frac{3}{4}$ cents. This is June 1920, I am giving you.

Mr. Hill: 1919?

The Witness: And in January, 1919, were getting 25 cents per hour. The new effective rate will be 50 cents per hour. Engineers, June, 1920, are receiving 75 cents per hour; in January, 1919, $57\frac{1}{2}$ cents per hour.

Mr. Hill: That is the same? Did I get it right?

The Witness: No. 75 cents.

Mr. Hill: 75 cents now and 57 cents before?

The Witness: $57\frac{1}{2}$ cents. And the new effective rate will be $81\frac{1}{4}$ cents per hour. Oilers are receiving $43\frac{3}{4}$ cents per hour; in January $28\frac{1}{8}$ cents.

Mr. Hill: How much?

The Witness: $28\frac{1}{8}$. I haven't the new rate fixed out here,
400 but it amounts to $3.05 a day. I haven't that figured out. The new rate will be $3.05 a day.

Mr. Hill: Eight hour day?

The Witness: Eight hour day, yes—or $3.55 per day the new rate will be. Firemen are receiving $62\frac{1}{2}$ cents per hour in June, and in January were receiving $53\frac{1}{8}$ per hour; and will receive under the new rate $68\frac{3}{4}$ cents. Dock foremen receive $56\frac{1}{4}$ cents per hour, and in January, 1919 it was $45\frac{5}{8}$ cents per hour; under the new rate it will be $62\frac{1}{2}$ cents per hour. Now, we have various classes of repairmen. I have three classes: one class receives $68\frac{5}{8}$ cents per hour; in January received $53\frac{1}{8}$ cents per hour, and the new rate will be $71\frac{7}{8}$ per hour. Another class is $66\frac{7}{8}$ cents per hour now, in January received 50 cents per hour, under the new rate will be $73\frac{1}{8}$

cents per hour. Another class receives now 75 cents per hour, and in January received 34⅜ cents per hour; under the new rate will be 81¼ cents per hour.

Mr. Hill: That is 34 you increased from 34 cents an hour?

The Witness: 34 cents to 75 cents.

Mr. Hill: To 75 cents?

The Witness: Yes.

Mr. Moran: Lawyers' fees have not gone up in any such

401 percentage.

The Witness: That was a boiler repair man. Blacksmiths receiving now 66⅞ cents per hour, in January received 56¼ cents per hour, and the new rate will be 75⅛ cents per hour. Carpenters receive at present 53⅛ cents per hour, received 40⅝ cents per hour, will receive 59⅜ cents per hour. Now, the scale of laborers runs all over the map. They range from laborers now receiving 53⅛ per hour to 56¼ cents, which received on January 43¾ cents down to 34⅜ cents will be increased 50% cents to as high as 62½ cents.

The Master: Can't you approximate the percentage of increase in the labor, the cost from January, 1919 to the present time?

The Witness: Yes. Each unique is about 10 per cent.

The Master: About what?

The Witness: About ten per cent each time.

Mr. Moran: Just a moment. It is only ten per cent?

The Witness: No. Each group I say, has been ten per cent.

The Master: I mean in the period. Don't bother to do it if you haven't it worked out.

402 The Witness: I have finished them practically now. The bricklayers and the others—do you want me to finish them?

Q. Yes, finish them, please.

A. Drivers receive now 62½ cent.

Mr. Hill: Bricklayers, did you skip them?

The Witness: Bricklayers, oh yes. Bricklayers now receive 82½ cents. I haven't his rate in January, but his rate in June was 56¼ cents.

Mr. Hill: Wait a minute, his rate in June of what year?

The Witness: June, 1919.

Mr. Hill: Was how much?

The Witness: Was 56¼ cents. He will receive 68¾ cents. Drivers receive 53⅛ cents now, in January received 43¾ cents, and the new rate will be 59⅜ cents. Dripman now receives 53⅛ cents.

Mr. Hill: What?

The Witness: Dripman. Man pumping drips.

Mr. Hill: Now, how much?

The Witness: I don't know how much. They dropped a line here, I guess. I will have to check that rate at the present time. He did receive 40⅝ cents.

Mr. Hill: In January, 1919?

The Witness: In January, 1919, yes.

403 Mr. Hill: That is all he is receiving now?

The Witness: No.

Q. There are not many of those, are there?

A. There is only one man. I have lost him some place.

The Master: I think we have gone far enough over this. Can't we approximate the increase?

The Witness: There is an increase throughout the works now of 50 cents a day. Yes, I can give you the increase. From January to the present time of new increase? Gas makers are increased here 27.2 per cent.

Mr. Hill: If they do strike I know where they can get a job.

The Witness: Gas-makers' helper. I am giving now the increase that will be under the new rate.

Mr. Hill: You have done that, haven't you?

The Witness: No, in percentage. The Master asked us for percentage.

Mr. Moran: Now, let us all understand what it is. It is the percentage that the new rate will be above which rate?

The Witness: January, 1919.

Q. That is all right. Now from January, 1919, the new rates that will be effective presently are what percentage above the rates that were paid in January, 1919?

A. For gas makers, 27.2 per cent, gas makers' helpers, 104 35.1 per cent, watchman, 29.3 per cent, coal weighers, 100 per cent, engineers, 11.3 per cent, boilers or exhauster operators, the same thing, 100 per cent. Firemen, 29.1 per cent in one class, 32.2 per cent for another class, repairmen 52.5 for one class, 46.2 per cent for another, and 81.8 for the third class. Blacksmiths, 30 per cent, carpenters, 46.1 per cent, laborers, an average of 28.2 per cent, and the drivers 35.7 per cent.

Q. You have not in this gotten into the commercial office at all?

A. No. I thought you asked Mr. Gemmond yesterday to get up a compilation on that, and I have not done it.

Q. These figures of 1919 which you have given, were probably higher than had prevailed prior to that time?

A. For 1919, yes; that other increase went into effect in October, 1918, the previous one.

Q. Had the cost of labor increased again alone in 1917?

A. About the first of 1917 we commenced to have our labor troubles, yes.

Q. There has been a constant increase since then?

A. Yes.

Q. The general average now of employes' wages are probably a hundred per cent over what they were before the war, aren't they?

A. From 1916, I should say easily that.

105 Q. Average over 100 per cent increase?

A. Yes.

Q. Laborers getting somewhere $5.00 or $6.00, now, a day, where they used to get

A. Common laborers being paid in our territory $6 and $7 a day, common laborers in the building trades.

Q. A man that used to get under $2 years ago?

A. Getting $1.75 and $1.50.

Q Gas makers now average about $5 a day?

A Oh, yes, they average more than that. They were paid before the increase $5.35 a day, they are now receiving $6.85 a day plus their time off in vacation, a week's vacation.

Q In the good old so-called normal times when did a gas maker get

A About $7 a day and worked 7 days a week, no time off.

Q What is the number of hours that he works?

A He works eight hours a day.

Q Are the union wages applicable to these employes?

A We run an open shop but you know the scale of wages is approximately the same as a union wage, a little less.

Q Now in your help down there, you are in touch with the play every day?

A Yes.

Q Have you got it well manned during the period in question, 1919?

A No, we have always been undermanned during the period in 1919. Ever since the war we have been undermanned

Q You mean to say that you have no excessive number of employes there at any time?

A No, we have not, we have always been short of labor in the work.

Q Well, have you got an excessive number of gas makers?

A No, we are short of gas makers.

Q Of any kind?

A We are short of all labor in the work.

Q Well take the other department.

A Well, the distribution department, we have been short of labor ever since 1917. We have not been able to get street laborers at all.

Q Well the clerical force in the street department?

A Well just a moment. Without paying a price for labor which we could not compete with, that is, the building trades and before the building turned up we had to compete with war industries, and so we are always short of labor in that department. In the clerical end we have always had very few employes.

Mr. Hull: I object to that as a conclusion.

The Witness: It is a fact.

Mr. Hull: That they had very few employes is a conclusion.

The Master: Objection overruled.

Mr. Hull: Exception.

Q Going over to the commercial department, how about it over there? Have you got enough help over there? I am speaking about the period in question, 1919 to 1920?

A We have just enough to do our work, but we have always been undermanned there.

Q You would say there was no excessive number over there, no one idling around?

A No, on the contrary it has been necessary for practically all

our employes to work a great many hours overtime—it is being done right along.

Q. Now, Mr. Elsman, your company serves the people of the 30th and a portion of the 31st Ward with gas, does it not?

A. Yes.

Q. Now, the 31st Ward—the 30th Ward is generally what sort of a territory?

A. It is a sparsely settled territory, made up principally of two family houses. We have a few apartment houses, no industries whatsoever, small semi-business houses, drugstores and grocery stores and things of that kind.

Q. Well, the major part of your consumers are ordinary householders using the gas for domestic purposes?

A. Yes.

Q. Have you any large hotels?

A. No, we have not.

Q. Is any of your gas used in any industries to speak of?

A. None. We have one fairly good sized customer in the United States Government, a temporary consumer.

Q. At the present time about how many consumers have you got?

A. About between 39 and 40 thousand.

Q. And you occupy how many miles of street, practically 308 with your mains?

A. About 200 miles of mains.

Q. And I think some one said you had about 20,000 services, service pipes connected up?

A. Just about, that is right.

Q. Now, since you have been with the company, has this territory been developing, growing?

A. Oh, tremendously so the past three years, the past two years especially.

Q. Well, you took on additional consumers the first year you were there?

A. Yes.

Q. Approximately how many?

A. About—let us see—around 2,000 the first year.

Q. In 1918?

A. About 1,600, I should imagine.

Q. 1918? In 1919?

A. 1919, about 1,600, and 1918 I don't recall. Say in the neighborhood of 2,000 to 2,100.

Q. Have you looked at the records of the company to see what has been the average number taken on for the period of the last eight or ten years?

A. Say around 2,000—2,000 to 2,100.

Q. How has it been going this year?

A. Oh, this year there has been a tremendous development.

Q. I know, but how many new customers have you taken on?

A. We have not taken on very, very few, hardly any.

Q. People do not want to be with you any longer?

A. Yes- they want the gas- but we have not been able to supply them.

109 Q. Have you had applications?

A. Oh, yes, I have over two thousand applications on file.

Q. That you have not filled?

A. That we have not filled.

Q. These 2,000 applications are from people who are to occupy newly constructed buildings, houses out there?

A. It is for applicants for gas at new locations, new buildings.

Q. Has there been a large development in that direction?

A. A great development.

Q. Have these applications come in within the last week or two or have they been accumulating?

A. Oh, no they have been accumulating for the last year and a half or two years—the last year and a half principally.

Q. And how many have you on hand now?

A. I should say about two thousand.

110 Q. And to supply these you will need mains?

A. We will need extensions of our entire plant, meters, mains.

Q. Last mains.

A. New meters, new service, extend new mains, and we have to put in new plants.

Q. Do you have to extend your mains for one thing?

A. Yes.

Q. They are not all along the lines of your mains?

A. No.

Q. Are there some of them on the line of your mains?

A. Quite a few.

Q. Some of them have service pipes in their premises?

A. Some.

Q. And others have not?

A. Others have not.

Q. So for some you have to build mains, and all of them you would have to put in—or some of them you would have to put in service pipes without building mains?

A. Yes.

Q. And all of them you would have to supply meters?

A. Yes.

Q. And are there applications from present consumers for enlarged service, as the installation of larger meters?

A. Yes, we have a great many applications for larger meters on account of enlarged gas installations.

Q. Well, now, has there been—has your output grown, output of gas? I think gas men call it demand on your plant—increased in the last year or so?

111 A. About 35 per cent last year over the previous year.

Q. Before we get into the details of that, what sort of plant have you got there? You manufacture, some one said, carbureted water gas?

A. Carbureted water gas.

Q. That requires gas machines?
A. Yes.
Q. How many have you got?
A. We have five gas making machines.
Q. And how long have those been there? Since you have been there?
A. Oh, yes.
Q. None have been installed?
A. None have been installed since my time.
Q. And how much gas can they make?
A. The rated capacity of the machines is 9,600,000 cubic feet a day, but the actual working capacity of the machines is about 7,400,000 per day under normal operating conditions.
Q. That means running the whole 24 hours?
A. Running the whole 24 hours.
Q. And why is the working capacity reduced from the rated capacity?
A. Well, it is always necessary to have one machine down for repairs, and overhauling. You can't have them all ——
Q. How frequently is it necessary to take a machine down for repairs and overhauling?
A. Well, under normal operating conditions, if we have good oil, and conditions are normal throughout, we take the machines out of service about every 1,800 hours, 1,500 to 1,800 hours.
Q. And what do you do with them?
A. We reline them and recheeker the carburetter and overhaul them generally.
Q. And in a battery of five or six, you have one of those out at most any time?
A. We ought to be in a position to have our largest machine down any and all times.
Q. And when your largest machine is down, your capacity of your plant is 7,400,000 cubic feet?
A. 7,400,000 cubic feet a day.
Q. If you had them all in and all running, you could turn out 9,600,000 cubic feet?
A. Yes.
Q. Have you been able to take them down during the last year as frequently as they ought to be?
A. We were not able to take them down last winter and all this year at all, until about the first of June, before we were able to make any machine out of operation.
Q. You mean they would run from last fall on to June?
A. Last October and November.
Q. And why did you have to do that?
A. On account of the excessive demand by the consumers upon the company for gas.

Mr. Hill: I object to this as immaterial and inadmissible. It has no bearing upon the issue of whether or not the rate fixed by statute amounts to a confiscation of the property.

The Master I think it has, Judge. It all appears—
413 the cost of operating the plant prior, all appears in these schedules, and I think it has an important bearing on the question. I will overrule the objection.

Mr. Hill Exception.

Q. On account of the demand just how did your demands compare with prior years? You have got the figures in your papers. Will you get one of those papers so you can give me the exact figures?

A. (Witness refers to copy of complaint.) In the year 1918 to the year of 1919, the greatest quantity we sent out in any single day was 5,083,000 cubic feet. In January 1920, in a single day, we sent out 8,908,000 cubic feet, an increase of 75 per cent. In January 1919, for the month we sent out 138,907,000 cubic feet of gas, while in January 1920, we sent out 188,143,000 cubic feet, or an increase of 34 per cent.

Q. What was the average daily sent out in January 1919?

A. The average daily sent out in January 1919, was 4,480,709 cubic feet.

Q. And in January 1920?

A. Was 6,014,000 cubic feet.

Mr. Deegan You are reading those figures from the complaint?

The Witness I am reading them from the complaint, from my affidavit, or from the complaint, rather.

Q. Was this increase due to an increase in the number of consumers?

414 A. No, it was increase due principally to the use of more gas by the present consumers. It was on account of the——

Mr. Deegan I object to that.

The Witness You object to my answer?

Mr. Deegan I object to the "on account of the."

Q. This was a very mild winter, I suppose they did not need much gas in your territory?

A. The winter of 1920 was a very severe winter. The winter of 1919 was a very mild winter.

Q. 1918 to 1919?

A. 1918 to 1919.

Q. Was there difficulty experienced by the people living in that district in getting coal for domestic uses in 1919, to 1920?

Mr. Deegan I object to that as incompetent, irrelevant and immaterial, and

The Master I think that is going fairly far afield.

Mr. Deegan This witness not qualified to answer.

The Master I do not think it is material.

Mr. Moran I think it is very material.

Mr. Deegan He stated that there had been an increase.

Mr. Moran And he stated that the increase was due to some other thing which the company was not responsible for.

Mr. Deegan: And he has also stated the increase was
415 not due to the increase of consumers.

Mr. Moran: There are a thousand other reasons that might apply.

Mr. Deegan: You can show through him that he knows.

Q. Do you know the cause for this increased demand on your plant?

A. I do.

Q. Will you tell us what it was?

A. Why, it was due entirely to the scarcity of fuel procurable by householders.

Mr. Deegan: How do you know that?

The Witness: Because consumers came into our office and told us that they could not get coal, and they had to have gas.

Mr. Deegan: Well, it is based on this hearsay that you got from the consumers?

The Witness: Not hearsay, I heard them myself.

Mr. Deegan: You heard them say that?

The Witness: I heard them say so. And I heard them come in and ask us and beg us to sell them heaters.

Mr. Deegan: I do not think it is very material, particularly, but I do not want him to be giving us too much hearsay.

Mr. Moran: Well, he has not given any yet. Do you want us to call the 40,000 people?

Mr. Hill: Yes.

Mr. Moran: It is just about as reasonable.

416 Mr. Deegan: But I do not see particularly the materiality of going into what were the reasons. He stated it is not due to an increase in the number of consumers. He has stated there has been an increase.

Q. Has the increase kept up after—you have given us statistics for the shipments there, a couple of winter months. Has it kept up down to the present time?

A. Yes. In the month of June we sent out approximately 10 per cent more gas, in the month of June, 1920, than we did in 1919.

Q. What percentage?

A. Ten per cent.

Q. Have you increased your number of consumers ten per cent?

A. Oh, no.

Q. And during the following months, February and March, April, May and so forth, was there a percentage of increase about the same as these months over prior months, corresponding months of the prior year, as there was in January that you told us about?

A. There was a marked increase in consumption on the part of the consumers throughout the entire year, over the previous year, right down to date.

Q. Well, did that tax the capacity of your plant?

A. It over taxed the capacity.

Q. That was the occasion for running your machines so long?

A. Yes, sir.

The Master: Mr. Moran, is there in evidence the number of
417 consumers in 1919 and the number of consumers at the present time? I do not mean definitely——

Mr. Moran: Yes, the witness has just given us that.

Mr. Deegan: I think it is in.

The Master: I do not know whether it is in or not.

Mr. Moran: No, it is just the exact number there are now which is in the basis of the complaint.

Q. You told us that there had been an increase in consumption and in the number of consumers also during the life of the company, the last eight or ten years. Now, I think you can give us the number of consumers and the amount consumed by private consumers at the years 1915, down to 1919 inclusive?

A. Yes.

Q. In 1915, how many consumers?

A. In 1915, we had 28,000. I am reading now from——

Q. Well, do you know it is true?

A. Oh, I know it, absolutely.

Q. These statistics that you refer to were furnished to me to prepare this complaint, by you?

A. Yes, I gave them to you.

Q. Can you give us the amount of consumers that there were in 1915?

A. In 1915 we had 28,925 private consumers. Do you want the consumption?

Q. Yes.

A. Who used 765,691,400 cubic feet of gas. In 1916 we had
31,182 private consumers who used 852,302,900 cubic feet of
418 gas. In 1917 we had 34,835 private consumers who used 977,119,372 cubic feet of gas.

In 1918 we had 36,308 private consumers, who used 1,179,104,600 cubic feet of gas.

In 1919 we had 37,884 private consumers, who used 1,226,312,600 cubic feet of gas.

Q. That was in 1919?

A. Yes.

Q. Now, you had—just a moment, Mr. Elsman—at the date of the complaint you had connected—by that I mean you had meters installed—on premises of how many consumers?

A. On 38,543 meters.

Mr. Hill: What is the date of the complaint?

The Witness: That is the date of the complaint, May 1st.

Mr. Moran: That was gotten up about May 1st.

Mr. Hill: 38,500?

The Witness: 38,543.

Q. About what is the population of the territory served by your company?

A. Approximately 250,000 people.

Q. Now, we have talked about——

The Master: About how many consumers have you got today?
The Witness: We have over 39,000, between 39,000 and 40,000 I figured there.
Mr. Hill: Since May 1st you have put in between 500 and 1,000?
419 The Witness: I think it is about 500 meters we put in this year. About 39,000—yes, a little over that.
Mr. Hill: Since May 1st?
The Witness: Since—this year.

Q. I do not think you have put in 500 this year?
A. Oh, yes, we put in 500 this year.

Mr. Hill: Since May 1st?
The Witness: Since May 1st?
The Master: Yes; since May 1st. You have given the figures to May 1st.
The Witness: Yes, since May 1st. We have about 39,000.

Q. This increased consumption in this last winter taxed your generators so that you had to run them excessive periods. Were the other parts of your works overloaded, in your judgment?
A. Oh, all the works is dependent upon the quantity of gas made, and if we overtax the gas machines, we overtax everything throughout the works.
Q. Well, I do not agree with you. I think you might have lots of boiler capacity in the plant and not have enough of generators?
A. Well, we have not enough, we have not sufficient boiler capacity.
Q. That is the condition, then it all overtaxes your boilers?
A. We overtax all the apparatus in our plant; that is what I am saying.
420 Q. But that is not the result of overtaxing your generators. It was because your boilers were no more adequate than your generators to supply this demand?
A. No.
Q. Now, speaking about the boilers, they furnish the steam which is used to make the gas?
A. They furnish the steam which is used in the generators to make the gas, they furnish the steam which is used for operating the blowers for the blast mains on the gas machines, they also furnish the steam which is used to drive—pull the gas all around the works, to operate the two large exhausters we have, and steam for all auxiliaries used throughout the entire works.
Q. The greater part of the steam, as I understand, is used in the process of making the gas rather than as power, to produce power?
A. Well, we use a great quantity of steam as well in our exhausters, for pulling the gas around the works and pushing it out of the works.
Q. Isn't it a fact that the most of your steam is used to make gas?
A. Yes.
Q. That is why you have to have so many boilers?
A. Yes, sir.

Q. What boiler capacity have you?
A. We have——
Q. You have five——
A. 1,400 Horse Power, about 1,300 H. P. rating.
Q. Consisting of what?
A. We have 4 100 H. P. boilers, 2 boilers 200 H. P., and 2 boilers 250 H. P.

421 Q. Are they all the same class of boilers?
A. No.
Q. Well——
A. We have one 200 H. P. tar burning boiler; one 100 H. P. tar burning boiler; three 100 H. P. hand fired boilers; one 200 H. P. hand fired boiler, and two 250 H. P. automatic fed boilers equipped with Cox stokers.
Q. When were the automatic fed boilers put in?
A. In October 1918, in operation.
Q. And even with those in, your capacity is not sufficient for the demand you had this winter?
A. No.
Q. Now, is there any other part of the works there—your piping, is that big enough?
A. No, our works piping is entirely too small. Our condensers are entirely too small; our shavings scrubbers we need additional capacity, purifiers we need additional capacity. We need additional meter capacity, boiler capacity, auxiliary pumps.
Q. They were all overtaxed?
A. All overtaxed.
Q. Now, was the plant adequate, in your judgment, up until this winter?
A. Yes, until the winter of 1919, yes.
Q. Winter of 1919 to 1920?
A. Yes.
Q. And you found it inadequate on account of the pronounced increase in the demand?
A. Yes.
Q. More than was expected, was it?
A. Oh, there was more than was expected, although we expected a demand.
Q. But it was more than you expected?
A. Yes.

422 Q. Now, before we leave the plant, Mr. Elsman, reference was made yesterday to the expenses of the company for repairing boilers in 1919. Did you observe that comment made?
A. Yes.
Q. Was there any particular reason for any apparent increase in the cost of repairing boilers and accessories?
A. You are figuring now the repairs of boilers, not the boiler fuel?
Q. I am talking of——
A. (Interrupting.) Repairs?
Q. Repairs surely.
A. We required in the period from October 1918 to down until

November, 1919,—we ran our Cox stoker boilers continuously. Up to that time the company was dependent entirely upon hand fired boilers, the eight hand fired boilers, including the two tar burning boilers. Those boilers were in operation continuously from the time that I went in with the company in 1917. It was not until the year of 1919 we were able to take those hand fired boilers out of operation to overhaul them and thoroughly repair them, and that we were enabled to do by the installation of our Cox boilers, when the installation of our Cox boilers was complete and in the year of 1919, we took down and overhauled and rebricked and relined and retubed our entire installation of hand fired boilers. All those repairs were made in the year of 1919.

Q. And in a word, you were enabled to do that because
423 you had put in the new equipment and was able to put those on the idle shelf for the time?

A. Yes.

Q. Prior to that time you were short of boiler capacity and had to use them to intensify?

A. Those were the only boilers we had.

Q. And you had to use them to capacity?

A. Yes, absolutely.

Q. If you had had sufficient boiler capacity in 1918, probably some of those repairs would have been made in 1918 and would have been reflected in that year?

A. Had been able to take those boilers out of operation long enough to repair them, they would have been repaired the previous year.

Q. Comment was also made referring to the other repairs about the works in 1919.

A. 1919 or 1920?

Q. Well, both. Is there any——

A. Why, yes, you will find that in 1920,—you will find a great increase in the cost of the repairs of our water gas sets and accessories. That is due to the fact that it was necessary for us to run these machines for periods as long as 5,000 hours before we could take them out of service; and on account of the demand for gas by the consumers, after we took those machines out of operation, instead of just finding it necessary to recheeker and rebrick them, we found many instances that we had to practically rebuild our entire machine, put in new doors where they were burned in, and hot spots in the lining, and the walls and everything had entirely gone. And
424 instead of getting a machine back in operation in a normal period of 24 hours to three days, it has taken us as long as six weeks or two months to get a machine back in service again.

Q. Owing to your other parts of your works—particularly your holder capacity—did you find difficulty on account of shortage of holder capacity in the time of this excessive demand last winter?

A. Oh, yes, we had all sorts of trouble last winter.

Q. Just tell us about that?

A. Well, our holder capacity consists of one 2,000,000 foot holder and one 500,000 foot holder. Now, our demands for gas have run

up to 700,000 cubic feet of gas per hour, 600,000 and 700,000. So last winter we had a period of large consumption. We have had accidents—had an accident to our holder, for one thing. We lost a lot of gas there, the water freezing in the cups and losing the gas in the holders; and at other times we have had accidents in the works which caused momentary shutdowns; and the demand of the consumers has been so great that we were not able to send out enough gas to take care of the particular hour that we were using it, and therefore the balance of the gas was drawn out of the holders, and it exceeded the supply. We have been down with our holders pretty near that for many days.

Q. Let me ask you a question now. Do your consumers use the gas continuously during the day time, or during the day
425 and night, and does the demand come on at particular hours of the day?

A. Oh, we have two distinct peaks in our demand. We have—well, we have more than that. We have a large demand in the morning between six and eight, we have another large demand between 12 and 2, and we have our greatest demand from five up until eight o'clock at night; and in the winter months, we have another demand from nine up until twelve.

Q. Why don't you make the gas and store it up?

A. We haven't holder capacity enough to store it,—have no place to store it.

Q. During the hours of low *construction* your holder, I take it, will get full and you will have to shut down some of your machines?

A. Oh, we have had to put on——

Q. Is that so?

A. Yes.

Q. You can't then run your machines during the whole day?

A. No, we can't run full capacity during the whole day.

Q. So you store up what you can during hours of low consumption?

A. Yes.

Q. When the hours of great consumption come up, you turn on all your machines, and still drawing on your reserve in your holders, you do not have enough to go through the high——

A. Over the peak demand, no.

Q. You say you are taking your demand—they take out sometimes 600,000 cubic feet an hour?

A. Yes, sir; they would take out more if we had it to give.
426 Q. At 600,000 an hour, your holder would only supply——

A. About four hours, less than four hours.

Q. Less than four hours?

A. Yes.

Q. If your works were shut down then at any time for four hours——

A. We would be closed down.

Q. How much additional capacity of holders should you have there?

A. About 6,000,000 cubic feet.

Q. A holder of 6,000,000 cubic feet?

A. Yes.

Q. Then you could run your machines to better advantage?

A. We could run our machines continuously until we got our holders filled up.

Q. Now, let me see. With your present holder capacity—with your present holder capacity and your uneven demand, can you make 7,400,000 cubic feet in a day?

A. Well, we can't make it and store it.

Q. I know, but can you get that efficiency out of your plant?

A. Well, we have done it.

Q. 7,400,000 cubic feet a day?

A. Yes, pretty near.

Q. Pretty near, but did you ever——

A. We ran 6,900,000 and the day we had an accident, we ran over that,—blowing it in the air.

Q. Well, of course; I am not talking about what the air will hold. I am talking about what your holder——

A. No, 6,900,000.

427 Q. Is the most you can turn out?

A. Yes.

Q. So your plant today hasn't a capacity of 7,400,000 cubic feet?

A. No.

Q. Although the machines have that capacity?

A. Although the machines have that capacity.

Q. Your plant is not balanced to give your full efficiency, is it?

A. No.

Q. On account of the shortage of holder space?

A. Yes.

Q. Which comes about because your consumers do not use constantly during the day?

A. No, the demand of the consumers is not uniform.

Q. Not uniform, it is intermittent, and that is why you need a larger holder capacity?

A. Yes.

Q. Now, without the larger holder capacity, what can you do to get along?

A. Why, we can increase the capacity of our works and our manufacturing plant. The fact is that is what we are contemplating doing.

Q. Now, what improvements are necessary to take care of the same demand, in another winter, that you had last winter, or a normal increase in that?

Mr. Hill: I object to that as immaterial, on the question of confiscation.

The Master: I will let him answer.

Mr. Hill: Exception.

428 A. We need at least two additional gas making machines, generators; we need additional scrubbing capacity, additional

condensers, purifiers, boilers, increased works piping, and the auxiliary apparatus which goes to drive the gas.

Q. Have you had any estimate of the cost of putting in that work?

A. I have, yes.

Mr. Hill: The same objection as to the previous question.

Q. About what does it come to?

The Master: The same ruling and exception.

A. The cost of the work in the works proper, necessary for this coming winter, is about $840,000.

Q. That would have to be expended in order to get this increased capacity you speak of?

A. Yes.

Q. Installing a couple of more generators and boiler capacity and so forth?

A. Yes.

Q. And now, if we went to this holder that you talk about, how much would that cost?

A. That would cost about a million dollars.

Q. And does it take some time to get in a holder?

A. Oh, yes, we could not get in a holder ——

Mr. Hill: You mean the holder itself cost a million?

The Witness: A million dollars.

429 Mr. Moran: The holder and foundation.

The Witness: The holder and foundation, erected. That was a price I got some months ago. I don't know just what the price would be.

Mr. Hill: That was for a 6,000,000 holder?

The Witness: 6,000,000.

Q. Could you get it in this coming winter?

A. No.

Q. How long would it take you to get it in? Have the dealers informed you?

A. It would take over a year to get it in. We would have it by the winter of 1921.

Q. 1921 to 1922?

A. If we started work now, yes.

Q. Will you need it by that time?

A. Indeed we will.

Q. Even though you have these increased facilities at your works, you will need it at that time?

A. Yes, we will.

Q. For the coming winter you will need these increased facilities at your works?

A. That is the minimum amount required.

Q. Why haven't you had this done before?

Mr. Hill: I object to that as calling for a conclusion.

Mr. Moran: I won't press that.

Q. Have you started this work?
A. No.
Q. When did you discover that you needed this additional facilities during the past winter?
430 A. Over eight months ago, a year ago.
Q. And you did not undertake the work? How?
A. We did not undertake the work, no.
Q. Have you the funds with which to undertake it?
A. No.

Mr. Hill: I object to it as immaterial, and move to strike out the answer as incompetent and inadmissible.
The Master: I will let it stand.
Mr. Hill: Exception.

Q. You haven't the funds?
A. We have no funds.
Q. Have you endeavored to get the funds?
A. I have.

Mr. Hill: I object to that as incompetent, irrelevant and immaterial.

Q. With what success?
A. I have had absolutely no success.
Q. For what particular reason?

Mr. Hill: The same objection as to the previous question.
The Master: Well, I think we have enough in evidence to——
Mr. Moran: I imagine we can all get at what were the reasons.
The Master: Get at the reasons. I think we have gone a little far afield on that.
431 Mr. Moran: I do not like the Court to comment like that on my testimony. I would like to be heard on the absolute materiality and relevancy of this situation. It has been quite the view taken by counsel representing the defendants here that the one thing to look at is the question whether the company can supply present consumers with gas at 80 cents. Now, the confiscatory nature of the law goes far beyond that. If the statute provides such a small return that you can't get new capital to enlarge your plant, confiscation results. That is the theory of my case. Of course we have the bare furnishing of present consumers, their lack of funds on that, but I think a different view must be taken of these questions, and the people are going to have a demonstration of it in this present situation.
The Master: Of course, we do not know anything about how you are going to get this money, if you do get a rate increase.
Mr. Moran: Well, I am sure of it.
The Master: I mean, as I understand it, we are going to agree on the rate base in this case, so I do not think we want to get too far into the future as to the extent of these improvements that are

necessary. I think it is very material to show that the plant
432 at the present time can't be run in the most—in order to supply the needs of the consumers—in the most efficient and economical way. And I think that any proof to show that, you have to run a generator far longer than the average time which a generator should be run, and sometimes you have to close down boilers, for protracted periods, because they have been so badly worn out—I think all that is good evidence in this case.

Mr. Hill: It is the position of the defendants that for many years there were fat years, from the standpoint of profits, to this company, and wise economical administration of its business would have required them to store up a surplus in anticipation of any necessary increase of plant, and that the people that they serve should not be penalized because the owners took their profits, large sums of money in the past, rather than—

The Master: Well, of course there has been no evidence about that so far. I will let this evidence go in at the present time, to see how persuasive the proof is later on. I do not see any objection to it now, except that I hope you won't go too far into the future.

Mr. Moran: No, I won't.

433 Q. You have applicants now, I think you said, about 2,000 in number.

A. Yes.

Q. And you have not complied with their requests to put in service?

A. No.

Q. And what reason have you——

Mr. Hill: I object to that as a repetition.

Mr. Moran: It is the first time we got to it. I do not think it is repetition.

Mr. Hill: You have had that 2,000 around here for three days.

Mr. Moran: Yes, but we have got them. That is all we have got about it. Now, why have we got them? Why aren't they consumers at the present time?

Q. Why haven't you taken them on?

A. We have not had the money with which to purchase the materials necessary to take them on in one instance, and we have not had the capacity in the plant to serve them.

Q. That is, you have not had the money to buy the meters and lay the services and mains; is that right?

A. That is right.

Q. And besides that, you say that your plant—the present overtaxed situation of your plant, would not warrant your taking them on?

A. No.

Mr. Hill: I object to that as leading and a repetition.

434 The Witness: I can answer the question without leading.

The Master: I will let him answer.

Q. Is that the situation?

A. It is.

Q. This additional capacity that you have just described, would enable you to supply those people?

A. It would.

Q. And all who might within reason apply to you for gas, in your judgment?

A. They have applied.

Q. Well, I know, but others—there are others who may apply?

A. Yes, others might apply.

Q. You say this expenditure of about $900,000 or $1,000,000 on your plant would enable you to take care of the people who are now applicants, and all that may within reason be expected to apply within the next year?

A. Within the next year or year and a half.

Q. And when you get in your holder that you expect to buy, you think then you can go right on and take them as fast as they come?

A. Unless we have an abnormal demand, an abnormal building development that will sweep us off our feet.

Mr. Deegan: You think this proposed new plant would only take care of the normal increase in the next year and a half?

The Witness: No, the plant itself, Mr. Deegan.—I am speaking of the plant.

435 Mr. Deegan: The plant plus these proposed extensions?

The Witness: No: I am speaking of—if we install the plant at the works, that is the increased capacity at the works.

Mr. Deegan: Yes.

The Witness: Without the holder capacity.

Mr. Deegan: Without the holders?

The Witness: I think we will get by until we are able to get the holder in operation in the year 1921, the winter of 1921.

Mr. Deegan: Well, have you figured how long it would take, that is, how long you could get along with the increases at the plant, without the holder?

Mr. Moran: Yes.

Mr. Deegan: To carry you over until 1921?

The Witness: To 1921.

Mr. Deegan: The end of the winter?

Mr. Moran: No, it is the beginning of the winter of 1921.

The Witness: The winter of 1921.

Mr. Moran: It is a year from this fall.

The Witness: A year from this fall.

Mr. Moran: Oh, yes, we must have the holder.

Mr. Deegan: With the holder, have you tried to figure
436 how long that would carry you,—how long with a normal increase of say 2,000 a year?

The Witness: I think in the year 1921, we would have to have an additional gas making machine.

The Master: Of course, I do not think this is very important, and I think it may be misleading. Supposing there is another one of

these cases. In five or six years you might get costs—this is all speculative.

Mr. Deegan: Yes, but to figure out what they are now estimating as to reserve capacity which they will have as a result of these proposed additions, the question is whether they would have a reasonable or an unreasonable reserve capacity.

The Master: Yes.

Mr. Deegan: That is what I was trying to get at.

Mr. Moran: Well, there is nothing speculative about it, that we need to build a new plant, an additional plant; there is nothing speculative about that. There is nothing speculative about what we will need in 1921, nothing at all. It is as certain as the night follows the day, as far as that is concerned. And so far as the materiality of showing these things, I would say that that is why we are here today instead of waiting to try this case in November or December. That is, the dire necessity of this company to get new capital in the business.

137 The Master: Yes, but we were going into 1921 to find out if we were going to have reasonable——

Mr. Moran: That was the Public Service Commission's counsel.

The Master: No, you were asking him if he could accept every application that could reasonably be made.

Mr. Moran: Yes, in the year and a half.

The Master: We are getting to 1922 then. I do not think we get anywhere that way. I think you have adduced proof to show—to support your claim that they need an addition to their plant, an additional holder.

Mr. Moran: I think so.

The Master: Now, what the effect of all that is going to be two or three years from now, I don't know; and that is what you are asking.

Mr. Deegan: The point, your Honor, is simply to draw out from Mr. Hannan whether or not they are going to allow for an excessive reserve capacity by making these additions, that is all. Assuming that they are entitled to the reserve capacity, how much reserve capacity are they entitled to?

The Master: I see.

Mr. Moran: I do not propose now to use this new work as a reserve capacity or a future rate base at all. I will agree with

138 the Court on that, that the court here cannot go over to 1921, and guess at what the earnings of this company are going to be in that year, and guess at what the value of its plant in that year will be. I quite agree with that, and I am not working on any such thing as a rate base for 1921, and prospective earnings in 1921.

Now, this case is too strong to have to resort to any such proposition as that. It is going to rest, so far as I am concerned, right on present conditions, and one of the present conditions is the necessity of taking care of the 2,000 people who are now applying, and those who will apply within the next year; and that necessity that exists in adding this additional plant. I don't ask the Court at all to speculate on what our returns will be in 1921, and what return we ought to have in 1921. I quite agree, if the Court means to

shut it out on that ground, I agree. And we are not working on reserve capacity, we haven't any reserve capacity, have not got enough of it.

When revenue does not meet operating expenses, I do not think you have got to go further in a rate case. If I am wrong about it, then I am in the wrong business, have no grasp of the law, and I will quit the game and take up something that I can comprehend.

The Witness: Gas making.

439 Mr. Moran: Yes, gas making or peddling papers, something that is simple, where words of one syllable are employed. We have the plant.

Mr. Hill: I move to strike out the threat of counsel.

Q. Do you keep a record of the quality of gas made?

A. We do.

Q. And the exhibits that have been offered here and marked Exhibits 15, 16, 17 and 18, are the records kept at the works of the quality of the gas made in the years 1919 to 1920, showing the British thermal units and the candle power?

A. Yes.

Q. What quality of gas have you endeavored to make in this period?

A. In the year 1919 we have endeavored to supply gas on a heat unit basis of 585 b. t. u.'s, and we have endeavored to supply the same quality of gas in the year 1920.

Q. How long have you been making b. t. u. gas?

A. Since 1918.

Q. You began that in 1918?

A. Yes.

Q. What did you make in 1917?

A. We made candle power gas.

Q. At what standard did you attempt to maintain?

A. 22 candle power we did maintain.

Q. Did maintain a 22 candle power?

A. Yes.

440 Q. And prior to 1917, from the records of the company, do you know what it was making?

A. It was 22 candle power.

Q. Always, prior to that?

A. Yes.

Q. And you were in charge of the company in 1918, when you changed from candle power to b. t. u. gas?

A. I was.

Q. What was the occasion for changing?

A. The first part of the——

Mr. Hill: I object to that as immaterial, incompetent and inadmissible.

The Master: Oh, I will let him answer.

Mr. Hill: Exception.

A. In the winter of 1918, we were unable to procure sufficient oil to enable us to make gas of 22 candle power.

Mr. Hill: I object to that as a conclusion, and move to strike it out; also it is incompetent and inadmissible.

The Witness: I was going to tell you why we were unable to.

The Master: Well, he is the general manager of the company; I think he can testify as to that. Of course, the statutory court on that. I would just like to have your advice on this point—the statutory court in its decision on the motion for a preliminary injunction, stated that the failure of the plaintiff to furnish
141 gas of a statutory candle power, or its failure to conform to the requirements of the State Court, are not reasons for denying it relief against a present rate which is confiscatory. Of course I am bound entirely by what that court says. Now, in this case how material is it? The plaintiff has admitted it never has during this period. I think it has admitted that during this period it has not produced gas of a candle power required by the statute.

Mr. Hill: It has made no effort to do so; it has endeavored not to do so.

Mr. Moran: On the contrary, the testimony will show that their effort has been to the contrary.

Mr. Hill: If I am not mistaken, your witness has just said that he endeavored to make some other kind of gas.

The Master: Now, do you think it is wise to have in the record all the circumstances about that?

Mr. Moran: Yes.

The Master: Well, then, go ahead, put them in. I just want to know whether you people think it is wise to have that.

Mr. Hill: I objected to it.

The Master: Of course, no matter what is in the record, I should think the District Court on that question would be bound
142 by the statutory court's finding on this matter, or decision in this matter.

Mr. Pegram: I would like it to appear in the record, your Honor, that the position of the Public Service Commission is this—at least, the position of the counsel of the Commission is this: That the Chapter 406 of the Laws of 1916 amending the Chapter 225 of the Laws of 1906, prescribes that they shall furnish gas having illuminating power of 22 candles measured at a distance not less than one mile from the holder.

Now, there is a provision in the Public Service Commission Law expressly and specifically authorizing the Public Service Commission to change the standard, notwithstanding there may be a standard fixed by statute; and it is our contention that it was the duty of this company, before taking upon itself to endeavor to change its standard to the b. t. u. basis, to make application to the Commission for such a change, one of the factors in that to appear specifically in the record.

Mr. Hill: It is the position of the Attorney General that——

Mr. Moran: So far as appears in the record now, the Company did make an application and it did not grant it. All I want is to have the facts brought out.

443 Mr. Deegan: Won't you concede it did not?

Mr. Moran: I will have the exact facts put on the record in regard to it.

Mr. Hill: The Attorney General takes this position: Here was a statute with a means of modifying, means of changing the standard, and this company now comes into a Court of Equity, not having obeyed the statute, and saying they attempted not to obey the statute; and that no explanation of theirs is admissible or important, other than obedience of the law; and therefore the testimony is inadmissible.

The Master: Well, I think you had better have in the record the facts about it.

Mr. Hill: Exception.

Q. Now, I asked the occasion for going to the b. t. u. gas in 1918, and you said you were unable to get oil. Due to what cause were you unable to get oil?

A. In the first—the winter of 1917 and 1918 was a very severe——

Mr. Hill: All this is taken, your Honor, under the objection and exception?

The Master: Oh, yes.

A. In one period there, the early part of the winter, for 26 consecutive days this harbor was frozen solid. Our oil supply went down to the very bottom of our tank.

Q. You mean that the boats could not go there and deliver?

444 A. Boats, we could not—our oil supply went down to a very, very low point; boats could not get across from Perth Amboy to our docks, and we were required under the circumstances to cut down on our oil as much as we possibly could in order to conserve the supply of oil, and keep gas on the town. That condition pertained until March, nearly March——

Q. Now, just a moment. Up to that time, in order to make the 22 candle power gas, you had to use—I would take it from what you say—more oil in your generators than you did when you turned to the b. t. u.?

A. We were using $4\frac{1}{4}$ gallons of oil, between $4\frac{1}{4}$ and $4\frac{1}{2}$ gallons of oil per thousand cubic feet of gas manufactured.

Q. Made or sold?

A. No, this is on the made.

The Master: That is on the 22 candle power gas?

The Witness: Yes, 22 candle power. It was $4\frac{3}{4}$ gallons on the sold—on the made.

The Master: On the what?

The Witness: It will average between four and a quarter to 4.7 gallons per thousand cubic feet of gas made.

Q. To produce 22 candle power?

A. To produce 22 candle power gas. That has been our experience.

Q. Now, during this difficulty in obtaining deliveries of oil, you turned out another kind of gas—just a moment now—you turned out another kind of gas, using a smaller amount of oil?

A. Yes.

445 Mr. Hill: Just a moment. I want to learn whether your question meant it was the 27 days that the harbor was frozen over, or some other difficulty in obtaining oil.

The Witness: I did not catch the point.

Mr. Moran: In the fore part of the winter of 1917 to 1918.

Mr. Hill: That was the 27 days last——

Mr. Moran: Oh, no. The 27 days, according to the testimony of the witness, was merely the fact that the harbor was frozen over 27 days.

Mr. Hill: I know of no other testimony about difficulty of obtaining oil.

Mr. Moran: When the harbor was frozen 27 days, we could not get a lot of oil the day the ice went out, because there was a shortage all the way along the line, and it took a long time after that to get up to a normal delivery again.

Q. Am I not right about that?

A. Well, we were still in difficulties.

Mr. Hill: I object to that as leading.

Mr. Moran: All right.

The Witness: We were in difficulties up to April or May in getting our oil tanks in normal condition.

Q. On account of difficulties of delivery?

A. Yes.

446 Q. You used in that period a fewer number of gallons?

A. Yes, we cut down our consumption per thousand cubic feet of gas.

Q. Number of——

A. Number of gallons of oil used per thousand cubic feet of gas.

Q. Now, then, did you resume 22 candle power after that?

A. No, we did not.

Q. Well, was there some motive or reason for that?

A. Yes; in cutting down—in getting away from the 22 candle power we went into a heat unit gas, endeavoring to give 585 b. t. u. gas, using that figure for the reason that from the experience of other companies in the state——

Mr. Hill: I object to that as a conclusion, the witness not being shown competent, and as speculative.

The Master: Won't you just explain before that what the difference between candle power and b. t. u. is?

The Witness: Well, the candle power gas is the gas that is used on—it is a standard that was put into use many years ago for determining the illuminating quality of the gas, and that determination was made of gas used in an open flame burned. Now, the b. t. u. gas determines the number of heat units in a cubic foot of gas, and it

is the fundamental—the principle of the heating quality of the gas versus the illuminating quality of the gas. Now, we changed
447 from the illuminating quality of our gas in this period of cold weather when we could not get a supply of gas to a heating—

Q. (Interrupting.) Supply of oil?

A. Supply of oil—to a heating quality gas. In view of the fact that 95 per cent of our gas is used for heating, cooking and heating, a very small proportion of our gas is used for illuminating. Practically, I should say, we estimate that there is less than one per cent of all the gas that is sold which is used in open flame burners. The open flame burners are used merely in hallways and attics and cellars where electricity is not used. Where gas is used for illumination it is burned in a Welsbach burner. There again the heating quality of the gas determines the amount of the illumination, and not the illuminating quality of the gas. So we supplied a gas, over this winter period when we had the shortage of oil, on the heating unit basis of 585 b. t. u. per cubic foot of gas.

Q. That means that many heat units in a cubic foot?

A. Yes, British thermal units.

Q. And 22 candle power means the number of candles that will show in an open flame burner when tested by certain standards?

A. Yes.

Q. There is no heat test applied to that at all?

A. None whatsoever.

Now, in the latter part of the year, with the increased cost
448 of materials, and increased cost of our labor, we commenced to get into worse financial condition continuously, and we had such very good success with our heat unit gas, and our complaints had dropped off so materially, that we continued the use of the British thermal unit standards.

Q. By complaints, you mean complaints from consumers?

A. Complaints from consumers on account of poor gas.

Q. Poor gas?

A. Or uniform gas.

Q. Or defective appliance?

A. Or defective appliance.

Q. Just a moment. You found therefore, when you made this 6 t. u. gas in the winter of 1917, to 1918, spring of 1918, a marked falling off in the number of complaints from customers?

A. Yes, requiring regulation of appliances and ranges and things of that kind.

Q. And you continued then to furnish that gas throughout that year?

A. Yes.

Q. You say your financial condition was a determining factor in that situation?

A. Yes, we got into a very bad financial condition in the year 1918, such that we had no funds; and the point of supplying 22 candle power gas versus a heating unit gas, meant a great many thousands of dollars to us.

Q. Now just a moment. What revenue did you have available for your expenses in that year?

A. We had but 80 cents per thousand cubic feet of gas sold to private consumers available.

449 Q. And 75 cents against——

A. Sold to the City of New York.

Q. You sold gas for 95 cents?

A. 95 cents.

Q. What became of the other 15 cents?

A. The balance was deposited.

Q. That 15 cents?

A. Yes, with the Empire Trust Company.

Q. Under the order of the Court?

A. Court.

Q. In the State action?

A. 1916.

Q. State Court action. That was deposited. Now, what were your expenses of operation in the year 1918, with the making of b. t. u.? About what would they come up to per thousand?

Mr. Hill: I object to that as a conclusion. The elements that go into the making of it should be proven rather than the conclusion of the witness as to the cost.

Mr. Moran: Well, regardless of whether it was reasonable or not, what was the expense, what did they pay out for it? You see, he speaks about financial condition. That will determine what he paid out here. Now, we are getting the statements out, at your request, for 1917 and 1918, and they will show what the witness now said, what it cost the company in that year to make gas.

The Witness: 80 cents per thousand cubic feet.

Q. That was on the b. t. u.?

A. That was on the b. t. u. basis.

450 Q. And that consumed the whole revenue you were getting from consumers?

A. Entirely.

Q. And you did not have money enough to buy the oil; is that it?

A. No.

Q. Now, we have the statistics at hand, but do you know the average number—or the number of gallons of oil you actually did use per thousand cubic feet of gas made in 1918?

A. I would like to check that up, Mr. Moran. I do not know the exact number of gallons. I don't recall offhand.

Mr. Moran: Well, that will appear on our statement for 1918 anyway, and I think it is 3.78 made—or sold, rather. 3.78 sold.

Q. At any rate, how much more did it require when you made 22 candle power gas than it did when you made heat unit gas?

A. Approximately a gallon of oil more.

Q. And therefore the oil expense was reduced per thousand cubic feet?

A. Whatever the price is we paid for oil at that time, the price per gallon, the cost of a gallon of oil.

Q. And did you continue that the same in 1919?

A. We did.

Q. In 1920?

A. Down to the present date, although in 1920, we have not been able to make 585 b. t. u. gas.

451 Q. Well, I know. You continued for the same reasons?

A. For absolutely the same reasons.

Q. That is, the financial condition did not permit you to purchase?

A. It did not.

Q. And how about the complaints of the consumers in 1919?

A. Oh, there were very few. Our complaints from consumers on account of quality.

Mr. Hill: I object to that as immaterial, there being no excuse for raising the question whether some one complained.

Mr. Moran: I think the Court ought to decide whether there is any excuse or not.

The Master: I think it all refers to the position of the plaintiff in reference to the statute.

Mr. Deegan: I understand all of this is taken under our objection?

The Master: Yes.

Q. Did you make any application to the Commission to exercise its powers in reference to this?

Mr. Hill: I especially object to that. The records of the Commission are the best evidence. There is a court, a quasi court, and there are records kept of applications.

The Master: Well, he is not testifying as to the records, the contents of the records; he is simply answering the question as to

452 whether he made any application or not; and I assume that if he is going to testify as to what was in the application, Mr. Moran will be perfectly willing to put in the testimony.

Mr. Hill: As to whether it was made or not, it would seem that the records up there are the best evidence.

The Master: I think he can testify as to whether he made one or not.

A. In the winter of 1919, just before—Christmas eve 1918, I had a conference with Commissioner Whitney

Mr. Deegan: Now, I object to that. Applications can be made to the Commission as provided by its rules, and that is by a formal application.

Mr. Moran: I agree with you now. You raised the point that he ought to make an application. I was going to prove by the witness that he did not make any such application. He has missed the term application there. I am going to prove by him that he did not make any application. He knows that.

Q. You did not make any application?

A. I made no formal application.

Q. Now, let me ask you something. Do you recall that in the winter of 1917 to 1918, through this cold spell, your gas company and other gas companies experienced difficulty in keeping up their service?

A. I do.

453 Q. And some of them broke down?

A. I do.

Mr. Hill: I object to that as immaterial, in regard to some other gas company.

Mr. Moran: I am leading up to something. I will concede that the other gas company had nothing to do with it. I am leading up to something.

Q. Do you recall that the Public Service Commission summoned all the gas companies to appear before it and explain the cause of their delinquency?

A. Yes, I do, in the spring of 1918.

Q. When the cold snap was on?

A. While it was on.

Q. Was your company there?

A. Yes, I was the witness.

Q. And did you testify there that you were making [illegible] gas?

A. I did.

Q. And the reasons for it?

A. Yes.

Q. In the winter of 1918?

A. Yes.

Q. You did?

Mr. Hill: I object to that as secondary evidence, that the evidence which he gave at that time was preserved, and that that evidence is the best evidence of what he testified to.

Mr. Moran: All right. I will offer it in evidence. Mr. Deegan, will you bring it down this afternoon?

Mr. Deegan: Do you know the number of the case? I can get it.

454 Mr. Moran: I can put it in evidence.

Mr. Deegan: The whole record of that case?

Mr. Moran: Mr. Elsman's testimony in that case. I think probably we can get it easier through you than by making application to the secretary.

The Witness: I have a copy of it.

Mr. Moran: I know, but the Judge has objected.

Mr. Deegan: If you have a copy, do you want to press your objection on the competency of it?

The Master: Is there any question about that? Can't you verify the testimony that has been given here and accepted under that? I mean, it must be a matter of record as to whether the witness appeared there.

Mr. Hill: A copy of what he said there is entirely satisfactory.

Mr. Deegan: I know Mr. Elsman did——

Mr. Moran: The Judge wants to eliminate that from this record, and I agree with him.

Mr. Hill: Only the portion that he went ——

Mr. Moran: It was the whole two days up there. He was on the coals two days and the substance of it all was why he did it, and he told them why he did it, just as *as* he has told ——

The Master: I do not see that it is——

Mr. Hill: Wouldn't it be a repetition of what he has told us here?

455 Mr. Moran: Absolutely.

The Master: At great length. No. I do not think I will let that go in any way.

Mr. Moran: Then you overrule the objection?

The Master: Yes. I am not going to let that whole hearing go into this testimony.

Q. Well, you testified there and told them why you did not do it?

A. I did.

Q. Because of the harbor conditions?

The Master: Of course, one reason why I won't let the testimony go in, is that it is all in the hands of the Public Service Commission, and if they want to put it in they can make application to put it in.

Mr. Deegan: Yes, but plaintiff's counsel was bringing this out, your Honor.

The Master: Yes; but if you want on cross-examination to bring it up, we will cross that bridge when we get to it, but you have got that hearing, you have got the record of that hearing.

Q. Did the commissioners afterwards ask you when you were going to get back to the candle power standard?

A. The commissioner summoned me to his office on Christmas eve, 1918, and asked me that question.

Q. Did you tell him why you did not do it?

The Master: We will adjourn until 2 o'clock.

(Whereupon a recess was taken until 2 P. M.)

456 Afternoon Session.

Mr. Moran: We have some witnesses here from out of town, and we thought we could use them this week in the ordinary course, the ordinary development of the evidence. It is getting toward the end of the week and they want to get away. I have spoken to counsel, and we would like to put them on now and have the company's witnesses wait until a more convenient time, if you are satisfied to do that.

The Master: It is all right so far as I am concerned.

(The examination of the witness Mr. Elsman was suspended.)

JOHN B. KLUMPP, called as a witness in behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Moran:

Q. Mr. Klumpp, where do you reside?

A. In Philadelphia, Pa.

Q. And what is your business or profession?

A. Well, I am assistant general superintendent of the United Gas Improvement Company, in charge of the operating of gas companies, outside of the city of Philadelphia.

Q. What is the business of the United Gas Improvement
457 Company?

A. Well, the United Gas Improvement Company owns and operates, through stockholdings and stock ownership, a number of gas and electric companies in the United States, all over the country. Well, that is what the United Gas Improvement Company is.

Q. It manufactures gas equipment, does it not—or does it?

A. Well, the United Gas Improvement Company does not, but the U. G. I. Contracting Company is the manufacturer of it.

Q. You say it operates a number of gas plants throughout the country. How many?

A. Well, we have about thirty plants; operates in forty odd cities.

Q. You are serving forty odd cities?

A. We are serving forty odd cities.

Q. You say you are assistant superintendent in charge of that work?

A. I am. The direct operation of the properties in charge of the general superintendence. I am an assistant general superintendent of the gas department, in charge of the operating of the gas properties.

Q. In all these cities?

A. Yes sir.

Q. Forty cities?

A. Yes sir.

Q. Have you any in the state of New York?

A. There are two, the Syracuse and the Johnstown and Gloversville.

Q. Name some of the cities. Not all of them, but the prin-
458 cipal ones.

A. Manchester, Concord, New Hampshire; Reading, Allentown, Harrisburg, Norristown, Pennsylvania; Des Moines, Sioux City, Iowa.

Q. That will do. You have been in charge of those for how long?

A. Well, directly in charge for about two years—I have been assistant for them.

Q. What were you doing before that?

A. I was assistant engineer in charge of investigations of all kinds, and purchasing, and making examinations of properties that we de-

ired to improve or purchase, and reporting on practically anything outside of the direct operation of the plant.

Q. You were doing this for the United Gas Improvement Company?

A. For the United Gas Improvement Company.

Q. How long were you in that work?

A. Well, I have been with the United Gas Improvement Company for twenty-five years. I graduated from Stevens Institute with the degree of mechanician engineer in 1891 and went with this company, and I have been through the construction department, for several years, and on special work and special investigations—oh, off and on for fifteen years. I was superintendent of the manufacture of the Omaha Gas Company for two years. I was superintendent for short periods of time at Waterbury, Paterson, Jersey City, Allentown, and I have made gas in a number of cities.

159 Q. So you went to the U. G. I. right after your graduation.

A. Yes, within three months of my graduation.

Q. Have you made any study of the gas conditions of any gas conditions anywhere else.

A. Well, I think I have been in or through the gas plants of every large city in the United States probably, except three or four, and in 1906 I spent six months with the National Civic Federation examining the gas plants in six or seven of the largest cities in England and Scotland, reporting on the subject of municipal ownership. In that time I valued the properties and reported on their condition and their efficiency of operation.

Q. You have examined the plant of the Kings County Lighting Company, have you?

A. Yes.

Q. When did you examine the plant?

A. I made an examination of the plant in February of this year and I have been through the plant since that time. I cannot tell you the dates.

Q. Have you given any attention to the matter of supplying candle power gas and heat unit gas?

A. Why, I have been interested in heat unit regulations for gas and always was an advocate of the measuring of gas on a heating value basis instead of the candle power basis, I think probably for fifteen years, and I attended many of the hearings and pre-

160 pared editions and data showing arguments for the change, and have probably appeared in twenty or thirty different cases on that subject.

Q. Will you just state for the record what is meant by heating quality gas versus candle power gas?

A. Well, all gas has a heating value, even candle power gas, of course. Any gas that when burned generates heat has heating value and I always advocated the utility value of gas by the amount of heat it produced.

Mr. Hill. I object to it as immaterial and move to strike out the contention of the witness. It is of no importance in this case.

The Master. I will let it stand.

Mr. Hill. Exception.

The Witness (continuing). In proving this contention and showing that when gas was made under a candle power standard that the heating value varied with various seasons of the year and various times of the day, to produce a certain candle power, that the candle power regulation produced gas that was less uniform and less efficient because the quantity of oil necessary to produce candle power at the different seasons was variable, and when the consumers' appliances were adjusted for one quality of candle power they were adjusted for a certain heating value at the same time, and
461 when the candle power was maintained constant the heating power varied and therefore at times they were out of adjustment and they would not burn as efficiently, with uniform candle power, and the same argument and the same reason has been considered in every state commission that has considered the subject of regulation, and has adopted heating value standard on that account.

Q. You mean the state commissions throughout the United States?

A. Throughout the United States.

Q. Then you do not include the New York City Commission, do you; or did you not know that they maintained the candle power standard here.

Mr. Hill. You will pardon me. Will you read that question to me?

(The question was repeated by the stenographer.)

A. I said the commissions, and I did not make any exception of New York, because I was at the hearing in this city before the First District Commission when I believe they made the candle power, with the heating value standard as an alternative.

Mr. Jackson. I object to that as immaterial and irrelevant, and at the same time just to cover the ground I object to any testimony of this class which would tend to substitute the opinion of
462 this witness or any other witness, or the action of any board or commission, in place of the act of the Legislature upon the subject of candle power.

The Master. I will let him give his opinion as to what he thought. But I do not think he had better discuss what the New York Commission has done. If the Commission has changed its requirements it is perfectly simple to put in the order of the Commission showing the change.

Mr. Jackson. My point is just general, to all evidence of this class, that it is incompetent and immaterial and irrelevant to substitute any evidence which has for its purpose the substitution of an opinion of this witness for the opinion or action of any board or commission in place of, or to nullify, tending to nullify, the act of the Legislature providing for a specific candle power.

Mr. Moran: Well, of course they have a right to do that under the statute. You would not object if we brought in the order——

Mr. Jackson: Except so far as any board or commission may be authorized specifically under the statute.

Mr. Morgan: Well, they are authorized to do it.

Mr. Hill: Then they should bring in their ruling rather
463 than his interpretation of it.

Mr. Moran: Now I will state right here the fact——

Mr. Jackson: If this testimony goes to any other purpose I may not find an objection, except that the Attorney-General may find an objection; but as it may tend to defendants, before the Master, of nullifying or overruling or being put in place of the act of the Legislature or any duly constituted or authorized board or commission, I would object to it.

The Master: If they have changed it in connection with the Kings County Lighting Company it is perfectly easy to show the order changing it.

Mr. Jackson: Yes.

The Master: Now, if they have changed it with reference to other companies——

Mr. Jackson: That I would object to.

Mr. Moran: It is all very simple; I can state what the fact is and bring the document here to show it.

Mr. Jackson: That would be the best evidence.

Mr. Moran: I know, but what is the use. We had it up this morning generally when you were not here and it was agreed that we would not lumber up the record with these documents. The Judge knows what was done, Mr. Deegan knows what was done.

Mr. Jackson: If you have a method of proving it, shorter
464 or more direct, I will not object to it. But you cannot add any weight by giving evidence of this nature.

Mr. Moran: I was afraid the witness' answer was too inclusive when he said that the commissions throughout the country had gone to the heating quality standard.

Mr. Jackson: I think that is objectionable, and I object to that and ask to have it stricken out. And I make my objection now so as not to have it repeated on the record too many times. I object to that class of evidence as immaterial and incompetent, and I intended to waive a general objection that would not necessitate my objecting all the time as the witness might be allowed to testify to these things—if I might be allowed to offer an objection in this way.

The Master: This witness can give us an opinion or judgment as an expert on the respective merits of candle power and heat unit gas, and if there have been changes which were permitted under the statute, by the Public Service Commission, it seems to *be* it would be perfectly simple to make a little summary of those changes and put it in. There cannot be any dispute as to the facts.

Mr. Jackson: I think any such changes, except direct
465 changes made applicable to this——

Mr. Moran: I do not want to prove by this witness' oral testimony any orders of the Public Service Commission. I will

disavow it, no matter what the witness will say. I will have it stated on the record that we will not accept his testimony on those things as showing any orders of the State Commission here, of the lower Commission, in this City. They have made just two orders in the premises, one of them was made during the period of the war, when they made it optional with the companies to go to the heating standard if they reduced their price, since then they have made an order permitting the Brooklyn Borough to charge for that——

Mr. Jackson: But, Mr. Moran——

Mr. Moran: I know, but I would like to get along with the case.

Mr. Jackson: But when the question is pending with the Master I do not think you should substitute your statement for some testimony that may be ruled out.

Mr. Moran: But I give you my assurance that the court can and must not, I will not permit the court, to accept the word of the witness as to any order of the Commission. If the witness inadvertently—he is not a lawyer—should refer to an order, I
466 will ask the court to take it as not truth, and that he does not know about it. I would like to go on with the case.

The Master: Let us hear the question.

Mr. Jackson: Permit me to make an objection.

The Master: The statements of counsel are not evidence anyway.

Mr. Jackson: I mean my objection, as I stated it, to evidence of this class. If you think it is better for me to object to each question as it comes along, I had in mind stating on the record a general objection because I see the purpose of this testimony and a general objection will cover the purpose and save time on it, if you will allow it in that way.

The Master: Yes.

Mr. Jackson: And give me an exception. I think I stated it and I won't take the time with objections to each question.

Q. I want to clear up and ascertain, Mr. Klumpp, in your answer with reference to the action of commissions in authorizing heating standard instead of the candle power standard, do you include all the commissions in the United States? Just yes or no.

A. As far as I know, yes.

Q. They have all done it.

A. As far as I know.

Mr. Jackson: Of course, that does not amount to anything.
467 Mr. Moran: Well, I just want to know what his answer is. That is all I care to know. He made a statement that the commissions throughout the country had done it, and I wanted to get it clear.

Mr. Jackson: That is not the Legislature of the State of New York. You cannot substitute the action of these commissions throughout the country or the action of any other legislature, of any other state, for the legislature of the State of New York.

Mr. Moran: Oh, I think you can——

Mr. Jackson: A review of this whole subject I do not mind listening to myself.

Mr. Moran: I think an act of a commission does have some effect.

Mr. Jackson: That is what we have to deal with, whether this act is constitutional or not.

The Master: I will let his testimony go in for what it is worth.

Mr. Jackson: I do not want to interrupt him. I have an objection and exception.

Q. You have made no exceptions?

A. I made no exceptions, as I know of no exceptions.

Q. You operate some plants in the Second District of New York State?

A. We do, two.

Q. And up there you are making what kind of gas?

468 A. We are making gas under the heating value standard.

Q. In what plants?

A. Syracuse and the Johnstown and Gloversville.

Q. Do you know, then, that the up-state commissioners adopted an order permitting that kind of gas to be made up there?

A. I have read such an order.

Q. Then you are operating and acting under it?

A. We are operating under that order.

Q. You say you have testified before this New York City Commission here in reference to this subject?

A. Yes, I did.

Q. You appeared there once or twice?

A. I cannot say exactly whether it was once or twice.

Q. Do you recall whether it was during the period of the war or since?

A. Mr. Straus was the Chairman. I think it was during the war.

Q. It is your recollection that they made some order afterwards giving the companies full options.

A. They did; that is my opinion.

Q. Do you know absolutely of any order they made; you do not mean to say that they made an order giving the companies the right to do that regardless of all other conditions, or do you know?

Mr. Jackson: Don't you think that the order would show for itself?

469 Mr. Moran: Of course it will.

Mr. Jackson: Why lumber the record with this.

Mr. Moran: You are lumbering the record.

Mr. Jackson: You are contending for brevity in the record. Don't be the chief offender while you are contending for that. We are all keeping pretty quiet on that and giving full leeway just for that purpose. It seems to me if you have a record, the simplest way to do is to hand in this record without bothering the witness about it.

Mr. Moran: I tried to get by this point. I have not got the order here. Will the court permit the order to be received in evidence now to show just what it is?

The Master: Yes.

Mr. Jackson: We will object to the materiality of the order.

The Master: I will look at the order when it is offered, but you do not have to offer it through this witness.

Mr. Moran: And that order will take the place of the testimony of the witness on that subject when it is answered?

The Master: Yes.

Mr. Jackson: We will see it when it is coming in.

470 Mr. Moran: You have it up there in your office. It says they can change it if they reduce the price, I think, for the period of a year or two that was optional, and that terminated by its own limitations, six months after the war was over, I believe.

Mr. Jackson: Just specify it so there won't be any question about it.

Q. In the plants that you are operating in other states what kind of gas do they make, the heating quality or the candle power?

A. Working under the heating value standard, I think, in——

Mr. Jackson: Of course, this cannot be material, if the court please, as to what other plants are doing in other states. Are we going to have even all the plants in the City of New York? Can we not bring this witness, after qualifying him, to the direct question that he is called for?

The Master: Well, I won't let him go very far afield on this—just a few more questions.

Mr. Jackson: I take an exception.

A. (Continued:) We operate under the heating value standard in every city, but in one or two cities I think we have a secondary candle power standard also.

Q. I have asked this question before, but it was not quite understood the way I asked it. When we say a gas has a certain

471 number of b. t. u.'s, what is meant by that, Mr. Klumpp?

A. A b. t. u. is generally understood as the amount of heat that will raise one pound of water one degree fahrenheit between certain limits, but when you speak of gas having a certain b. t. u. we mean the number of heat units per cubic foot, or, in other words, the number of pounds of water theoretically that that gas would when burned completely raise to the temperature of one degree.

Q. When we say 585 b. t. u.'s we mean it has 585——

A. (Interposing:) 585 British thermal units per cubic foot, when it is completely burned, it produces that much.

Q. Is it essential in supplying gas for domestic use that it be kept uniform or of a uniform heating quality as it goes through?

A. For the best service and to maintain the highest efficiency at all times the gas should be uniform within very narrow limits of heating value.

Q. Is it possible to keep a candle power gas as near uniform in heating quality as it is a heat unit gas?

A. No, it is not.

Q. Well, please explain that; why isn't it?

A. A candle power gas means the amount of light that five cubic

feet will burn as compared to a standard candle specified, and the time of burning is also specified, and it is dependent upon the hydro-carbon, the condition of the hydro-carbon in the gas and the character of the hydro-carbon. Now, you can have a gas
472 of 22 candle power, for instance, varying fifty heat units; you can have a gas of equal heat units, say, such as coal gas and water gas, both 600 heat units, and one will have a candle power of twenty and the other will have a candle power of twelve. But in utility value they are practically of the same value for all domestic uses except the open flame burner.

Q. Why is it essential that the gas have a uniform heating value?

A. The reason is principally due to the fact that consumers' appliances will stay in constant adjustment with the constant heating value gas. When a gas of a uniform heating value is delivered and the appliance is once adjusted the air shutter, the — and the shutter maintained constant, the gas will burn with equal efficiency. If the heating value should vary the amount of air necessary to go through the air opening in the burner varies also, and that cannot be changed from hour to hour or day to day, and therefore the gas when consumed is apt to be burned inefficiently at some time.

Q. Do the changes in temperature from season to season and from day to day affect the heating quality of gas as it goes through the main?

A. It does to some extent. The change in temperature drops, dropping in temperature, drops down the condensible hydro-carbons in the gas and they are picked up again when the tem-
473 perature rises. This is particularly so in the holders.

Q. Will the changes of temperature cause as great variation in 585 b. t. u. gas as they will in 22-candle power gas?

A. No, they will not.

Q. Not near as much?

A. No, maintaining a 22 candle power gas, manufacturing straight water gas, the heating value will probably value from 600 to 650 b. t. u.'s.

Q. And that is too wide a variation in order to have the greatest efficiency out of appliances, is it?

A. It is too wide to have the greatest efficiency at all times.

Q. What will a 585 b. t. u. gas—or how much variation will there be in that, or within what limit can it be successfully made and distributed?

A. Well, with proper apparatus it can be manufactured within 20 b. t. u.'s up and down.

474 & 475 Q. And is that a variation that is permissible, or with that variation will they get reasonable efficiency out of their appliances?

A. They will get reasonable efficiency within—yes, within that variation.

Q. Are you familiar with the territory which the Kings County Lighting Company serves?

A. I have driven around it.

Q. And do you know how the gas is principally used?

A. Well, for domestic consumption, I would say.

Q. And which sort of gas is proper to supply to a community of that character, would you say?

A. I would *a* say a heating value gas, a gas of uniform heating value should be supplied for domestic consumption particularly.

Q. Is the candle power gas superior for any domestic use, for any particular domestic use, to the heating quality gas?

A. For the open flame burners only.

Q. The open flame burners?

A. Yes, because in all other domestic appliances, the Bunsen burner is utilized and the gas is mixed with a certain percentage of air at the burner before it is used, and the candle power is completely destroyed before it is used, so there is no sense making candle power.

Q. Take the mantle burner, is the uniform quality of gas important in that?

A. No, because the mantle burner has the Bunsen burner and the hydrocarbons are completely consumed before it reaches
176 the mantle.

Q. The illumination on the mantle burner is brought about by heating the mantle to incandescence, is it not?

A. Yes, sir.

Q. The heat will do that, rather than the candle power; is that the idea?

A. Well, the candle power is not necessary and heat is necessary to do that.

Q. Whether in making water gas there is a difference in the elements necessary to produce the gas, in making one and the other, oil or anything else?

A. Well, there are different elements used?

Q. Yes.

A. To make heating gas?

Q. Yes.

A. No, the elements used are the same but the proportions might be different.

Q. What particular ingredient is changed in order to get the different result?

A. Well, in making candle power, as I said before, you have to vary the quantity of oil used at different seasons of the year, because some of the luminants are carried at certain seasons and at other seasons they drop. In making heating value gas you are not particular whether those hydrocarbons are dropped or not; they can be scrubbed out at the works, and uniform gas go out at the works. It would be a uniform heating value, and if it is once washed down to the temperatures, the heating value would carry. It would use less oil and more generating fuel making heat unit gas.
177 Q. What would you say, as to whether candle power gas or the heat units are the measure of the efficiency of gas supplied to the consumers of the Kings County Lighting Company?

Mr. Jackson: Oh, I object to that question as immaterial and incompetent. We have got about all there is to that, that you are entitled to, and a little bit more. It is a clear proposition to substi-

tute the opinion of this witness as to what standard be fixed for that of the Legislature.

Mr. Moran: No, it is a scientific question as to whether——

Mr. Jackson: He can state the value of each, and the conclusion is for the Court to draw. If anybody may draw a conclusion, it is for the Court—as against the Legislature.

The Master: Mr. Moran, won't you just state briefly the purpose of this examination now?

Mr. Moran: The purpose of this examination, and the purpose of covering this subject of candle power is to justfy what the company has done in that respect; to show that neither the public health nor the public morals were injuriously affected by what was
478 done, that on the contrary the consumers got as much or more *the* money than they would if we tried to maintain this obsolete standard——

Mr. Jackson: Does not the question go ——

Mr. Moran: Just a moment, I am answering the question, now.

The Master: Let Mr. Moran tell me.

Mr. Moran: Furthermore, that it does not constitute unclean hands or any objection to relief here. We believe what we have done was justified to serve the interest of the consumers. Not only that but we were the pioneers in it, and what we have done will be done by all companies before another winter comes around. We are not going to make any prediction on that but we think that will be the result. In order to establish that I tried to show by the witness that the heating value gas was what was supplied practically throughout the whole of the United States. I contend that if public bodies and legislatures in all the other states of the Union and in this State, except the First District, permit the sale of heating quality gas, it is very strong evidence that that is not deleterious to the public health, the public welfare, or to the morals or even the pocket books of the individual.

479 Mr. Jackson: That is what I was going to mention, that *are* are directly concerned with their pocketbooks but not with their morals.

Mr. Moran: No. Your Honor, the statute provides 22 candlepower gas and provides a penalty of a thousand dollars for each offense. It has been found—the nature of the penalty would indicate that it was criminal to do it, you know, to serve a different kind of gas.

The Master: Am I right in this. In this case your contention is that even the kind of gas that you produce cannot be produced within the rate prescribed by statute?

Mr. Moran: Yes.

The Master: And then you show that it is more expensive?

Mr. Moran: To produce the 22 candlepower.

The Master: To produce the kind required by the statute?

Mr. Moran: Absolutely.

The Master: Do you want to go any further than that?

Mr. Moran: Well, that is about as far as I want to go, yes. This

question was bringing pointedly into the record the question
480 whether the candle power standard——

Mr. Jackson: Please, there is a question there pending, and if you want the same question, ask the stenographer to read it. I would object to that question.

The Master: He is answering my question.

Mr. Jackson: But just to show how immaterial his argument is——

The Master: But I am asking counsel. I am not interrogating the witness.

Mr. Moran: The question I asked the witness was in substance whether the number of candle power that a gas had, or the number of heating units it had, was the measure of its efficiency to the ordinary consumer, such as the Kings County Lighting Company has and has had during the last two years.

Mr. Jackson: That question I object to as immaterial and incompetent.

The Master: What is the question? Read it.

(The question was read by the stenographer as follows:)

"Q. What would you say as to whether candle power or heat units are the measure of efficiency of gas supplied to the consumers of the Kings County Lighting Company?"

A. Shall I answer?

481 Q. I guess you may answer.

The Master: I will let him give his opinion. He is an expert on it.

Mr. Jackson: Exception.

A. I would say that the heat unit indicated a direct measure of the usefulness of the gas to the Kings County Lighting Company's consumers.

Q. Have you examined the exhibits in this case showing the heating quality?

A. I looked over them this morning, yes. That is the 1920 figures. The 1919 figures, I was more or less familiar with before.

Q. Taking the year 1919, the average monthly b. t. u.'s are maintained as about what?

A. 591 b. t. u.'s average monthly.

Q. From the exhibit you are looking at would you say that there was a fairly uniform quality of gas delivered through the year?

Mr. Jackson: Will you state the exhibit he is looking at for the record.

Mr. Moran: Yes, he is looking at Exhibit 16.

A. I would say the monthly heating—the monthly value was very uniform.

Q. Would you say that that gas was efficient for the purposes used by its consumers—as efficient as 22 candle power gas at the works?

482 Mr. Jackson: I object to that as immaterial and incompetent.

The Master: Objection overruled. I will let him give his opinion.

Mr. Jackson: Exception.

A. I think I made that statement in my affidavit here.

Q. Well, that is not before the Court?

A. This is not before the Court?

Q. Oh, no.

A. I would say yes.

Q. You would say it was?

A. It was more efficient than 22 candlepower gas.

Q. You would say that was more efficient than 22 candlepower gas?

A. Yes, sir, could be used more efficiently than 22 candlepower gas.

Q. Will you look at the 1920 figures on Exhibit No. 18?

A. I have it.

Q. Would you say the same thing about the gas furnished for the first six months of the year?

Mr. Jackson: The same objection.

The Master: Overruled.

Mr. Jackson: Exception.

A. For the first four months I would say undoubtedly. The average given for the six months is 577 heat units. I would say that is more efficient than 22 candlepower gas.

Q. It is lower, though, than the company furnished in
483 1919, and the first four months of 1920?

A. It is, the last two months.

Q. It is lower?

A. In May and June.

Q. You would say, Mr. Klumpp, that you visited the plant in February?

A. I did, on February——

Q. Never mind the date. You visited it in February?

A. Yes, in February of this year.

Q. What condition did you find there?

A. Well, I found the plant running with all its reserve apparatus in use, and practically right up to the limit of its capacity. In fact, I found the machines manufacturing gas were reduced in capacity and so dirty they could hardly handle the oil put in them at the time.

Q. That is, there was a demand on the plant at that time which required its entire capacity to be employed?

A. Yes, everything was going. There was practically no reserve apparatus being overhauled or put into shape to start up in case any of the present machines that were then operating were injured or damaged in any way.

Q. It is necessary to take machines out of service——

Mr. Jackson: I object to this testimony, so far as it may be intended or used on this hearing to show that that is any general or continuous condition in the plant. The fact that this witness went there at one time and saw the plant working to its full capacity
484 is absolutely immaterial to this hearing, I think, and the only purpose of it might be to show that there was a continuation of that at all times, and I think that that is incompetent, and not the proper method of proving it.

The Master: Of course, his testimony is limited to what he saw over there.

Mr. Jackson: Yes.

The Master: His own personal knowledge of what he saw, and his expert judgment. Objection overruled.

Mr. Jackson: Exception.

Q. Is it necessary to take machines out of service for overhauling occasionally?

A. Why, a gas machine cannot be operated and have good efficiency, unless it is shut down at periods varying according to the quality of oil. When we used to get what we call the good gas oils, we could run a machine from 1,200 to 1,800 hours, and then let them down and change the checkerbrick which was carbonized and in such condition that it would handle the oil with good efficiency; and then recently the grades of oil have deteriorated so that we are shutting down machines anywhere from 500 to 1,200 hours, and it depends upon how much repairs are to be made on it whether the machine has to be out three days or two weeks, before it can be put on again. That is outside of the ordinary shutting down for one
485 or two hours during the day for cleaning.

Q. Did you find the machines down there had been run longer than ordinarily?

A. I only got the time the machines were last cleaned, but from the records——

Q. Surely.

A. (Continuing.) ——that Mr. Elsman furnished me. I found the machines——

Mr. Hill: I object to it as hearsay. We have already had the testimony of the superintendent and general manager as to how long they ran.

The Master: I assume he is just laying the basis for his opinion on that evidence.

Mr. Moran: Yes.

A. (Continuing.) I found the machines were very dirty and handling the oil badly and inefficiently, and they were not getting—the capacity was quite reduced. If I did not know anything from the records, I would say the capacity had been reduced maybe 25 per cent for each machine.

Q. Due to the lack of overhauling?

A. Due to the lack of overhauling, the fact that they had not been shut down and cleaned and repaired.

Q. You are familiar with the type of machine they have down there?

A. Yes, they have two types.

Q. But you know the capacity of those machines, and the aggregate capacity of the five?

A. Yes, approximately.

486 Q. What is it?

A. Why, when I was there in May—I do not know whether they have made any alterations since—there were three u. g. i. machines in there. One had a capacity of 1,200,000 a day. There were two u. g. i. machines that had about 2,000,000 each per day, and two Williamson machines. I think we put them down at 2,200,000 each a day.

Mr. Hill: Each?

The Witness: Each. That was the rated capacity when cleaned and new.

Mr. Hill: Pardon me, but haven't you got a capacity of 940? Haven't you left out one there?

Mr. Moran: 9,600,000.

The Witness: That makes 9,600,000 about.

Q. The plant of that capacity, with the necessity of taking out of machines, has a working capacity of about how much?

A. Well, now you must always figure the largest machine down, because there is one machine down, and that is the way we have of taking care of capacity. That would take off 2,200,000 from the rated. Of course, the time the machine has been in use without cleaning—of course, we would decrease its capacity accordingly.

Q. That would give about 7,400,000 a day, would it not?

A. The total rated was about 7,400,000, which is with the large machine down, and I figured at that time it had decreased

487 to six million and something. But that was just the making of the gas; it did not take care of handling the gas beyond the generating house.

Q. Of course, I am not talking beyond that.

A. That is not beyond the generator house.

Q. You could turn out over seven million feet of gas every day provided you could store it and use it?

A. Provided all the machines were running.

Q. Oh, yes.

A. And provided you could store it.

Q. If you could store it?

A. Yes, the machines could probably turn out better than 7,000,000 a day.

Mr. Jackson: I did not get that figure.

The Witness: Better than 7,000,000 a day.

Q. If it had a storage place?

A. If it had storage to put it in.

Q. Did you examine the holders?

A. I found they had two holders at the works, a relief holder of about 100,000 capacity, and one commercial holder of about 100,000 capacity, and outlying holders, a couple of miles from the plant, one 2,000,000, and the other, I should say a little less than 500,000, or 400,000. I forget the exact figure.

Q. 2,000,000 in all?

A. 2,500,000 storage capacity outside the relief holder.

Mr. Jackson: What is that total?

The Witness: Two and a half million.

488 Mr. Jackson: Total storage capacity?

The Witness: Yes, approximately.

Q. Is that storage capacity sufficient to enable this plant to turn out the seven and a half million, considering the class of consumption it has?

A. No, it is running on very treacherous ground, so to speak. In other words, if anything stopped or happened to the plant, the storage capacity, I think would carry it at that time about four hours. For the maximum day or the maximum hour when I was there, we figured approximately 700,000 cubic feet.

Q. With the storage capacity that it has now, the plant, and the consumption it has, considering the quantity?

A. Yes.

Q. What is the plant able to turn out in a day?

Mr. Jackson: I object to that. The witness has fully answered that in his last question.

Mr. Moran: No, he has not at all.

Mr. Jackson: Although the counsel may not be satisfied, the answer is exact.

Mr. Moran: Then you have not followed it. What is the answer? I will take your answer on it?

Mr. Jackson: My answer?

Mr. Moran: Yes.

Mr. Jackson: Read it please.

489 Mr. Moran: To my question.

Mr. Jackson: I have only examined it once, so I will try to answer it. I think the witness covered that ground as to the storage capacity to take care of the production.

Mr. Moran: He said it is not sufficient.

Mr. Jackson: He did not so inform me. He said they were treading upon treacherous ground, that they had about a four hour leeway in case anything happened. That means the storage capacity takes care of the production barring accidents.

The Witness: I would consider it unsafe operation, and if anything happened, why, the management would hardly be called upon to put its plant in shape inside of six hours. We have plants that come down for six or eight hours continuously, due to something, and it is a good practice to have storage capacity to one day's supply.

Mr. Jackson: It is fair evidence of safety if they have not had any breakdown to date in a good many years' operation.

The Witness: I should say that it is the greatest luck that ever happened that they did not go out of gas last winter, and they
490 could not go through another winter without going out of gas. When I testified before that they could not carry through this winter unless they put in more apparatus and more storage, more apparatus——

Mr. Jackson: There is no reason why they should not carry through the coming winter just the same as last winter.

The Witness: Yes, sir, absolutely, because the oil they are getting now has decreased the capacity of those machines and as manufacturers we will not guarantee the make, and the machines dirty up in six or seven hundred hours and if they do dirty up in six or seven hundred hours, they will not run through this winter, they will shut down to clean them.

Mr. Jackson: Can I ask a question now?

Mr. Moran: Yes, go ahead.

Mr. Jackson: If you can think up some more, and I will bring them all out. I am not intending to bring out anything in your favor, but I will let it go, if I do. Now, if this oil makes these machines less efficient—is that what you say?

The Witness: That is what I say.

Mr. Jackson: Then by that less efficiency it increases the
491 holder capacity or storage capacity in proportion, does it not?

The Witness: I do not get you.

Mr. Jackson: Because the production capacity is lessened by the inefficiency of the lessened quality of the oil?

The Witness: No.

Mr. Jackson: So that it makes it safer in operation by reason of having a less efficient productive plant, does it not?

The Witness: It makes it more dangerous to operate because the same holder storage will not permit of any machine being down. Now, if the machines that were in operation could make more gas they might crawl through a few hours longer, but if one machine goes down, the inefficiency of the others, would put them out very quickly.

Mr. Jackson: Of course, that situation is altogether dependent upon the period of the day when there may be a maximum consumption, and upon the maximum consumption, that is, the draft, the consuming draft upon the product at any time, is it not?

The Witness: If you could regulate your accident between midnight and morning, your gas might last an hour or two longer.

Mr. Jackson: But as a matter of fact, the present
492 holder and storage capacity is taking care of the production, is it not?

The Witness: It did not, no, because the company had——

Mr. Jackson: Well, did you not say that when you said it is just a matter of luck that it does not, and what you are fearful is accidents in the future and that it is not safe operation?

The Witness: If you wanted good service, it did not, because they had to keep the pressure in order to get the gas to hold that they were making.

Mr. Jackson: Does the fact that there may be an accident to the service or a breakdown in the future detract from the fact that you were getting good service and sufficient service now?

The Witness: Yes, it does.

Mr. Jackson: Well, that is what your testimony is directed to, is it?

The Witness: No, the fact that they are getting through now, and when I saw them running the plant the whole force was worn down. I saw men on there in May when they had the heavy oil operating 24 hours straight, men in that condition did not warrant good service after they got by the troubles.

493 Mr. Jackson: Your observation has been countrywide, has it not?

The Witness: If you want to call it that, you may.

Mr. Jackson: I think you have assumed it that way on your qualification testimony. Have you seen yet a plant across the country that was as safe as it should be in your opinion, or as it might be? Now, tell us.

The Witness: Gas manufacturing is a hazardous business——

Mr. Jackson: No, please——

The Witness: Gas manufacturing is a hazardous business.

Mr. Jackson: Won't you answer me that question?

The Witness: As safe as it might be?

Mr. Jackson: In your opinion.

The Witness: I do not know what that means, as safe as it might be.

Mr. Jackson: We are only basing this on your testimony now. Have you seen a plant across the country that you could not criticise on that very point, that it might be operated upon a safer and a larger basis providing against accidents?

The Witness: I have seen plants that——

Mr. Jackson: No, no.

The Witness: That have taken ever- precaution that was
494 known or that was possible, and I would consider them as safe as they could be made, but that did not mean that they were absolutely safe.

Mr. Jackson: I think that is an apparent answer. I will be satisfied under the circumstances, and now I won't take any more time, Mr. Moran.

By Mr. Moran:

Q. I wanted to ascertain what the maximum consumption per day was that this plant is capable of supplying, with good oil, as it stands there. Is it a 7,000,000 a day plant or is it a 5,000,000 a day plant, or what is it?

A. You mean taking the whole plant into consideration?

Q. Oh, yes, just what we got.

A. I should say it is about a 5,000,000 feet plant.

Q. 5,000,000?

A. 5,000,000, yes.

Q. And if the record shows it is frequently called upon to deliver more than 5,000,000 a day, you would say it was overtaxed?

Mr. Jackson: I object to that, there is not any such conclusion follows. If the proper conclusion was followed, it would be that the witness is entirely mistaken in judging it a 5,000,000 plant, because it has been proven in actual — to be a 7,000,000 plant. That is the conclusion. I object to your testifying for the witness to that effect, because he never intended to say anything of the sort.

195 The Master: It is simply his opinion, of course.

Mr. Jackson: Well, his opinion is contrary to the fact, therefore, he must admit himself that his opinion is wrong.

Mr. Moran: No.

The Witness: I do not think my opinion is contrary to the fact; the fact that they have got more gas out of it does not increase its capacity as a manufacturing plant.

Mr. Jackson: This is something new. I would like to hear this.

The Witness: They put 10 or 15 inches of pressure to force the gas through some 20 inch connections that should be 24. For instance, that puts more pressure on the pumps. That utilizes more steam to do the work. That caused the troubles that did occur — stoppages. The condensers were too small; the condensers were 5,000,000 and they were putting seven through with the gas left at too high a temperature, and that high temperature caused depositions in the mains, and probably caused some outages in some sections.

Mr. Jackson: Please do not interrupt him, because this is something we want.

Mr. Moran: No, I won't.

196 The Witness: There is such a thing as having a purifying rated capacity. If you overwork them you can get more out of them, the same as you can get more speed out of a machine that is designed to run a certain number of revolutions, but if you do you are going to run the machine out, and that is the same way with the boilers and everything else. They were worn out, and they are wearing out fast, and they demand extraordinary repairs and extraordinary expense to put them back into shape they could be. That is why I say a 5,000,000 cubic foot plant would run more efficiently and produce gas at a more reasonable figure.

Mr. Moran: I would like the privilege at this point to introduce in evidence a document, and I request the privilege of the Court to introduce it at this time, as it may shorten the proceeding, and may possibly mean a change of attitude on the part of the counsel for the Commisson. I would like to introduce a certified copy of an order adopted by the Public Service Commission, a defendant in this case, on the 11th day of June, 1920, in case marked on its records No. 2741.

Mr. Hill: The Attorney General objects to it, that any order of the Public Service Commission is not binding upon the Attorney General as a defendant, whatever effect it may have upon the

197 other defendants. We have no notice of the application or of the order, and it is hearsay as to us.

Mr. Jackson: It does not change my position in this action. I object to it on the ground that I stated before, as incompetent, irrele-

vant and immaterial and having no bearing upon this action—this end of it.

Mr. Hill: What is the fact about whether the company has accepted that order?

Mr. Moran: It has accepted it.

The Master: I will admit it. Exception to anyone who wants to object. Do you want exceptions noted?

Mr. Jackson: If you please.

Mr. Hill: I want an exception particularly, because we have nothing to do with it.

(The paper was received in evidence and marked Plaintiff's Exhibit No. 32.)

Mr. Moran: Counsel has asked if the company accepted the order, and I offer in evidence an acceptance of the order, filed with the Commission.

Mr. Hill: The same objection on the part of the Attorney General.

Mr. Jackson: The same objection.

Mr. Hill: As not binding upon him or the people he represents.

498 The Master: Overruled.

Mr. Jackson: Exception.

Mr. Hill: Exception.

(The paper was received in evidence and marked Plaintiff's Exhibit No. 33.)

Mr. Moran: Your Honor saw what it was?

The Master: I did not see the acceptance. (Takes exhibit.)

Mr. Jackson: As our contention is—as to that among others—our contention is that such an order operates in no way to relieve the company of its obligations to comply with the law of the State.

Q. Mr. Klumpp, what, in your opinion, should be done at the works there, to put that plant in condition to render the service reasonably expected of it?

A. Why, I think that you should put in new generating apparatus, either in the shape of new machines—I would put in two large water gas machines, and probably remodel the third U. G. I. machine. I would put in additional scrubbers and condensers, and exhausters, put in some new boilers in place of the old ones, and change the boiler room, enlarge some of the yard connections, and I would take steps to put in a new holder and have it ready by next fall. That would be the foundations would have to go in

499 this fall; that is, the contract. And that would take all next year to build.

Q. You mean the holder?

A. It would take all next year to build the holder.

Q. But right away, you would go ahead to improve the manufacturing end of it?

A. Right away.

Q. What would the manufacturing apparatus cost, approximately, to put up?

A. Why, I made an estimate. I have not revised that according to present day prices, but I think my figure was about between seven and eight hundred thousand dollars, outside of the holder.

Q. And the holder would be what?

A. I think it would cost $150,000 a thousand; that is 6,000,000 would cost you at least $900,000, and possibly more, and a 5,000,000 would be $750,000 to $800,000.

Q. With these increased manufacturing facilities in your opinion would the company get along during the coming winter?

A. Well, I have not made a study of what your increases are going to be this coming winter, but I would feel from last year's record, and what I see there, that you would be safe for this coming winter, and with the holder you would be safe for the following winter.

Q. You would advise that the manufacturing end of it be treated first?

A. Oh, that is the only thing you can get in this winter.

Q. And you cannot get in the holder?

500 A. You cannot get in the holder for 15 months.

Q. And in order to get the manufacturing facilities increased by the cold weather, the time of our maximum consumption, how soon would the holder need to be started—yesterday?

A. Two months ago.

Q. You ought to go at it right away?

A. It ought to take six months to do what I had in mind, and I do not think it can be done in much less than six months.

Q. It is safe for the company to take on additional consumers without increasing its facilities there?

A. No, if I was manager, I would not take any more consumers on for next winter.

Q. You spoke about oil, different grades of oil. Were you down at the plant this spring when they had some difficulties of operation?

A. I think it was in May that Mr. Elsman sent for me in Philadelphia, and I went over with an oil expert and saw the trouble his plant was in from the use of heavy oil. The plant was stopped up and some of the machines off, and the yard covered with—B. S. we call it.

Q. And that heavy oil is an inferior grade of oil, would you say?

A. Why, it is inferior for gas making purposes. We made an analysis of the oil, and it is very difficult to tell what an oil is from an analysis, analysing it. We have tried similar oils in our

501 plants, and find that certain modifications and remodeling of the machines have to be made to handle these heavy oils, and we have plants shut down now trying to change them to handle the oil.

Q. You are familiar with oil that has been delivered to other plants throughout the country. Are they all getting good gas oil?

A. No, it is coming in mixed. Some are getting this heavy oil,

three or four of our plants are getting this heavy oil. I say very heavy, an oil that does not gasify quickly, and the percentage of carbon is higher, and others are getting fairly good gas oil.

Q. Have you made any particular study or inquiry into this oil situation?

A. Why, I was asked to be Chairman of a Committee representing the American Gas Association, and we got half a dozen of our best gas engineers on the Committee and chemists, men who understood the oil situation, and we met with the oil men and we ——

Mr. Jackson. The determinaton of that Committee or their proceedings I object to as immaterial and incompetent.

Q. Never mind what the Committee determined. What did you find out?

Mr. Jackson. I object to any informaton that he received.

The Master. Well, he can give his judgment as to the present situation with reference to this oil. I do not think I would
502 go into the proceedings of this Committee.

A. Then I will speak of my personal views in it. I made a study of the oil situation with the oil men, and the oils that we thought were coming, and the oils in which more gasoline had been abstracted have come, and by anticipating we were able to formulate some temporary rules, by working together, that have saved a good many gas companies already, and enabled them to handle this oil with reduced capacity. But as the quantity of gasoline was increasing, why, the quantity of gas oil decreased because the manufacture of gas from gas oil is simply more or less the same process as the manufacture of gasoline is. We gas-fy all the oil to an extreme in our process with nothing but carbon left. In making the gasoline, why, they take out of the oil a lot of the gas oil that we can use.

Q. What I want to find is, did you make an inquiry and find out the fact as to whether this oil was being shipped and whether it was necessary to do it?

A. We found that the supply of gas oil, in gathering all the statistics published and all the quantity of gas oil available was deficient for the gas being made, or else it was in such parts of the country that we could not get it through transportation facilities. They were inadequate.

Q. Then it was something that you expected, as long back
503 as April or May you expected it to come through yet?

Mr. Jackson. What does that mean, "expected it to come through yet"?

Mr. Moran. He is speaking about an inquiry, and an investigation that he made; that was made some months ago, and he, as I understand it, anticipated or really learned that this kind of oil might reasonably be expected to be delivered to the oil companies for some time to come—if I get him right.

The Witness. That was the idea; we saw that in the manufacture of gas oil, as we studied them from the Burton and other processes,

in cracking down their oils, they were using our process, they were using the gas oils to produce gasoline.

Q. And you expected they will continue that on account of the demand for gasoline?

Mr. Jackson: I object to that.

Mr. Moran: I think he said so.

Mr. Jackson: I know what you are trying to prove.

Mr. Moran: No, you do not.

Mr. Jackson: You are trying to prove that this condition is going to continue by this witness.

Mr. Moran: No, I am not.

Mr. Jackson: Well, whatever it is, it will be argument from the testimony.

504 The Master: Apparently this witness has made a close study of this whole situation. Why can't he simply give us the results of his duty and that he found a certain situation and the studying of the entire question, and from what other people said about it, as an expert let him give his conclusions. I think that is perfectly pertinent.

Mr. Jackson: I would say I think it is very interesting, and I would be glad to receive personally all the information that he has to give. I am very much interested in it. All I object to is the weight of his testimony as proving any question at issue in this case.

The Master: Well, his testimony is directed to explaining the character of the oil that the company is now receiving, and the character of the oil that he now is receiving, apparently has some bearing on the expense.

Mr. Jackson: That is true.

The Master: Which the company is under in carrying on its operations.

Mr. Jackson: I do not think he is competent to testify to the effect of this oil that is being received or that the oil that will be received in the near future is going to continue, and that is the drift
505 of the counsel's questions now.

The Master: He can give his opinion. I think he ought to state it in that way, after having made a study of the situation.

Mr. Jackson: I object.

The Master: Your objection is noted.

Mr. Jackson: And an exception.

The Master: Your exception is noted.

Q. For the purpose of varying it, you made this investigation about what time; when did this thing first arise, Mr. Klumpp?

A. Why, I think it came up in December, 1919, or January, 1920, and we started this investigation with the idea—because this is the way it started, a number of gas companies——

Mr. Hill: I object to it as immaterial, how it started.

The Witness: A number of gas companies could not get gas oil, the companies refused to supply them with gas oil, and we cooperated with the gas companies and the oil companies, to find out whether

this was a general movement or not, and we found out it was in certain localities only, and the oil companies, the oil men who represent the companies had an idea that we could use fuel oil. Now, the gas men, they tried to —

Mr. Hill: I object to this as incompetent and immaterial
506 and inadmissible on any question in the case at bar.

The Master: If the witness will state it in the way I asked him to, it would be all right.

The Witness: I am trying to, your Honor.

The Master: That as a result of his investigations he found so and so.

Mr. Hill: Give his conclusions.

The Master: That he has come to certain conclusions with reference to the supply and quality of the oil which this company, along with other companies, must use in making gas. I think that is entirely material. I think that we get a little bit afield going into this investigation. I do not think it is necessary for you to tell so much about the investigation. If you will shorten it in that way all right.

The Witness: All right. Gas oils were apparently getting scarce and going up in price. The gas men thought, well, maybe we can use fuel oil. We found that fuel oil as such could not be used as gas oils except in a very few cases, and in those cases they were oils similar to gas oils we were using, being sold as fuel oils. But we could not use all the fuel oil because they had been through the cracking process, and the gas, so to speak, had been taken out of them.
507 There was a high percentage of carbon or else they were Mexican oils and had so much sulphur we could not use them.

So we said to suppliers that we must have a gas oil that can make gas, and they said, "We can give you some, but it is the same oil that we are making gasoline out of, and if you will pay 40 per cent of the price of gasoline, why, we can furnish that oil in pretty nearly all localities." In some localities, they did not have any to furnish at all. Then the price, of course, was a big factor to the gas man, and we endeavored to investigate the so-called fuel oils, and we found some that could be used, that had not been completely cracked, or had not been cracked at all, although they had been topped, and those oils had a good deal of carbon, and it was one of this type of oils that the Kings County Lighting Company had. We found we could make gas with it, but we could not get as much per gallon, and the high percentage of carbon in it, stopped up the machines and decreased the capacity of the machines.

The Master: That was the oil that was used by the Kings County Lighting Company?

The Witness: And knowing that, we had one or two cases of it, and knowing that, Mr. Elsman came over and asked if
508 we could help them out. I took my expert over and we advised certain changes, but we could not make the changes in their machines without taking them down and rebuilding them, because there is a question of temperatures, time of exposure, making the quantity of oil per thousand, and Mr. Merryfield and I were there

all afternoon, and we both agreed that the machines could handle that afternoon three gallons of oil, but probably no more, it would not gasify, and on that day we cut the oil.

Q. You have learned that the oil companies are turning out this product for the gas companies, what they call heavy oil; is that not a fact?

A. Some refineries are. There are a great many refineries here. Some were turning out this oil and apparently selling it for gas oil.

Q. Are not the most of them doing it?

Mr. Jackson: Let him state.

A. Well, out in the West, then. They are topping the crudes. You see, some refineries have a cracking process and others have a topping process.

Q. Do I understand out in the West they are delivering to the companies good gas oil?

A. Not in the sense that we understood gas oil, but a gas oil that has not been cracked, and a gas oil that has better gas making qualities than this Eastern oil has.

509 Q. To a layman in this process of refining the oils, they take out of the crude product the gasoline, do they not?

A. Yes.

Q. And in one stage of the separation there comes in a gas oil; is that right?

A. Yes, the gasoline is taken off first, the kerosine, then the gas oils and the lubricating oils.

Q. Now, they are going further, they are dipping further into the gas oil, are they not, for the gasoline; is that the idea?

A. It is, yes.

Q. That is the idea?

A. That is the refining process.

Mr. Jackson: I do not think it quite describes the process, and I think that if the witness is going to describe a technical process, Mr. Moran, he ought to describe it.

Mr. Moran: But we won't know it, when he gets through describing it

Mr. Jackson: I think we are entitled to it, to hear this technical process described by the witness.

Mr. Moran: I was told all over the place that was the reason. I am trying to find out.

Mr. Jackson: I say it is not so.

Mr. Moran: Let the witness say whether it is or not.

The Witness: I am not an expert oil man, I do not know
510 the oil refining business. I know the gas making business, and the types of oil supplied to us, and the effect upon them; how the oil companies arrive at this or tell this, I do not know, except in a general sort of way.

Q. That is what I mean.

Mr. Jackson: Let the witness describe it.

A. I won't put my reputation down as attempting to describe a technical process that I am not familiar with.

Q. That is right, but you said something to the effect that along last January or February you were then in a position to know that this sort of oil would be delivered in April, May, June, July and August?

Mr. Jackson: No, he did not say that.

Mr. Moran: Let us see if he did say that. Did you say that?

511 Mr. Jackson: We are going to find out if he did. We are not going to get through if you are going to testify in place of the witness and correct him. I am perfectly satisfied to let the witness state his opinion, but I do not want yours. There would not be any occasion for my taking any time at all if you would not constantly do that.

The Master: Is there a question?

Mr. Jackson: A sort of question. Ask him what the fact is.

Q. Now, the fact, Mr. Klumpp? Can you answer that question? Mr. Klumpp, in January or February when you first investigated, did you discover, learn of, come across causes then working which led you to believe that thereafter through March, April, May, June and July and August the gas company would probably be handed this sort of oil?

Mr. Jackson: I object to that question.

Q. (continued:) Heavy so-called oil.

Mr. Jackson: In the first place it is grossly misleading, it is also improper.

Mr. Moran: No it is not. It is a question.

The Master: What difference does it make; we are here in August now and we know what they have handed them.

Mr. Moran: I want to bring out if he did discover any 512 causes and I want to know whether those causes are still operating and whether we are going to expect the same thing in the future.

Mr. Jackson: Let me state how I can avoid my objection. I appreciate that the witness is an intelligent man, and I am perfectly willing that he should accept that question and answer it according to the fact, as to what is—that is subject to my general objection as to its being incompetent, irrelevant and immaterial anyway; but that being overruled, I say as far as the question is concerned, if he will state the facts, what his opinion is, and not be led by counsel, I withdraw the objection that it is leading.

The Master: State the facts and then the conclusions from those facts, whatever they were. This is back in February, isn't it?

The Witness: Yes sir. In February we were led to believe they were going to get heavier oils than they had been handling for gas making purposes.

Q. What led you to so believe?

A. Well, there were—we accumulated a great deal of data along all lines. We studied the gas supply—the oil supply, the oil being delivered then in one or two cases, the refusal to deliver oil in
513 some few cases, and the general methods of refining and of producing gasoline today.

Q. That is, take the oil as it comes from the ground——

A. (Interposing.) Well, general refining process of gasoline and the fact that it was worth so much more as a motor fuel led us to believe that we must be prepared in the near future to use a heavier grade of oil.

Q. Have your expectations in that regard made you——

A. (Interposing.) I was going to say that. We therefore sent around the United States to a great many places and obtained gallon samples of fuel oils, wherever we had friends who could pick it up, and these fuel oils we studied and in a great many cases we found they were absolutely useless for gas making. In other cases we found they were fairly good grades of oil for gas making, that could be used with a modification of the apparatus, and in two or three cases we got carload lots and shipped to different plants and experimented with them, and we found that an oil that we had not heretofore assumed was a gas oil could be used by reducing the capacity of the machines, remodelling them, and be willing to take lower efficiency results in them.

Q. Mr. Klumpp, if you will pardon me to interrupt here, since the time of your inquiry in January and February, is it a fact that you have been receiving superior or have they been growing heavier all the time?

514 A. In some cases the normal grade of gas oil has been received, but in a great many cases the oil we had anticipated would be received has been coming in, and we have been called in now—oh, in probably a dozen different plants in the United States—to help them out.

Q. Have you kept in touch with the oil situation in the meantime so that you are able to express an opinion as to what we may expect during the balance of this year of 1920 in the way of oil?

Mr. Jackson: I object to that as incompetent and immaterial.

Mr. Moran: Just a minute. I want to ask has he kept himself in touch with it.

Mr. Jackson: He has stated he is not an oil expert, that he is not in the oil business: he is in the gas business or is an expert in the gas business.

The Master: Well, he has been called in consultation apparently by his own company and by other companies who pass on the quality and the availability of certain kinds of oil for use in his machines.

Mr. Jackson: Exception.

The Master: Of course, his opinion as to what is going to happen during the rest of the year can be heard for what it is worth, as an expert.

515 Mr. Jackson: I will take an exception.

The Master: The objection is overruled and you have an exception.

A. We anticipated it would come and we prepared a special letter of how to handle it and shipped it to——

Mr. Hill: I move to strike it out as not responsive.

Mr. Moran: I will consent to have it stricken out. Read the last question; I do not doubt, Mr. Klupp, it is so long ago, that you have forgotten it.

Q. Have you kept in touch with the oil situation in the meantime so that you are able to express an opinion as to what we may expect during the balance of this year of 1920 in the way of oil?

A. I have kept in touch with the oil situation, yes, and my opinion is that in some cases in some sections of the country the gas oil delivered will be a much different quality from others, and in certain sections that the only available supply will be this reduced crude oil that I speak of and not hitherto considered gas oil.

Q. Speaking about our little plant over here on New York Bay, what may we look for over there?

A. Why, I would be prepared to handle the type of oil that Mr Elsman was getting when I was there, although at some time I anticipate that there will be a little letting up and they will

516 get some better grade oils with the poorer grade oils. That has been our experience in our companies.

Q. That condition may continue on indefinitely?

A. I think it will.

Q. Can you say or give us your opinion whether the Kings County Lighting Company could have secured a better grade of oil than it has been using or has been delivered to at this year?

A. I would not want to say, because I am not certain. I suppose it may—no, I wouldn't say even that. Of course, they could buy kerosene; that would be a better grade of oil. It is a question of price.

Q. Well, that price is prohibitive, that price for kerosene, is it not? Is it or is it not; do you know, Mr. Klumpp?

A. What do you mean prohibitive?

Q. It is so much per gallon that you would not have money enough to buy it.

A. Well, all oils are so much per gallon now that we have not money enough to buy it.

Q. I know, but we have been able to worry along up to this time, but by July if we had to buy kerosene we would have — shut down. What does kerosene bring?

A. About 20 cents wholesale.

Q. Does it take as much of that as it does gas oil to make gas?

A. Why, we can get more gas per gallon out of it than we can with the heavy oils.

Q. Is kerosene used in any water gas plants?

517 A. Oh, it has been used this winter in a number of plants to tide them over shortages.

Q. But it is not used ordinarily.

A. Oh, no, it is not considered as a usual practise.

Q. You were called in conference with the members of the petroleum Institute, were you not, in reference to this situation?

A. The Petroleum Institute were the men I was speaking of; the oil men we met in conference with.

Q. The time you were down there in May, through the use of this oil the plant was in quite a critical condition, was it not?

A. This oil had produced a heavy emulsion in some cases, a lamp black and tar, some of it pitch. That was due to one or two machines of too high a temperature and another machine being too low a temperature. We find with this heavy oil that you have to run between very narrow limits of temperature in gasifying the oils.

Q. It clogs up the pipes, I believe, there.

A. Yes.

Q. It clogged the pipes, did it not?

A. Yes sir.

Q. And the machines, of course, could not turn out very much gas or near their rated capacity with that kind of oil.

A. It clogged up the take-off pipe between the condenser and the exhausters so the gas would not flow through. That was it.

518 Q. You have kept in touch right along with operating results of various water gas plants throughout the United States?

A. Yes sir.

Q. And in the State of New York?

A. It is one of my duties as an operating officer of my company to scan the results from time to time and pick up companies if they get off in any particular operation.

Q. Looking over expense receipts? Will you tell us whether your companies or a great number of them kept their accounts along the line of this uniform system in New York?

A. The New York companies are the only ones who keep—the details of the accounts. The main accounts are practically the same as the classifications used generally throughout the country for gas manufacturing, but the sub-account changed somewhat.

Q. But the main account——

A. (Interposing.) The main accounts are practically the same.

Q. You have two companies in this state that use the same accounts?

A. Yes sir.

Q. That is the Syracuse Company.

A. The Syracuse Company and the Johnstown and Gloversville.

Q. The Syracuse Company, how large is that?

A. Why, the Syracuse company——

Q. It supplies the city of Syracuse with gas?

A. It supplies the city of Syracuse with gas. The exact output was 1,126,000,000 last year.

519 Q. That is a billion one hundred million odd?

A. Yes.

Q. And the Kings County was 1,200,000,000 odd, so they are about the same size?

A. About the same size.

Q. What kind of gas do you make up there?

A. All carburetted water gas.

Q. The same as we do here?

A. Yes.

Q. Have you looked over the expense statements of the Kings County Light Company for the year 1919?

A. I have.

Q. As shown on their exhibits.

A. As shown on these sheets.

Q. Well, exhibits 2 and 6 in this case, copies of which were furnished you (indicating)? There is 1919.

A. Yes. And this one, yes.

Q. You have looked those over?

A. Yes sir.

Q. With the idea of determining the efficiency of management?

A. Yes.

Q. Now I call your attention to exhibit 6, which is the sheet you have right there before you, showing the number of pounds of generated coal that was used per thousand cubic feet of gas made, which is 32.3 pounds. I call your attention to that and ask you if there is any standard quantity of coal used in generators per thousand cubic feet of gas recognized by gas men generally.

Mr. Jackson: Just a moment. That calls for yes or no.

520 A. Yes.

Q. There is?

A. Yes.

Q. What does it run per thousand cubic feet made?

Mr. Jackson: I object to it as incompetent and immaterial. All we have to do with is the actual fact as to this plant.

The Master: The objection is overruled.

Mr. Jackson: Exception, please.

Mr. Moran: I think if that want to take that position I will accept it. If they accept this as all right I won't go any further.

Mr. Jackson: Your conclusion upon my objection is absolutely unwarranted.

A. Do you want me to answer it?

Q. Yes, I think you should.

A. We figure between 30 and 35 pounds is considered good practice.

Q. What is that?

A. Between 30 and 35 pounds. If we get a plant down to 30 pounds of generated fuel we think it is excellent. If it gets up to 35 we endeavor to reduce it to a figure like 32 or 33 or 31. You cannot beat 30 pounds.

Mr. Jackson: What is that?

The Witness: Generated fuel per thousand cubic feet of gas made.

Q. Take oil. I call your attention to the number of gal-
721 lons of oil, gas oil, used per thousand cubic feet of gas made, 3.43 gallons.

A. Yes.

Q. I ask you if there is a recognized standard quantity of oil, good gas oil, used to make a particular quality of gas per thousand cubic feet.

Mr. Jackson: I make the same objection.

The Master: Overruled.

Mr. Jackson: Exception.

A. I cannot answer that by yes or no exactly, because we have to calculate the—we have certain efficiencies that we can get from certain grades of oil, and after the gas has been made from the oil we calculate back and get the efficiency, and we can tell from the quality of the oil used whether it is being operated—whether the machine is being operated efficiently with that oil. For instance, if we find that we are getting a hundred thousand or one hundred and five thousand British thermal units in the gas from one gallon of oil, we know we are doing very good work. The present oils we are getting down as low as 85,000 and 90,000 and we know the oil is not worth as much. Under the heating value obtained here I would say this 3.43 gallons is an excellent figure. I would anticipate that it would be higher than that, and it must have been an excellent grade of oil.

Mr. Jackson: When was that, please?

722 The Witness: That was the year 1919.

Q. In other words, you would not expect better results than that from the use of 3.43 gallons of oil?

A. No.

Q. Producing a gas of the quality specified on the exhibits that you have seen?

A. 591 b. t. u.'s? No.

Q. Do you know what it would require to make 22-candle power gas; have you figured that out?

A. That will vary in the seasons of the year. I would say in winter that figure would probably get as high as four and a half gallons and in summer it might get down to four gallons.

Q. Is that per thousand cubic feet made or per thousand cubic feet sold?

A. That is the made. I do not carry them in sold, because I do not know what the unaccounted for is.

Q. It would go as high as four and a half cubic feet?

A. Yes, I think a year's average might be four and a quarter for the whole year, but it is variable with the different seasons.

Q. Have you looked over the other items here—boiler fuel?

A. Yes, boiler fuel is high compared to what I would consider good efficient operations.

Q. 18.8 pounds.

A. Yes, 188 pounds. But they are pumping all the gas down there and that would make that probably two or three pounds higher than what it would be without pumping it.

523 Q. What do you mean by pumping?

A. All the gas that is generated up there is pumped up to the outlying holder by steam turbines to get it to the supply district.

Q. That is, included here in the company's figures as a part of the manufacturing cost?

A. Yes, I judge it that way.

Q. Yes, it is.

A. As a production expense.

Q. Yes, production expense. That is an exceptional condition, is it?

A. Well, after going around the plant I think I spoke to Elsman; I said, "Your boiler fuel must be pretty high here." And in

524 looking it up it was, because the way the boilers are operated and the pumps and the scheme of the machines and the general system, the general distribution of the plant it is higher than it would be normally if they had been working under a normal load.

Q. On account of the excessive load that they had on the plant?

A. The excessive load on the plant.

Q. That required a greater use of steam for power purposes than for gas making purposes, in your judgment?

A. Gas making purposes.

Q. And power also?

A. Power also. The boilers were overloaded.

Q. The boilers were overloaded?

A. Yes, the boilers were overloaded.

Q. That is, the inadequacy in boiler capacity would manifest itself in excessiveness of coal?

Mr. Jackson: That is not the conclusion that is to be drawn.

Mr. Moran: Well, I am asking is that so.

Mr. Jackson: You are twisting it or turning it to something else.

Q. Is that so or not?

A. The boiler plant was not operated as efficiently as if it had a chance to be overhauled and some of the boilers let down and cleaned and you had a chance to make repairs.

525 Q. That together with the pumping of the plant, are the two reasons that you give us so far for this boiler fuel?

A. Yes, I think the fact that the machines were very dirty too, took considerably more power to blast them, and I should say also that the steam consumption per thousand feet made was in excess of what it would have been if the machines were cleaned.

The Master: What figure would you say would be normal?

The Witness: Why, if we get a good grade boiler fuel I figure on twelve to fourteen pounds of boiler fuel; and I operated in Omaha and we were using 25 pounds of boiler fuel, but I explained that by

the fact I was able to buy a much cheaper grade of coal with high ash, and I reduced my total of dollars and cents, but I used more coal. So the quality of boiler fuel used is an element that comes into that. Pounds do not mean as much as cents do.

Q. When you get 12 to 14, you did not include the expense of the boiler fuel necessary to pump to outlying holder stations?

A. No, we have not that feature except in very few cases. Our works are generally in a town where we are not supplying to a distance.

Q. In the figures you gave, applying it to the Kings County Lighting Company, you add two or three pounds for that pumped?

A. Yes. I do not know the exact consumption that
526 would take. I would like to know the pressures and the type of machine and study it a little more.

Q. The company down there uses these stokers pretty heavily during the last year, and used that cheap grade of coal, did they not?

A. I think when I was there they were using some—a mixture of barley coal and some bituminous, and they were using tar, firing tar under some of the boilers.

Q. You said a moment ago that the grade of coal had a good deal to do with it?

A. Yes.

Q. And that pounds of boiler fuel did not indicate much in any event, did you not?

A. Not unless—no, they do not indicate unless you have an idea of what kind of coal they are using.

Q. And the conditions under which they are operating?

A. Of course, the conditions, certainly.

Q. You have looked through the other expenses as shown on this page?

A. Yes. Yes, I have gone through all the expenses here of operating, and while there is some variation in the individual items, as I carried them in my mind of all reasonable and in keeping with similar expenses that we have incurred in our plants of practically the same size.

Mr. Jackson: I will object to that answer and ask to have it stricken out as immaterial and incompetent.

527 The Master: I will let it stand. Objection overruled.

Mr. Jackson: Exception.

By the Master:

Q. You have not said anything about the cost per thousand cubic feet of the boiler fuel coal and the boiler fuel water gas tar, combined, appearing on Exhibit 6. You said that you thought that was a little high, that 18.8 pounds.

A. Yes. Well, your Honor, that .48 of a gallon would be may be three pounds more or may be four pounds more, say. I have transferred that into coal too. It would make 22. The 22 total would be the sum of the total boiler fuel. I have that in mind.

Q. What would that be?

A. I had that in mind.

Q. What did you say there; I don't quite understand that?

A. Why, that is tar used. Now, weight for weight these fuels have heating values that are comparable. They are not exactly the same weight for weight, and if you translated that tar, that would probably be three and a half pounds.

Mr. Moran: Of coal.

The Witness: Of coal.

Q. Three and a half pounds of coal?

A. Three and a half pounds of tar, and equivalent, may be, to four and a half pounds of coal.

Q. So that that is really say, twenty-three pounds.

528 A. That might be 23 pounds of coal.

Q. And that is what you thought was rather high?

A. Yes. Yes, I think that is high.

Q. In getting at the cost—that cost you 7.30 cents?

Mr. Moran: 7.3 cents. Is that right, Judge?

The Master: Yes.

Mr. Moran: What you want to get is an idea of that?

The Master: Yes.

Mr. Moran: 7.3 cents.

Mr. Hill: In that cost he wants to take into consideration the freight rates, I assume.

The Master: What I am getting at is simply this—that according to the witness the boiler fuel is rather high, the amount of it that is used. It is stated that—

Mr. Moran: I think we will have to do a little more figuring.

The Master: Of course, a great deal depends upon the cost; the quantity is not the only factor.

Mr. Moran: We will have to do a little more figuring.

The Master: You see what I am getting at?

Mr. Moran: I do exactly, and I want to call your attention to the fact that the water gas tar is an arbitrary price.

The Master: I know that.

529 Mr. Moran: Instead of that we have here 4.2 cents for 18 8 pounds. Raising that to 23 pounds, which is going up about a third—

The Master: I see what you mean.

Mr. Moran (continuing): We will have to get that into coal. What would it be if it is all coal; that is what I want to find out.

By Mr. Moran:

Q. Are you working on something, Mr. Klumpp?

A. No, I was just looking at six or eight of our plants to see what it cost.

Q. Let us see what it cost us for boiler fuel coal if we had used all coal. The tar you say is equivalent to how much coal?

A. I said four pounds. That would be a fourth more than the

coal actually did cost, roughly. That would be the total coal at that rate, instead of 4.22 cents, about 5.30 cents say. Just the sum of the two.

Q. Yes, 5.3 cents?

A. Yes, roughly figuring.

Mr. Hill: That is figuring a gallon of this gas tar equal to how much coal?

The Witness: Well, I was just estimating roughly that this tar would weigh about 8 pounds to the gallon, and it would have a heating value of about 8,000 b. t. u.'s per pound. Now, I do not know what the coal b. t. u. heating value was. It might have been 12,000 and it might have been 14,000. I should say if it was anthracite it would be 12,000.

530 Mr. Hill: Well, a pound of the tar, according to the computation is equal to how many pounds of coal.

The Witness: A pound of tar would be about, say, 1.3 pounds of coal.

Mr. Hill: And a gallon is equal to——

The Witness: Multiply that, about three and a half.

Mr. Hill: That would be 11 pounds of coal.

The Master: No, .48 of a gallon is to be multiplied by three and a half.

The Witness: Call that three and a half, and multiply that by 1.3.

The Master: You get it into pounds, do you not?

Mr. Hill: You said there was .48 of a gallon.

The Witness: I said eight. About as heavy as water.

Q. We will call it four pounds of coal, then?

A. Four pounds of coal. If it is worth 1.3 pounds, why, there would be five and a half pounds of coal, that would be equivalent to, roughly.

Mr. Hill: So that gallon——

The Witness: No, a half a gallon, this .48 would be equal to five and a half pounds of coal.

Q. That instead of 4.22 would make it 5.3 about?

A. I would have to correct that again. Say 5.7 cents or something like that.

531 Q. What have you got to say about what the Court asked you?

The Master: Of course, that is less than the sum of the other two.

Mr. Moran: But that other is arbitrary, you know.

The Master. Yes.

Mr. Moran: You see, the price of that tar is an arbitary price we fix ourselves.

Mr. Hill: But also what is that tar worth if you sold it?

Mr. Moran: Well, I don't know.

The Witness: Why, that five and a half cents is not an extravagant figure. It is higher than four other plants that I have in mind—five of them, and it is lower than one other. I get figures

here that run—plants of the same size—that run from three and a half cents to five and a half cents.

Mr. Hill: You have in that comparison to consider your freight rates to be added on your 5 cents?

The Witness: I guess so. Minneapolis, making twice as much gas, was 5.11 cents.

Mr. Hill: What was the freight rate?

The Witness: I do not know the freight rates to Minneapolis.

Mr. Hill: What about whether it was coal gas or
532 water gas up there?

The Witness: Why, there is about 20 per cent coal gas, I think; fifteen or twenty per cent.

Mr. Hill: Would it not increase your boiler fuel?

The Witness: No, that would decrease it.

Mr. Hill: That would decrease the amount?

The Witness: Yes, that would decrease the boiler fuel, the coal gas.

Q. Anyway, those companies probably that you have got there did not have any *situation* of pumping it?

A. No, they do not pump.

Q. Is that right, they did not pump it?

A. They did not pump it any distance, not all of the gas. They all pumped some, but they do not pump it all.

Q. At any rate, I think you said you would expect what we might call a high boiler fuel expense on account of the condition the plant was in?

A. I did.

Q. You looked at the repair items and so forth through there?

A. Yes, I grouped the 1919.

Q. Did you group them to see what repairs there were?

A. Yes.

Mr. Hill: Repairs is about five and a half cents.

Q. Have you figured up repairs?

Mr. Hill: About five and a half cents.

A. That is a very reasonable figure today.

Q. What is?

A. Five and a half cents.

533 Q. Per thousand cubic feet of gas?

A. Yes.

Q. For a plant of this kind?

A. Yes.

Q. You would say very reasonable?

A. Yes, it is a reasonable figure.

Q. Before the war I understand they averaged about 5, did they not?

A. No, our plant ran three and a half before the war. I made an estimate of three and a half to four and a half cents would be my figure or estimate in a plant of this size.

Mr. Hill: Do you mean before the war?

The Witness: Pre war figures now. Our plants is running four and a half to six and a half cents, a water gas plant. It is a variable figure; it depends on whether you get a big repair in one year, or a smaller repair the next year.

Q. Turning to Exhibit 13, which is for the first six months of 1920, you have there a generator coal at 33.7 pounds per thousand cubic feet made.

A. That is a very good figure under the circumstances.

Q. And the oil 3.6 gallons?

A. Well, you see that concerns my first statement there. That heating value is ten or fifteen heat units lower than the year before, may be twenty, and more oil was used. And that determines that the machines are operating inefficiently or else the oil was very much poorer.

334 Q. Do you know whether the oil was as a matter of fact poorer?

A. The oil was poorer when I was there.

Q. You would expect the company to get a poorer grade of oil, would you not?

A. Sure, a lower grade of gas oil.

Q. We have a boiler fuel here running as high or higher?

A. Higher—higher than it was before.

Q. And that was due to the conditions that you observed there during February?

A. That only indicates that the plant was running less efficiently in a number of different ways. It is overloaded. It cannot get down to efficient operation, and I *except* to see the expenses increase on the per thousand make.

Q. Have you totalled up the repairs for 1920?

A. Why on production it is 3.36, I have it here That is not enough; it is too low.

Q. You mean the repairs in the manufacturing plant, it is not enough?

A. Yes, that is what I say. Under the production for six months of this year they are lower than they should be.

Q. Repair labor and material?

A. Yes.

Mr. Hill. There are two places they have got repairs. You have both of them?

The Witness: I have got them under production only, Mr. Hill.

Mr. Hill: There is a list of repairs over here on the second page of Exhibit 13.

335 The Witness: Page 3.

Mr. Hill: Page 2, repairs to mains.

The Witness: Well, that is different. That is under distribution. You see, that is a different figure. I was commenting on the plant.

Mr. Hill: Oh, pardon me; all right.

Q. Of course this 3.36 is only for the plant, Mr. Klumpp?

A. Yes, I understand.

Q. And when we speak of the whole plant, the distribution system, it is over 5 cents I think for 1920?

A. Yes, it is 6.7 cents.

Q. Would you say that is excessive?

A. Why, the distribution is all right, three and a half cents, but the plant is too low.

Q. Well, the distribution is higher in 1920, than it was in 1919?

A. I think it is.

Q. I think Mr. Elsman confirmed that.

A. Yes.

The Master: How much longer will the direct examination of this witness take?

Mr. Moran: I am practically through with him.

The Master: Mr. Jackson wants to get away before five.

Mr. Jackson: I do not mean to stop the examination, but I did not understand you as to whether you meant the witness wanted to leave tonight.

536 Mr. Moran: Yes, he does.

Mr. Jackson: Do you want the cross-examination to continue tonight?

Mr. Moran: Yes, I will be through with him in a few moments.

Mr. Jackson: I think if you are going to close at the ordinary time, if the witness wanted to leave tonight and come back at some other time,—you do not mind that, do you, Judge?

Mr. Hill: No.

Mr. Jackson: But I think the cross-examination will take longer than you think, and that time wouldn't give us very much.

The Master: We have half an hour still left. The question is whether you can complete it in that time.

Q. There is one item I want to inquire about here and that is unaccounted for gas, Mr. Klumpp. Is that something that all gas companies have?

A. Yes, gas companies of course have unaccounted for. You use the words "unaccounted for" as opposed to leakage, because all the gas unaccounted for is not leakage.

Q. What is the unaccounted for, what does it include; what does it mean?

A. It is the difference between the measurement of the meter at the plant and the sum of the measurements of all the consumers' meters.

537 Q. And in all plants those differ, do they?

A. Yes, and an estimate of stuff—it includes also an estimate of the gas that is not metered, such as street lights.

Q. What are the factors that contribute to this difference, or this unaccounted for?

A. Well, there are a number of factors. The gas is measured at different temperatures, and the consumers' meters are read at different temperatures from what the gas is measured at the plant. Just what the average of consumers' meters is, we do not know. Now, every five degrees of temperature makes a difference of one per cent

in the volume of the gas, and if the temperature of the consumers' meters is lower than that of the gas measured at the works, why then the gas contracts one per cent by degrees.

Q. Let me see. Gas is sent out from the works and measured at some particular arbitrary point?

A. It is corrected at 60 and 30.

Q. 60 degrees?

A. 60 degrees.

Q. So when we say we get a certain amount of gas, we mean the amount of gas measured at 60 degrees temperature?

A. Yes, sir.

Q. And when it goes to the consumers' meters, if it is at 60 when it gets there, there won't be any difference?

A. We would say that is standard. That is the standard foot.

Q. What?

A. That is the standard foot. That is the standard tem-
538 perature, 60, and that is what it is measured at at the works. If the temperature is 2 per cent more, he is getting more gas than he is paying for.

Q. He would not be gaining on us and we would not have an unaccounted for?

A. Yes.

Q. If it goes through at a higher temperature?

A. It expands.

Q. And our unaccounted for would be less?

A. Yes, that is right.

Q. Take the Kings County Lighting Company, where the houses are scattered out there, and the meters are in the cellar mostly. Assume that to be the fact, would the tendency be to measure those meters at 60 degrees or less?

A. Yes, where the cellar is cold and the meter is exposed, the tendency would be that it would be less. If the meter is near the furnace, the tendency would be to be higher.

Q. Where are they set? You have seen a lot of them.

Mr. Hill: I object to that.

Q. There is a standard practice of setting meters. Where are they set?

A. Where the service enters the building.

Q. At the street wall?

A. Yes.

Q. And the furnace is not there usually. Leaving out the factor of the furnace, is there any period of the year when the cellar will be above 60?

A. Why, there might be two periods in the middle of the
539 summer and in the very middle of winter.

Q. Why, we put the furnace out.

A. Why, I do not know what the average temperatures of cellars are in Kings County.

Q. Well, they are about the same as they are in Philadelphia.

A. I would assume there might be one or two per cent unac-

counted for, that takes place in the difference in temperatures, that is all. I think that the general condition of consumers' meters today, there would be a loss of two or three or four per cent possibly.

Q. On account of temperature?

A. No, not on account of temperature, on account of other things. I said possibly one or two per cent on account of temperature, and three or four per cent on account of the condition of meters in the last three or four years.

Q. Do you know in Philadelphia and in New York, the meters in the thickly settled portions, where they live in apartment houses—do you know where the meter is located?

A. In apartment houses?

Q. Yes.

A. Yes, they are generally in the cellar, or one meter room is set aside for meters.

Q. You were speaking, Mr. Klumpp, and I interrupted you, about the temperature, what are the other factors?

A. Well, non-registration - non registering meters. I think our meters today generally around the country are reading
540 against the gas company two or three per cent. The tests show it.

Q. How is that?

A. Well, that is due to a number of different things. Condensation, the fact that the leather is not as good, the leather in the diaphragm is not as good. We are having more non-registers due to sticking valves, carrying on of condensation in the oil.

Q. Due to any other factor? Street lamps?

A. Well, there are no other factors about meters.

Q. No.

A. Street lamps I understand from this they figure three and a half feet an hour for street lamps. I think to give good Welsbach service that should be four and a half feet an hour at least, and I think that a good deal of the unaccounted for might be figured on street lamps.

Q. Is there some leakage in mains and services?

A. Oh, yes, there is some leakage. Of course, the leakage will take place in filled ground, and under paved streets, and where there are a lot of stub services. It is rather an unaccountable reason, but in a number of our properties the leakage has increased from 8 and 10 per cent to 12 and 13 per cent in some of our properties, the last year.

Q. Do you mean the leakage or the unaccounted for?

A. The unaccounted for. Some have gone from 10 to 5 per cent.

Q. Will the percentage of unaccounted for vary with the
541 number of consumers per mile of main?

A. Well, of course if you have—we figure leakage at so much per mile of main, and to equate that we figure that a mile of six inch should have double the leakage of a mile of 3 inch, because it has double the joint service, so we equate it.

We take into account the number of services. If you have a large

main system, a larger main system for a constant send out, you have a larger unaccounted for in the system.

Q. I did not get that.

A. If you have a larger main system for a certain send out, you must expect a larger unaccounted for.

Q. To illustrate that, if the company had mains on a street and it supplied a lot of apartment houses, you would have the same leakage if that main only supplied one residence on that street, would you not?

A. As far as the main goes, you would, but as far as the services go, your leakage increases with your services too.

Q. Absolutely, but as to the main leakage, the leakage will be the same, whether there is one consumer on it or a thousand?

A. It will be just the same——

Mr. Hill: The defendant concedes that a mile is just the same in one place as in another.

The Witness: And the actual leakage will be just the same whether anybody burns gas or they do not.

Q. That is the idea.

A. If they maintain pressure on the system, and nobody consumed gas, all the meters were shut off, they would have a
542 certain big figure for unaccounted for. They would have to keep making gas to keep the main system—a certain percentage.

Q. Is there a factor of condensation and that sort of thing?

A. There is a factor of condensation, of course. Gas consists of perfect gas and condensible vapor.

Q. And the condensible vapors register in the station meter, do they?

A. Why, I think they do. May be some scientists will say they do not or are saturated, but I am quite sure they do measure them.

Q. And as they get out——

A. (Interposing.) And as they get out they fall down; there is some contraction for volume. Saturated gas is in larger volume than unsaturated gas.

Q. You have noticed the percentage of unaccounted for on these sheets here?

A. Yes.

Q. Is there any standard or unavoidable amount of unaccounted for gas recognized?

A. Not generally. I think some few companies have their own standard that they work to, and if it figures out a certain mileage, a certain unaccounted for per mile of main, why, they go after it to see if they can reduce it, they make investigations. We used to work on a figure something like 150. If it got below 150, or 200 thousand per mile of three inch per year, we would figure that we could afford to spend some money to go after it. Today we
543 do not consider or we would not spend any money unless we got above 300 or 350 thousand, because we cannot afford it.

Q. Tell me, if there is a leakage in a main, how do they discover it?

A. Well, there are two or three ways. It might be reported by smell, or we might close off the main, shut off all the consumers and measure the amount of gas that it would take to keep the pressure up in that main, or else we would go through the street and drive bars down over the joints and smell it.

Q. If there are leakages, are they ordinarily detected?

A. Oh, yes, all leaky cases are detectible.

Q. You can detect them ordinarily?

A. Why, yes, if there is any considerable leakage it is reported at once.

Q. And it will be detected by the passers by or the company's meter readers?

A. Yes, sir, broken mains or things like that, where there are considerable leakages of gas, are generally reported before very long.

544 Q. How about joint leakages?

A. Well, incipient leaks are not reported so quickly, but any bad leak is reported.

Q. Would you say that the unaccounted for of this company for 1919 or any part of it is unavoidable?

A. Well, possibly if the company had men and made an investigation, and the leakage is high enough to investigate and stop, it would cost some money to reduce it. I doubt if the money they would save would have paid them under the high cost of labor, and the fact that they would have to tear up the streets. It is an economic question.

Q. Of course they can reduce the unaccounted for due to the factor of consumers' meters by inspecting those meters and repairing them and everything more frequently; isn't that so?

A. Yes, that is true.

Q. But that is an added expense.

A. You could figure out, you might estimate just how much actually gas cost and then you could figure how much it would cost to recover fifty per cent. of it, because you could never recover all, it is just like subdividing and subdividing, for example, and then you would figure on whether spending that money would pay you in the gas that you save to manufacture.

Q. Did they expend that money, whatever they expended here in reducing the unaccounted for would be reflected in re-
545 pairs and other expenses?

A. Oh, yes, surely. Whatever you spend there would go into your increased operating, and that would make the gas that was left cost a little more, and reduce your savings. It is an economic question whether you want to put that amount in as a leakage cost or as a repair cost or manufacturing cost.

Q. Do you think there would be a saving here?

A. I do not know; I would not want to pass judgment just now. I would want to study the conditions further. I think that an investigation should be made on that subject when it gets to the

figure of fifteen per cent. Above ten per cent. I would look into it myself.

The Master: What was that last remark?

The Witness: If it was above ten per cent. the company should appropriate something toward investigation, to see whether it was an old leakage or whether there was some unaccounted for, such as street lamp estimates or temperature measurements.

The Master: Generally speaking, your idea is it is a pretty high average?

The Witness: It is higher than normal, although it is not higher than some other plants I know of around. It is higher than our average because we have some that are exceptionally low. What I mean by exceptionally low, I mean five or six or seven per
346 cent. We have a number of our plants that go up to twelve or fourteen per cent. If it goes above ten, those plants that are up to twelve and fourteen per cent., I would advise our people to start an investigation to see where it was, if we can locate it. We cannot afford to tear up the streets and repair the mains today, because we cannot get the labor, we can hardly get the labor to run our plants. So we have to keep the unaccounted for where it is for the present anyway.

Mr. Moran: That is all.

Mr. Hill: Are you through, Mr. Moran?

Mr. Moran: Yes.

Cross-examination.

By Mr. Hill:

Q. Assuming that the unaccounted for of the Kings County Lighting Company had been substantially the figure it was for 1919 for many years, would good management require that they should seek to correct that or ascertain the cost of it?

A. I should think that if it was as high as that for a good many years I would have wanted to look into it myself. Whether I could have corrected it, I do not know.

Mr. Moran: Someone says he did not finish his answer. Read the answer that you have got.

(The answer was repeated by the stenographer.)

347 Q. Do you know the area served by the Brooklyn Borough Gas Company?

A. That is the Coney Island.

Q. Well?

A. I know Coney Island, but I do not know how far inland they go.

Q. They go in and serve a part of the 31st Ward, the larger part of the 31st Ward, a part of which this plaintiff serves; and that plaintiff serves adjoining territory in the 30th Ward.

A. I think I have an idea——

Q. That is, do you think that the unaccounted for of those two companies ought to vary much under good management?

A. I do not know how they measure their gas Judge, if they corrected it or not. I would like to look into the company's records to see if they correct it.

Q. Assuming that they measured it under the same condition, corrected it to 60 just as this company does.

A. Are their mains under water there at all?

Q. I do not know, I was just asking your opinion.

A. Well, if the mains were under water they would not have a leakage. That would tend to seal any leaks, because they would be pumping drips to some extent, but some leaks will pass gas that won't pass water in. Good moist ground *goes* does not escape any, as much as it would in ——

Q. What is the unaccounted for in the Minneapolis Company that you mention?

A. The minneapolis company do not correct for tem-
548 perature there; their unaccounted for *in* nil. Their sales and sendouts are the same, so there must be—practically nothing.

Q. What percentage is there?

A. I have not got it in per cent. It is 2 100ths of a cent for this year and it is 79 100ths of a cent for last year. So I would assume that is a barometer correction, that they do not take into account. You see, the gas expands.

Q. You know what the unaccounted for is in your own plant, in Syracuse, in per cent?

A. I think I have that here. Ten per cent.

Q. What is it in the Johnstown and Gloversville, your other plant up-state?

A. I have not got that.

Q. But Syracuse is ten per cent?

A. Syracuse is ten per cent.

Mr. Moran: What amount of coal do they use in Syracuse; have you got that there?

The Witness: Why, I have not got the coal figures. I just have the operating expenses. I have not got the coal figures. Boiler fuel is about four cents.

Q. That is a higher freight rate than here in New York?

A. The freight rate is about—I do not know, I think the freight rate is about 2.25.

The Master: What was it the year before in Syracuse; didn't you say something about a jump in percentages?

549 The Witness: I have not got it. I have got 1919 in cents only, and the six months of 1920. I have not got the previous year with me, your Honor. Boiler fuel for 1919 was 4.42.

Q. As against 5.7 for 1919 in the Kings County Lighting Company, that was your computation?

A. I forget what that figure was. 5.7?

Q. That is the way I set it down.
A. Yes.

Mr. Moran: It was 5.3, wasn't it?
The Witness: No, I corrected that.
The Master: Won't you say what you meant when you said there is an increase in the percentage of unaccounted for of companies you are familiar with in the last two or three years?
The Witness: I said there was an increase in the unaccounted for because for one thing we had not spent the money repairing mains. We could not get the labor and we had started no systematic borrowing. What we call a systematic borrowing is isolating sections of main and measuring it occasionally, digging it up here and there to see the condition, and if we suspected that there was actual leakage of that main, even if it was a paved street, we would take out a block and drive a stone down over the different joints and smell the
550 gas, and if we suspected any particular district we would go after it.
The Master: But you say there was an increase?
The Witness: There was an increase, yes.
The Master: How large was that increase in the companies that you mention.
The Witness: That increase was— well, I should say our increases were from three to five per cent. In other words, the leakage that was normally five and six and seven per cent had jumped to eight, nine, ten, eleven and twelve per cent, so that we had not thought it necessary to spend the money to go out and reduce it.
The Master: Will you show the previous years in this matter?
Mr. Hill: We will be able to show it. It has always been seventeen straight on.
Mr. Moran: No, there has not been any pronounced increase in our company. It has been fifteen and upwards right along.
The Witness: I have got here Syracuse. 1913, 7.2; 1914, 6.9; 1915, 7.6; 1916, 8.6; 1917, 8.4; 1918, 8.6; 1919, 9.1. I was working backwards when I gave you that ten.

Q. That is 9.1 per cent.
A. That is 9.1 per cent of the gas made was unaccounted for.

551 Mr. Moran: Judge, would you mind saying—you asked about the Brooklyn Borough Company and you asked whether they ought to be the same or something like that. Just for the sake of clearing this, will you state what the Brooklyn Borough reports?
Mr. Hill: They have unaccounted for in 1919 of eleven per cent, in 1918 it is twelve per cent and in 1917, 12.57 per cent.
Mr. Moran: That is what they report?
Mr. Hill: That is what they report; that is, that is the data furnished me from the Public Service Commission.

Q. What b. t. u. or what standard of b. t. u. would you find in gas of 22-candle power?
A. Why, I found a b. t. u. from 580, the lowest figure I have gotten up to as high as pretty nearly 700.

Q. What is the yearly average of b. t. u. in 22-candle power gas?
A. Well, we ran from 215 to 220 in Des Moines.
Q. How much?
A. What was it, the b. t. u.?
Q. Yes.
A. 620. I was thinking of something else. The b. t. u. was 620 in Des Moines. One of the power plants was 615.
Q. That is higher than the b. t. u. furnished by this plaintiff from the tables that were exhibited to you, is it not?
A. Yes.
552 Q. So that if this plaintiff had manufactured 22-candle power gas from the lighting standpoint, the heating units would have also gone up about what they were normally?
A. Yes.
Q. So that they did not fail solely to furnish light, they also failed to furnish heat by this decrease of oil.
A. Average heat, yes.
Q. Average heat.
A. Average heat, yes.
Q. What fluctuation in the b. t. u. standard can be accommodated by the ordinary fixture in adjustment and get perfect combustion or get so nearly perfect combustion as not to be objectionable?
A. I would say five per cent up and down; 25 heat unites up and down.
Q. 25 heat units up and down?
A. Yes.

The Master: Have you a good deal more?
Mr. Hill: Yes, I have.
The Master: I think we had better adjourn now.
Mr. Hill: You can come back some time that it is convenient for you.
The Witness: Monday morning?
Mr. Hill: I am going to ask for an adjournment until Tuesday when we adjourn. When they get through their case we will want normally a little adjournment—not long. We would like to look some of these exhibits over with our experts to see if we
553 want to answer.
The Master: How many more witnesses have you got, Mr. Moran?
Mr. Moran: I have two more new witnesses that occur to me now.
Mr. Hill: You see we have got the cross examination of the superintendent this morning, Mr. Elsman, and Mr. Hopson has not been cross examined at all.
The Master: What are you going to do tomorrow? Have you got enough to keep us tomorrow?
Mr. Moran: I will put Mr. Miller on tomorrow and we will call Mr. Elsman.
The Master: Have you got enough?
Mr. Moran: It all depends on the length of the cross examination. I would like to go on with the cross examination of Mr. Miller tomorrow.

Mr. Hill: Here you have examined this witness for two and a half hours.

Mr. Moran: That was due to the objections that were made. I would have been through in an hour easily.

The Witness: I am going to Allentown tomorrow on a business engagement and it is possible that that may go off tonight. If it does I will come tomorrow.

554 The Master: The witness' testimony is important and they ought to have an opportunity to cross examine him.

Mr. Moran: I call the court's attention to the fact that all this testimony he has given here was given in his affidavit on a motion for preliminary injunction in this case, every bit of it; everything was given, and he has not touched on a new topic, absolutely.

Mr. Hill: And we are all ready to cross examine him, start right in tomorrow morning at ten o'clock.

The Master: We will adjourn then, until ten o'clock tomorrow morning.

(Further hearing adjourned to Friday, August 13, 1920, at 10.00 o'clock, a. m.)

554¼ [Endorsed:] Public Service Commission, First District. Aug. 13, 1920. Bureau of Statistics & Accounts.

554½ United States District Court, Southern District of New York.

Before Hon. Gordon Auchincloss, Special Master.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Transcript of Reporter's Minutes.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York,

Barclay, 8477.

555 KINGS COUNTY LIGHTING CO.

v.

NEWTON et al.

61 Broadway, New York,

August 13th, 1920—10 o'clock a. m.

Met pursuant to adjournment.

Present:

The Master.
Mr. Moran.
Mr. Hill.
Mr. Jackson.

ALTEN S. MILLER, called as a witness in behalf of the plaintiff, being duly sworn, was examined and testified as follows:

(The witness stated that he resided at Baltimore, Maryland.)

Direct examination.

By Mr. Moran:

Q. Col. Miller, what is your business?

A. I am the Vice President of the Bartlett Hayward Co. of Baltimore, a concern which builds gas plants, complete or in part, and also does manufacturing in other lines.

Q. How long have you been vice president of that company?

A. Five years.

Q. Have you ever been in the gas business directly?

A. Yes.

Q. When?

A. When I left college in 1888, I was several months in the construction department of the United Gas Improvement Com-
556 pany of Philadelphia, a company which is a constructing company and also an operating company. Then after that, which was in August 1888, I went to Omaha, Nebraska, as assistant superintendent. There I had entire charge of the manufacture of gas, of all the construction around the works, and also had charge of the distribution construction and of the new plant construction. This was all of course subject to the superintendent.

Q. You say after you graduated from college. What college did you graduate from?

A. Stevens Institute of Technology, as mechanical engineer.

Q. And that was in 1884?

A. 1888.

Q. And what other gas companies were you connected with, without going too much in detail? I do not think they question your qualifications.

A. On leaving Omaha in 1892, I had charge two years of the construction department in the west of the United Gas Improvement Company. In 1894 I came to New York and operated the East River Gas Company of Long Island City, and built the plant for the East River Gas Company of Long Island City, staying eight years with that company and its successor, the New Amsterdam Gas Company. Perhaps I had better say the owner, the New Amsterdam Gas Company, because the East River Gas Company of Long Island City is still a corporation. During a part of that same period with the East River Gas Company, I had charge of all of its operations, all of its engineering operations. That included
557 the manufacture of gas, and the engineering distribution of gas, including the setting and maintenance of meters. I had charge of all of its commercial operations in Long Island City. Then during two years of that period, from 1900 to 1902, I was the engineer of construction of the Consolidated Gas Company of New York, did a very considerable amount of construction work for that company, and during some months of that period, along around 1899 or 1900, I was the consulting engineer of the Brooklyn Union Gas Company in connection with certain proposed extensions.

In 1902 I went to Baltimore, and during a period of seven years was the vice-president and manager of the Consolidated Gas Company of Baltimore, and afterwards the Consolidated Gas, Electric Light and Power Company, its successor. There I had entire charge of all of the operations and construction of the company, and among other things built an entire new plant. For a succeeding period of two years I was vice-president, subsequently president of the Union Electric Light and Power Company of St. Louis, which had associated with it a small gas company.

Also during the period I was in Baltimore, I built a small gas plant at Hyattsville, Maryland, of which I was president, and of which I am still president. In 1911 I came to New York, and entered into a partnership with Dr. A. C. Humphreys, under the title of Humphreys & Miller, Inc., which was a consulting
558 engineering business purely.

Q. You have appraised gas plants and given testimony concerning the values and operating conditions of various gas plants?

A. Yes.

Q. You served the Government during a period of the war, I believe?

A. Yes; during eight months I was Lieut. Colonel in the Ordnance Department, and had entire charge of the design of—during a portion of the time of projectiles, and during the latter part of the period of all artillery ammunition.

Q. Recently have you given any attention to the gas situation in New York?

A. Yes, I have spent a large part of my time since December, 1918, in studying the course, the construction course and operations of the gas companies of Greater New York.

Q. Among others, the Kings County Lighting Company?

A. Yes.

Q. What other gas companies?

A. Brooklyn Union Gas Company, Newton Gas Company, Richmond Hill, the Consolidated Gas Company, New Amsterdam, Mutual, New York & Queens, the Standard Gaslight Company, Central Union Gas Company, Northern Union Gas Company.

Q. Are you familiar with the plant of the Kings County Lighting Company?

A. Yes.

Q. You have taken inventories and appraised that plant?

A. Yes.

559 Q. And later have you examined it for the purpose of determining its adequacy for the load that is on it?

A. Yes, sir.

Q. Did you visit it last winter?

A. Yes.

Q. Do you recall about what time of year?

A. It was in February.

Q. Colonel Miller, what conditions did you find there in that work?

A. The plant was generally well maintained, but it has been run at too great a capacity for a number of months, and certain apparatus needed overhauling. That referred particularly to the gas-generating apparatus and to the boilers.

Q. What is the capacity, the rated capacity of the plant if you recall? Do you recall that figure?

A. Well, I should rate the capacity of the plant as between five and six million, as a whole.

Q. Between five and six million?

A. Per day.

Q. That is, you take in the whole—what it can turn out in a day, considering the generating capacity and the holder capacity and everything?

A. What is economical and safe, reasonably safe.

Q. Yes.

A. Operating conditions.

Q. But you consider those things?

A. Oh, yes.

Q. Take the machines themselves, how much could they turn out?

560 A. If you had the proper holder capacity, I would rate the gas generating apparatus as having a capacity of about 7,400,000 feet a day.

Q. The machines though are rated higher than that, are they not,—the five machines?

A. Well, the five machines are, yes. In figuring that rating, I assume that one machine of the highest rate capacity is shut down for repairs.

Q. Is that necessary?

A. Yes.

Q. Why is that?

A. And it is customary. Let me also say that that rating is on a basis of the oils that were being used when I was at the plant and taking the oils that are being used now, the capacity will be probably ten or fifteen per cent below that.

Mr. Jackson: Below which?

The Witness: Below 7,400,000, with adequate holder capacity; or below six or seven—well, no, I won't—the oil will not reduce the capacity of five or six millions because that capacity is limited by other things than generating capacity. It will reduce that capacity of 7,400,000, of the generating machinery.

Mr. Jackson: By what per cent?

The Witness: By ten to fifteen per cent.

Q. How frequently do machines have to be taken down for overhauling and repairs?

A. Well, ordinarily, with the oil that we had up to six months ago, they were taken down under good operating conditions every 1,000 to 1,200 hours of actual operation.

561 Q. Did you find the machines over there had been run longer than that?

A. Yes, some of them had been run—I was told—3,000 to 4,000 hours; and I am well prepared to believe it, from the condition of the machinery as I observed it.

Q. Did you notice—did you consult the records to see the amount of gas that was being turned out?

A. Yes.

Q. And would you say the amount of gas was beyond the capacity of the plant?

A. Beyond the economical and safe operating capacity of the plant, yes.

Q. Of course, you have given the safe operating capacity of the plant as not to exceed 6,000,000 cubic feet a day?

A. Not to exceed that, no.

Q. In your opinion, Col. Miller, is it necessary to enlarge the facilities of this plant?

A. If the company is to safely take care of as much business as they had last winter, it should be enlarged.

Q. And what would you recommend being done?

A. I should recommend additional generating machinery, additional purifying machinery, additional condensing machinery, increased connections, a new holder, and probably increased boilers.

Q. What would you advise being done first?

A. Putting in new generating machinery.

Q. A couple of new generating machines?

A. At least two, yes.

562 Q. Some boiler capacity?

A. And increased boilers.

Q. That is, you would go to work to increase the manufacturing unit?

A. Yes. That, because it can be done so much more quickly than a holder could be filled. If a holder could be built in three or four

months, I would advise that a holder be built; but it can't be done, it will take practically a year to get in such a holder as this company should have.

Q. What would you say, what in your opinion would be the cost of the works, the manufacturing end of it; under proper conditions?

A. Well, I made an estimate in February, and I have not checked it up on subsequent prices; but on February prices it figured out seven or eight hundred thousand dollars at least on the manufacturing plant that was immediately necessary, and it did not include purifiers.

Q. And have prices gone upward since that time?

A. Yes, prices have increased.

Q. It would cost more now?

A. Oh, it would undoubtedly.

Q. How long will it take to get the work done?

A. Well, I think it will take seven or eight months.

Q. Is it safe for the company to take on additional customers?

A. No, it was not safe last winter with the customers it had.

Q. In your opinion, the company is justified in refusing applications from new customers?

563 Mr. Jackson: I object to that. That is immaterial and incompetent.

The Master: Read the question.

(The question was read by the reporter as above recorded.)

The Master: Objection overruled, and exception.

Mr. Jackson: Exception.

A. Yes, I think it is its duty to refuse them.

Q. Is there danger by overloading the plant?

A. Yes.

Q. What is the danger?

A. The danger is that the gas may go off the town on sections of the town, with the result that gas having been left turned on, the gas going off, the flame goes out; then when gas comes back on the town, the gas will escape, and is liable to asphyxiate persons or to cause an explosion.

Q. Well, even if the gas does not go off the town, it will reduce the pressure and cause pilot lights to go out?

A. Reduction below a certain point, which will vary with the design of the apparatus, will cause them to go out, or cause them to be—what we call a tender flame, such that the slightest draft will blow them out.

Q. Do you advise work on this plant to be undertaken right away?

A. Yes.

Q. It is late now, is it not, to get it in time?

A. Well, I am afraid—I would not undertake to make the

564 extensions before next—to complete the extensions before next February or March, outside of the holder; but it might be possible to secure them more promptly, depending on what the different contracting companies—how busy the different contracting

companies are. They should be ready by the first of December to take care of this year's load, that is, the heaviest load.

Q. Is there danger, in your opinion, if that can be done now, that there will be a breakdown over there before another winter?

A. In my opinion there is a very great and very grave danger that——

Q. (Interrupting.) And it is becoming more grave every day, is it not?

A. —that there will be a breakdown. I know as a matter of fact that the people did not have enough gas the last winter. The only way the company got by last winter was that they reduced the supply of gas below what the customers wanted.

Q. You noted a sharp increase in the consumption last winter over the prior winter?

A. Yes, very greatly increased.

Q. The testimony here has been it was as much as 35 per cent?

A. That was on periods, but in individual days greater than that, to the best of my recollection.

Q. Yes. Take the holder,—you would advise that arrangements be made to secure a holder as soon as possible?

565 A. Yes.

Q. And get it in by the winter of 1921 to 1922?

A. Yes.

Q. What would a holder cost?

A. Well, I am not sure just at the moment. Some months ago that holder figured out about—as I recall it—about $800,000. Meanwhile the price of delivered steel has gone up quite materially, and the price of labor has gone up, and so it certainly would not be less than $800,000, and I would not like, as I said, to take a contract to do it for $1,000,000, because I have not checked it sufficiently.

Q. Yes. Well, what size holder would you advise being put in?

A. At least 600,000.

Q. Six million?

A. Six million I should say; at least six million. The difference between a five million and a six million in cost is comparatively small, and it makes that extra million very cheap.

Q. You think, from the location of the company and the tendency of its business, it will need a holder as large as that?

A. Oh, it needs it now as large as that, yes.

Q. Its present holder capacity is how large?

A. Its present nominal commercial holder capacity is 2,600,000, of which 100,000 is at the plant and hardly can be said to be available; therefore it is two and a half million, for a maximum load of seven and a half million.

566 Q. That holder capacity is not adequate for a plant that is turning out as much as 500,000 or 600,000 an hour?

A. No.

Q. It is not, is it?

A. No.

Q. Was there a crisis in the company's affairs when you were there in the plant,—I mean in the operation?

A. There was.

Q. Well, how serious?

A. Well, it was so serious——

Mr. Hill: I object to that as calling for a subject not the subject of expert testimony, calling for something not expert testimony.

The Master: He can tell what was going on at the time he was there.

Mr. Hill: A crisis?

Q. Well, what was going on? Tell us?

A. The plant was so much overloaded and had been run so long overloaded, that I expected any day to get word that the territory was out of gas, that the plant had broken down; that is, that the generating machinery had broken down, or the boilers or blowing engines broken down.

Q. Well, was that condition due to faulty management?

A. No, due to the plant being overloaded.

Q. What would you say about the management at that particular time?

A. The management was very good.

Q. You spoke about oil conditions,—oil that they are getting now. What did you refer to by the quality of the oil they are get-

567 ting now?

A. There is a great deal of oil that is now being delivered that is either cracked or top oil, or topped heavy oil, and what we call the cracked oils which are oils which have actually been changed in chemical composition in the distillation process, do not work at all satisfactorily in the machine. These very heavy oils which have had the gasoline taken off, give a great deal of trouble, due to the very rapid deposition of carbon in the gas apparatus, which reduces the capacity of the apparatus in two ways. One by the fact that the machine can handle less oil in a given time, and in another way by requiring the machine to be cleaned very much oftener; and therefore the machine cannot run as many hours in a month or a year as it could with the lighter oils which did not cause cleaning so often.

Q. You say being delivered now. You mean what, just this month or——

A. Well, the local companies sometimes get the gas oil of the older type and sometimes get these heavier oils. I do not know whether any is being delivered at this minute, or even this month; but I am informed by the gas people that from time to time they get a shipment of the heavier oils.

Q. Well, this has been going on back during this spring, this past spring?

A. This has been going on in certain localities back to December, and other localities around here at a later date, since around Febru-

ary, I think, or March.

568 Q. Do you know the causes of this?

A. Well, I am told it is the demand for gasoline, that the old gas oil is the raw material for gasoline that can be cracked into

gasoline, and therefore it is being used—gas oil is being used to make gasoline.

Q. Is it something, in your opinion, that gas men will have to contend with during a period of, we will say the balance of this year.

A. Well, they will have to contend with it for the balance of time. It is a commercial proposition.

Q. You think that the gas oil now, from now on, will not be the gas oil of two years ago?

A. Oh, no. There won't be any gas oil as long as there is a demand for gasoline. There is no reason to suppose that that will ever cease, and the gas companies must compete with the automobile for gas oil.

Q. Then they must be prepared to handle this—what I might say was inferior gas oil?

A. Yes.

Mr. Jackson: That does not follow.

The Witness: Which has been ordinarily known as the fuel oil.

Mr. Jackson: I object to that from this witness as immaterial and incompetent.

The Master: No, I think that has some bearing on this question.

Mr. Jackson: Exception.

569 The Master: Just let me ask if I understand what you are driving at. As I understand, in the witness's opinion the tremendous demand for gasoline is going to cause the oil companies to crack this——

The Witness: Gas oil.

The Master: This inferior, this lower level of the oil, to get out more gasoline. Is that it?

The Witness: Yes.

The Master: And that then this lower level, which was ordinarily used for gas oil, will be less useful for that purpose, and will be harder to use and will need a readjustment, there will have to be a readjustment of the machines and of the equipment of the company in order to use it. Is that what you are getting at?

The Witness: Yes.

Mr. Moran: Precisely.

The Master: But it is possible to use it, if you do make these readjustments?

The Witness: Up to date they have been able to use it. They have not yet become expert at using it. It has not been an economical and satisfactory operation up to the present time, but we believe that we will be able to learn to use it satisfactorily. We must.

Q. And adjust the machines, is that the idea,—make adjustments and alterations in the gas making machines, so they can handle it? Is that it?

A. Make the adjustments in the machines so they can
570 handle it, increase the manufacturing capacity and teach the men how to run—it requires more skill, more care to use it: therefore the men must be taught that they must be much

more careful in future in keeping the temperatures almost uniform, where in the old gas oils, you could run with a range of temperature of 150 to 200 degrees, perhaps, without causing too much trouble. These other heavier oils, require a very much narrower range, probably they ought not to run over 25 degrees range. Also you will need a great deal more manufacturing capacity, because as I stated, the capacity of a gas machine is much less with the heavier oils. A machine will handle less oil per hour and will run a less number of hours in a year.

Q. Well, this—

Mr. Jackson: Well, just let me state my objection. What I had in mind in objecting was to object to this witness testifying as to any probabilities as to the future oil conditions. I think he is not qualified as an expert to testify as to the probabilities or possibilities of oil supply or condition of oil in the future. His business is not the oil business, it is the gas business, as I understand it.

Q. Are there several companies—

The Master: Well, the objection is noted and over- 571 & 572 ruled and exception granted.

Q. Are there several gas companies throughout the country making preparations along the lines you have indicated, to handle this oil?

A. Yes.

Q. Practically all of them?

A. Well, many of them.

Q. Now, speaking about—there will have to be greater care you said in its handling, will that in your opinion require a higher class of labor to handle it,—gas makers and so forth?

A. Yes, it will require a higher class of labor and an increased capital charge for putting in semi-automatic or automatic operating machinery.

Q. Col. Miller, you have been giving attention to the matter of candle power gas versus heating quality gas?

A. In general, I never studied it in great detail.

Q. Which is more generally supplied, in your opinion?

Mr. Jackson: Now, I object to that as immaterial and incompetent.

The Master: It seems to me we have had a great deal of testimony on that, haven't we, Mr. Moran?

Mr. Moran: We have had Mr.

The Master: Your witness yesterday was a man who had studied the thing very exhaustively, according to his statement, and Mr. Miller just now says that he has not gone into it in any great detail.

The Witness: Not the technical detail. I have of course 573 the commercial detail, but not the technical.

The Master: I mean, it seems to me that unless the previous witness's testimony is very seriously attacked on cross-examination, you do not need to pile it up on that question.

Mr. Moran: Well, that is something I never can tell till defendants rest, what they are going to do or claim.

Mr. Jackson: My idea would be that you have got all the value—pardon the suggestion—on that point that you could have from that witness, and that the facts would appear to the Master very clearly pro and con from that witness as well as from many.

The Master: Well, just with that suggestion, you go ahead, because Mr. Miller does not seem to wish to qualify.

Mr. Moran: I think he simply——

The Master: As a candle power gas expert anyway.

Mr. Jackson: May I have an exception.

Mr. Moran: The witness has been all over——

Mr. Jackson: Both because the witness has stated he did not assume to be, as I understood it, an expert on that branch of the subject; and the question itself is immaterial and incompetent.

Q. The question was, if you know?

574 Mr. Jackson: It has nothing to do with this case.

Q. Which kind is more generally supplied in this country?

A. Yes, I do know.

Q. Which kind is?

A. The gas measured by heating power and not by illuminating power.

Q. Are there any notable exceptions where the candle power requirement is maintained?

A. Yes, in New York City.

Q. Any other place that you know of? Are we all alone here?

A. As far as I know——

Q. Some one has said Philadelphia?

A. Yes. As far as I know, yes.

Mr. Jackson: You are going to contradict your other witness on that, are you?

Mr. Moran: We may.

The Witness: But there may be other places. As I said, I have studied the commercial end more than the technical end of this question.

Q. What do you mean by the commercial end?

A. I mean by the advantage to the company and to the consumer in furnishing gas of a uniform heating power as against a gas of a uniform illuminating power.

Q. That is just what we are interested in? Now, is it more advantageous to the consumer to furnish the heating quality gas?

A. Yes; practically all the gas is used for heating, and therefore the consumer is interested in the heating power and not in the

575 illuminating power.

Q. And is he interested in a uniform heating quality of his gas that he gets throughout the year?

A. Yes.

Q. Why?

A. Because of the design of machinery or apparatus.
Q. Well, in a word, doesn't

Mr. Jackson. I suppose as long as his bills are uniform, he is interested in having a uniform product served him, isn't it?

The Witness. His bills are entirely under his own control and not under the control of the company. The company can't make them uniform, because the consumption of gas is not uniform.

Mr. Jackson. The rate he pays for his product is uniform and so he should have a uniform product furnished him, shouldn't he?

The Witness. Not necessarily; not by any means. If the rate does not cover—

Mr. Jackson. I am speaking from the consumers' standpoint and not the standpoint of the companies.

The Witness. From the consumers' standpoint he can't expect to get service, he is more interested in service than he is anything else, and he is interested in a rate—

Mr. Jackson. He wants gas instead of air?

The Witness. He is interested in a rate that will permit the company to give him good service. If the consumer has air he does not have to pay for it.

Mr. Jackson. He does not?

The Witness. No.

Mr. Moran. Just a moment. Cross-examination, I think, ought to be taken up at the proper time.

Mr. Jackson. Pardon me.

Q. I get it that he is interested in a uniform gas of a uniform even quality?
A. Yes.
Q. Now, can a uniform heating quality gas be supplied him?
A. Can it? Yes.
Q. Just as well when a candlepower gas is being furnished as when a heating quality gas is being furnished?
A. Not if a uniform illuminating quality is furnished, no. Uniform heating quality and uniform illuminating quality do not go together.
Q. Do not go together?
A. No.
Q. So—

Mr. Jackson. Now, I think that the witness—if you will pardon the interruption—I think that the witness is getting away beyond the commercial feature of this subject.

Mr. Moran. Yes, because you don't—

Mr. Jackson. He is getting in to the very technical and chemical analysis features, as I see it; and I object to that as immaterial and incompetent from this witness.

The Master. Objection overruled and exception.

Q. Can a uniform candlepower be maintained with this class of oil we are getting now?
A. I don't know whether it could or not.

Q. Well, taking it by and large, can a uniform heating quality be supplied, if the company makes an effort in that direction, to keep up a more uniform gas, than they can if they go to a candlepower, and just look for candle power?

A. Yes, surely.

Q. Have you looked over the quality of gas furnished by this company in the last year, 1919 to 1920?

A. Yes.

Q. And what do you say about that?

A. I say it is very good.

Q. Would you say it was a sufficient gas as a 22 candlepower gas would have been?

A. Well, it depends on how the 22 candlepower gas was burned.

Q. Well, I mean burning it for cooking purposes, and just as it is burned?

A. I should say that it could be, that it could be burned—that under normal domestic conditions it is more efficient.

578 Q. This gas that we furnish is more efficient?

A. Yes, under normal domestic conditions.

Q. Manufacture and distribution of a heating quality gas such as we supply there can be done with the use of less oil?

A. Yes, less oil than 22 candle gas.

Q. Well, that is what I mean, less oil. Col. Miller, have you looked at the operating results of this company for the last 18 months, or the 18 months ended July, 1920?

A. Yes.

Q. You have been furnished the statements, copies of which have been received in evidence here?

A. Yes.

Q. I want to call your attention to the figures of 1919, Exhibit 6, I call your attention to the quantity of coal, generator coal, used per thousand cubic feet of gas, and ask you if there is any standard by which you gas men can tell whether the amount used is reasonable or not?

A. Well, in my experience you can get a certain yield from a pound of coal.

Q. Will you finish your answer, please?

A. Well, that referred to the coal.

Q. You can get a certain yield?

A. From a pound of coal.

Q. Well, how much can you get from a pound of coal?

A. 20 to 22½ cubic feet.

Q. And translating that into thousand cubic feet, it takes how much?

A. That depends on the oil. It depends on how much 579 oil you would use in order to—you get about 80 to 85 feet, probably a little—from 75 to 80 feet of gas from a gallon of oil, and 20 to 20½ feet to a pound of coal. So as the oil goes up, the coal would go down, and as the oil goes down the coal goes up.

Q. And do you take into account the quality of gas in that equation?

A. No.

Q. Well, then, we have got to take the coal, the generator coal, and the gallons of oil used here in order to get an expression of your opinion, have we not?

A. Yes.

Q. Now, will you express your opinion on that?

A. As to the quantities?

Q. Yes.

A. Well, the quantities are low, the quantities are low to make a thousand feet of gas.

Q. Well, to make a thousand feet of 22 candlepower gas?

A. I do not think that 3 43 gallons of oil would make a thousand feet of 22 candle gas.

Q. Well, you do not think—you mean by that, you know it would not do it?

A. Well, I don't know of any oil that would, that would do it.

Q. Do you know the quality of gas—you have consulted the schedules here, the exhibits here, showing the quality of gas made?

A. Yes.

Q. What do you say about the quantity of generator fuel and gas oil used to provide that quality of gas?

580 A. They are comparatively low.

Q. They are low?

A. Yes.

Q. Results are good?

A. Results are very good.

Q. Have you looked through our other expenses for repairs and things of that sort?

A. Yes.

Q. What have you to say about those?

A. I would say that the expenses, taken as a whole, are very low.

Q. Would that apply to 1920 as well as to 1919?

A. Yes. They are lower than the average company around the section.

Q. Regardless of the size of the company?

A. Yes.

Q. Prices, total costs vary to some extent on the output of a company, the total output, does it not? I mean you take a plant that is turning 15,000,000 feet in a year, can it make gas less—or ought it to make gas cheaper than one that is turning out 1,000,000 a year?

A. I should say it ought to make it materially cheaper. It does not always do it.

Q. I want to ask you something about this. You examined the statements of the gas companies, expense statements of gas companies for a great many years, have you not?

A. Yes, for over thirty years.

Q. And I want to ask you if it is a practice among gas companies in the gas business, to set up their expenses something as we

581 have them here on this uniform system of accounts?

A. In general terms, yes.

Q. In general terms?

A. Yes.

Q. That is the way a gas man likes to get it, if it wants to——

Mr. Jackson: What difference does that make in the case?

Mr. Moran: Oh, it makes a lot of difference.

The Witness: Yes, you must have it in some general detail, if you are—if there is any irregularity about them. Of course, what the customer and what the stockholder are interested in is the total, not the details.

Q. Yes.

Mr. Jackson: Totals are only arrived at from the items and details, are they not?

The Witness: No, the totals are arrived at from the final figures in the ledger—the details make up the total.

Mr. Jackson: That is all I want.

The Witness: But the total is what interests the stockholders and the public; and you can change the details a great deal without changing the totals.

Q. But you gas men like to see the details?

A. Yes.

Q. To a certain extent, so that you——

752 A. We like to see them. Then it often requires a lot of study of how the company is operated to know how the details are made up. Two companies under the same system of accounts, may get quite different results from the same figures, without affecting the total.

Q. Have you given attention to the matter of unaccounted for gas?

A. Yes.

Q. In thirty years, I presume you have heard a good deal about that subject?

A. Oh, a great deal.

Q. And considered it a good deal?

A. Yes.

Q. How?

A. Yes.

Q. And what does it mean, unaccounted for gas?

A. It means the difference between the gas made and sent out, as taken from the works' meters in connection with the holders, and the gas registered on the consumers' meters and estimated as having been used in street lamps.

Q. And it differs—those don't ordinarily tally, that is, the amount registered in the company's meter at the station does not ordinarily tally with the aggregate registration of the consumers' meters plus the estimated amount for the street lamps?

A. Never in my experience.

Q. Never and the difference you call unaccounted for?

A. Yes.

Q. And why is it called unaccounted for?

A. Because it is not accounted for. You have got to estimate what has become of it.

583 Mr. Hill: We will concede that.
Mr. Moran: What?
Mr. Hill: We will concede the reason for the term "unaccounted for."
Mr. Moran: The reasonableness of the term, eh?
Mr. Hill: Yes.
Mr. Jackson: It is a pleasant sounding phrase.
Mr. Moran: You do not use it in your memorandum about leakage.

Q. What are the factors contributing to it, Colonel?
A. The first is condensation, the average ——

Mr. Jackson: Now, if you please, I am going to —if the counsel will ask what are the causes likely to contribute to it, I would not object, but if he asks what are the causes contributing to gas that they cannot account for the disappearance of, I think on the face of it that is a contradiction. If it is absolutely unaccounted for and impossible to account for it, I don't see how he can state, as a fact, what reason contributes to its loss or disappearance. But if he will say what causes will likely contribute to it, I will not object.
The Master: Well, all he is trying to say is that they lose some gas and that they think their experience has been that they
584 lose it in certain ways, they don't know how much.
Mr. Jackson: They say they can't account for it.
The Master: He does not know how much he loses by condensation, he does not know definitely how much he loses by escaping gas in the mains. You go ahead and answer the question, Mr. Millet.
Mr. Jackson: Exception.

A. Part of it is accounted for through condensation, part of it is through the different temperature between which the gas is figured at the station meters or work meters and the gas at the consumers' meters. A very considerable amount is lost due to the low estimation of the gas used in street lamps. There is a certain amount due to the consumers' meters running slow, there is some loss from the joints in the mains. I think I have named the principal causes of the difference.

Q. Speaking about the loss at the joints in the mains, that is commonly spoken of as leakage?
A. Yes.
Q. Does the nature of the soil determine or have an effect on the amount of leakage?
A. Oh, yes.
Q. Explain that, please.
A. Take a heavy clay soil which will ordinarily become so dense that gas won't go through it, so that I have seen pipes with bad leaks in them, and yet the gas did not flow away from that point.
585 So there is no loss of gas. Take a light sandy soil that is quite porous, and if the gas leaks, it goes right away through the sand, so that there are losses in a sandy soil due to leakage which would not be experienced in the clay soil even though the distri-

bution system in the clay soil would not be any better than the distribution system in the sandy soil. Taking an extreme case, I know of one city that has its pipes all laid under water, and their losses from actual leakage are practically nothing.

Q. Take our situation over in Brooklyn, there, is that a soil that will hold a gas or allow it to escape freely?

A. Brooklyn is sandy soil.

Q. It would escape there as easily as any place you know of, would it not?

A. Yes. Yes, all the west end of Long Island is terminal morain and it is largely sand.

Q. Now, we have about 39,000 consumers on about 2,000 miles of main. Does that affect the gas that will be unaccounted for in your judgment?

A. The more the business is concentrated, the less the loss will be.

Q. Through leakage?

A. Through leakage, the loss through leakage——

Q. From the main?

A. —varies principally with the mileage of mains, and therefore the more you can sell per mile of a main of given size, reducing everything to a uniform diameter—the more you can sell
586 from a main of a given size, the less your loss is likely to be.

Q. Does the location of the consumers' meter have anything to do with the question?

A. Yes, if the meter is in a cold place, the apparent loss, or the unaccounted for, will be greater than it will be if it is in a warm place.

Q. Is there any particular cause, any particular difference, between the registration of meters in a district like ours where there are mostly single or two family houses with the meter in the cellar, and a district where there are apartment and tenement houses like Manhattan—is there any difference in those situations.

Mr. Hill: I desire to object to that as assuming a condition not proven. There is no evidence that they have cold cellars in the area furnished by the plaintiff, or that they have warm basements or cellars in the portion of the City of New York furnished by the Consolidated or for any of the facts assumed by the counsel in his question.

The Master: Read the question.

(The question was read by the Reporter as above recorded.)

Mr. Hill: In the prior question he said it was stated that the temperature was the cause, was a cause in the difference.
587 There is no proof whether those cellars over there are cold or warm.

The Master: Well, there is some proof that the meters are in the cellars over there, and that there are small consumers, that is, small houses over there.

Mr. Jackson: I think counsel is going to get slipped up on that theory if he proceeds with it, because he will find out that the cellars

are the warmest places over there in those houses to keep the meters in in the winter time. The furnaces are all in the cellar and they are very warm.

The Master: Well, let me ask this question, which I would like to have some information on, though I am not entirely sure it is a competent question. I don't know whether you know it or not, but in Judge Hand's decision in the Consolidated case he states that the average for the whole system over the period of 13 years during which the statistics were given to the authorities was 5.31 per cent gas unaccounted for. And he accepts that. I don't want to go into the Consolidated case at all in this discussion, except to ask you to explain the very large difference between the finding of the Court—the allowance for unaccounted for gas in the Consolidated case, and the percentage of unaccounted for gas during the year 1919 in the present case. Now, of course, I don't want to go into all
588 the details of the Consolidated case, but here is a difference of—it is more than three times as much—of unaccounted for gas over here; and the witness yesterday said that in his opinion when the gas unaccounted for reached ten per cent in amount, he thought it was rather a serious situation and should be looked into pretty thoroughly. Well, now, we have gotten up to 17.83 per cent; it seems to me that is very high from the evidence that has been adduced here, and I would like to know what you think of it?

The Witness: Of course, the first difference is the sales per mile of main in New York and in Brooklyn. I think as a result of the study of the situation, that management has put its efforts in other directions rather than on leakage, watching the total. The total seems very reasonable, the leakage does seem high, and as testified yesterday, the boiler fuel seems high. There are other items, however, of course, that seem very ; and I think the management has put its efforts in certain directions and left others. My experience has always been that a situation like this is almost like an air pillow, you can push it down almost any place you like, but it is liable to pop up some place else. And we have always got to have prominently before us the total, and I should say that this management
589 has gone after other lines, rather than those two particular lines of loss of gas and of boiler fuel. On the other hand, inherently, there will be a good deal more actual leakage in that situation than there would be in New York. Also, I do believe that the measurement of the gas in a consumer's meter is done at a lower temperature there than it is in New York City.

Q. Explain that now.

The Master: Just a minute. Your idea is then that the total cost of the manufacture of this gas, taking into consideration the unaccounted for——

The Witness: Manufacture and distribution.

The Master (continuing): Is a reasonable amount?

The Witness: The total cost of manufacture and distribution of gas is low.

The Master: Is low; but you feel that the unaccounted for is high?

The Witness: Taking that alone. I do not like to take any one item, except we have — take it with all of the others, but taking that alone, yes, I should say it looks high.

The Master: Go ahead, Mr. Moran.

Q. You said there would be a difference—I think in your last answer—in registration in meters in Manhattan and over
590 there?

A. That is my belief, yes.

Q. I know, but what would that—what is the basis for any such belief?

A. I believe the gas is measured at a lower temperature in the consumers' meters there than it is in Manhattan.

Mr. Jackson: While we are on it here—why?

Q. Yes, tell him why?

Mr. Jackson: Tell me why?

A. Because in Manhattan there is a tremendous mileage of cellars and vaults on the streets, and also a tremendous amount of gas delivered direct from the gas holders at the manufacturing plant to the customers. Also, it is my belief, based on my knowledge of the general situation here, that the average Manhattan meter is situated in a warmer place than the average meter in the outlying districts around Brooklyn, including this Kings County section. Now, this Kings County Company, in the first place, delivers all of its gas through a long line of main——

Mr. Jackson: Just a moment. While you are on the position of the meter, please explain why you say that the meter in Manhattan is in a warmer — generally on the average than the meter in Kings County?

The Witness: Because the cellars of the apartment houses——

Mr. Jackson: In Manhattan?

591 The Witness: In Manhattan, where the meters are placed, or the other portions of the houses where the meters are placed, are in my belief warmer than that front wall of the cellars in the outlying districts around Brooklyn. Now, in the Kings County situation——

Mr. Jackson: Have you been in the cellars? Just a moment.

The Witness: I have been in a good many cellars in Brooklyn.

Mr. Jackson: You know the cellars are all— the average you are speaking about, the average conditions?

Mr. Hill: Why have you been in the cellars?

Mr. Moran: You had better get some addresses here, your Honor.

Mr. Hill: We assume you went in the cellars in the course of your gas investigation.

The Witness: Well, perhaps.

Mr. Jackson: It was perfectly lawful entry?

The Witness: It was lawful enough.

Mr. Jackson: Now, then, you are speaking about the general condition over there of the cellars of the two family houses?

The Witness: Cellars of two family houses.

Mr. Jackson: Yes.

The Witness: With meters against the front wall.

592 Mr. Jackson: Against the side wall, too?

The Witness: Side wall, if it is a corner house.

Mr. Jackson: Oh, if it is not a corner house.

The Master: Well, the difference would be infinitesimal, wouldn't it? I mean the difference—the loss that was testified to yesterday is about one per cent. Wasn't that testified to yesterday?

Mr. Moran: I don't recall it. One per cent for what?

The Master: For the loss on account of the cold place at which the meter was.

The Witness: I think it would be more than that.

The Master: It seems to me the gentleman yesterday testified one or two per cent.

Mr. Jackson: Now, as this is entirely speculative, I think we are entitled to get the Brooklyn situation as an average situation, because there is absolutely, in my opinion, no ground for this distinction whatever. I think it is purely a theory to account for something that they cannot otherwise account for, or that they do not choose to.

Mr. Moran: Is this a summing up, general, or what is it—a question?

Mr. Jackson: No, it is part of the question. It does not go as far afield as your answers for your witness.

593 Mr. Hill: I think he is a good witness.

Mr. Jackson: I think Mr. Moran is an excellent witness. Now, what is the ordinary size of those two family houses, as far as the plan dimensions are concerned?

Mr. Hill: One per cent for every two degrees is what he said.

The Witness: I don't know.

Mr. Jackson: About.

The Witness: I don't know what is the ordinary size.

Mr. Jacgson: 20 by 60?

The Witness: I don't know. That sounds a little large. But I do not know how deep they are.

Mr. Jackson: 18 by 50?

The Witness: They are generally about 20 or 25 feet front, as I recollect it, but I do not know how deep they are.

Mr. Jackson: Well, you know from the cellars you were in.

The Witness: No, I do not know how much cellar there is that I did not see. The cellar does not run all under the house.

Mr. Jackson: Just a moment.

The Witness: The cellar, so far as I know, does not run

594 all under the house, and I do not know what they are.

Mr. Jackson: Were you in some of the cellars of those two family houses, generally served by this company in Brooklyn?

The Witness: I was in a few.

Mr. Jackson: Now, haven't you an impression in your mind of the size of those cellars?

The Witness: I have not, no.

Mr. Jackson: Did they cover a city block?
The Witness: I didn't see any that covered a City block.
Mr. Jackson: No, but they ran from 18 to 20 by 50.
The Witness: If you say so, I will assume they do.
Mr. Moran: Assume they do.
Mr. Jackson: No, I am not going to assume a thing. I am going to ask you, if you saw the cellars, you must have some impression in your mind of the size.
The Witness: The cellars were subdivided, and I do not know how large they were. I did not go all through them. I did not go into the private vaults.
Mr. Jackson: Now, there aren't any private vaults in the cellars of those two family houses, are there?
The Witness: I do not know. I say I did not go into
595 them.
Mr. Jackson: Isn't it, as a matter of fact, all open and just one room?
The Witness: No, not those I went in. There may have been some. They were small, they were not tremendously big cellars. I did not see any 20 by 60.
Mr. Jackson: As a matter of fact, they are all one room?
The Witness: May be they are; I will take your word for it.
Mr. Jackson: There is a furnace in the room.
The Witness: I will take your word for it, if they are.
Mr. Jackson: There is a furnace in the room?
The Witness: Some of them, and some did not have.
Mr. Moran: Others were hot water or steam heat.
Mr. Jackson: Don't you know the general condition of those houses in Brooklyn?
The Witness: No, not all of the places. I told you I visited a few of the places.
Mr. Jackson: You should have informed yourself enough to state there is a general condition that meters in Brooklyn are in a colder place than Manhattan, or you should not testify to it.
596 The Witness: I said my general impression is they are, and there is a belief in my mind, they are.
Mr. Jackson: You are testifying as an expert on the facts, based on your knowledge of the facts.
The Witness: That is my knowledge of the facts, that they are colder in the outlying districts of Brooklyn than they are in Manhattan.
Mr. Jackson: We have heard that, but I want to know on what you base it—whether you base it on some evidence, some observation or opinion.
The Witness: Some observation and knowledge, and having lived in this section——
Mr. Jackson: However, the meters in the cellars in Brooklyn are in the open places of the cellar and not in any confined place?
The Witness: They are as a rule in no confined place, but against the front wall.

Mr. Jackson: So that they can get right at it. Well, it is a stone wall?

The Witness: Usually, or brick wall.

Mr. Jackson: And it is underground.

The Witness: It is underground.

Mr. Jackson: Yes.

The Witness: And very cold.

597 Mr. Jackson: And it is the warmest part of the house, the cellar is?

The Witness: No, it is not.

Mr. Jackson: You could not grow a plant down there, because it is so hot.

The Witness: That is not true.

Mr. Jackson: Well, you have not observed the cellars of Brooklyn, and I guess we will have to furnish some evidence about that.

The Master: Mr. Klumpp said yesterday that he would assume that there might be one or two per cent unaccounted for, that takes place on account of the difference in the temperature.

The Witness: Well, the gas is corrected to 60 degrees, and the normal temperature of New York is 52. Now, that would indicate that the ground temperature three feet underneath, which is the level of the mains is not less than—is not above 52, in a section of this kind. I think it is above that in New York City, that is, in Manhattan. But say that would be eight degrees. Now, counting condensation and reduction in volume together—I mean reduction in the condensation and contraction of gas—there is a difference of one per cent for each four degrees. Mr. Klumpp yesterday used one per cent for five degrees, but he divided his contraction of
598 gas due to temperature from his condensation, but taking them together it is one per cent for each four degrees. Now, if the gas is measured at the ground temperature average, that would make just two per cent. But I did not finish my other statement. The pumping of the gas in the case of this company, through a long line of main to outlying holders, where it stands a certain amount of time, reduces the temperature, and the loss through condensation is very much more than is the case where the company distributes directly from its works to the city.

Mr. Jackson: If the temperature were properly lowered before it left the works, that would be obviated, wouldn't it?

The Witness: No.

The Master: Well, you said in your testimony that you understood that the Consolidated Gas delivered gas to consumers at the holders.

The Witness: Directly from its works holders in many cases. The company has some outlying holders, of course.

The Master: You mean that the gas is metered at the holders?

The Witness: Oh, no. No, what I mean is that the many holders at the works, the gas goes directly from these holders to the mains and to the customers.

599 The Master: Oh, I see.

The Witness: This company's works——

Mr. Moran: You see, in our case the gas is all sent up to 56th street, a mile and a half, and stored there. All the gas passes through that holder.

The Master: I see.

Q. If that holder were located at the works, the gas at the works would be warmer than going that mile and a half. It is cooled as it goes into the holder?

A. Yes.

Mr. Hill: But you claim you do not hold it long enough there to cool?

Mr. Moran: No, we don't claim any such thing. We claim our gas will cool as quick as any other man's gas.

Mr. Hill: But you have so little storage you have to hurry it up.

Mr. Jackson: I think Mr. Moran ought to be sworn on this, because it may be important. But may I just be indulged in for one more question on that meter propositions?

Mr. Moran: Oh, any number.

Mr. Jackson: Because I would like to have it settled.

Mr. Moran: Any number.

600 Mr. Jackson: Now, as against the meters in Brooklyn that are generally in the cellar, this single room of a two family house that has the furnace in it, the meters in Manhattan are in larger proportion not in the cellar but up in various apartments on floors running from one to perhaps ten floors in the apartment buildings in Manhattan; is that not true?

The Witness: As far as possible they keep them in the cellars, sometimes they have to go up in the——

Mr. Jackson: But in the various apartments they do not keep the meters always in the cellars, do they?

The Witness: They don't always do it, but they like to.

Mr. Jackson: Sometimes they keep them in the apartments?

The Witness: Sometimes in the apartment, and sometimes in the cellars. Where they can get them in the cellars they can keep them in the cellars.

Mr. Jackson: Are you informed on the general condition in that respect?

The Witness: They are both, they wrok both ways.

Mr. Jackson: I appreciate they work both ways, but that is not the answer to my question. I want to know the extent of
601 your information upon which you base your opinion.

The Witness: I have a general knowledge of the situation and know they work both ways, as I have explained.

Mr. Jackson: To what extent have you examined it?

The Witness: As far as——

Mr. Jackson: I know they work both ways too.

The Witness: As far as possible they keep them in the cellar.

Mr. Jackson: Now, that is not an answer, and you know it. You know that it is not possible to keep them in the cellar, and that

they keep them in the apartments on the various floors, just as we suggested.

The Witness: They keep them both ways.

Mr. Jackson: I appreciate that, but do you know the difference—the extent to which they keep them one way or the other?

The Witness: I do not know how much in the cellar and how much in the apartment.

Mr. Jackson: That is what I thought.

The Witness: But in the apartment they will be warmer than in the cellar.

Mr. Jackson: Now, are you sure that follows?

The Witness: Yes.

Mr. Jackson: Don't you know that there have been com-
602 plaints every winter about the apartment flow not getting heat?

The Witness: There has been some complaint which made a lot of noise, yes.

Mr. Jackson: Have you informed yourself as to the complaint which made a lot of noise?

The Witness: Through the newspapers only.

Mr. Jackson: That is all?

The Witness: That is all.

Mr. Jackson: Yes.

The Witness: But they were not——

Mr. Jackson: You have no information as to how many water pipes were frozen in those apartment houses, and the meters, because there wasn't any heat?

The Witness: I don't know how many water pipes were frozen. I don't know that any water pipes were frozen by any meters.

Mr. Jackson: You would not call this testimony of yours any more than a mere speculative theory, without any real information amount the situation either in Manhattan or Brooklyn.

The Witness: I know that it is correct, and I know that a meter in an apartment will be warmer than a meter in the cellar against a front wall.

Mr. Jackson: Is all your evidence——

603 The Witness: On the average I do not think——

Mr. Jackson: Is all your evidence on conditions, based on the same proportionate amount of knowledge of the facts as you have concerning the location of meters in Brooklyn and Manhattan, and no more?

The Witness: I know the situation, know it thoroughly. I have been in this business all my life.

Mr. Jackson: Well, is that the best answer you wish to make?

The Witness: That is all I care to make for that.

Mr. Jackson: Well, I think it is enough for me.

The Witness: All right.

Q. Colonel, this unaccounted for, so far as it is due to low registration of meters generally, it *has* not injure the consumer at all?

A. No.

Q. So far as it is due to condensation it does not injure the consumer at all; is that right?

A. I don't know just what you mean.

Mr. Jackson: I didn't get that question.

The Witness: —in that case, by injuring the consumer. If it does not condense——

Q. It does not make his gas cost any more because there is some condensation between the meters as to the work and his meter, does it.

Mr. Hill: I object to that as not a subject of expert testi-
604 mony. On one phase it does. If he is to turn around his investment——

Mr. Moran: I will withdraw the question, to save time.

Q. In your opinion, Colonel, does the amount of unaccounted for shown on these exhibits of the Kings County Company for 1919 and 1920, indicate inefficient management?

Mr. Jackson: Well, I object to that as incompetent and immaterial. He hasn't any slightest idea where the unaccounted for—what the unaccounted for is due to. How can he say whether it is due to inefficient management or not?

The Master: I think he can state whether he thinks it is reasonable or not, a reasonable amount; and then he can state what the causes are.

A. Taken alone I have already stated it looks high. Taken in connection with total costs it looks reasonable.

Q. The total cost, for instance, the meter repairs; is that the idea?

A. The repairs of mains, meters, services, works apparatus.

Q. You think on expending more in repairing meters they could probably get at some of the unaccounted for at that point?

A. Yes.

Q. Repairing mains and services, they probably could get at some of the unaccounted for due to that—any possible
605 leaks?

A. Yes.

Q. That would increase the repair expense?

A. Yes.

Q. How does the management determine what they will do?

A. Why, it must depend on——

Mr. Jackson: I object to that as immaterial and incompetent.

The Master: Go ahead, answer the question.

Mr. Jackson: Exception.

A. It must depend on the management's best judgment, taking into consideration the total operating costs, which after all the management is finally interested in; and the public are finally interested in.

Q. Now, Colonel, you have known for the last couple of years or at any rate of the amount of unaccounted for this Company has, have you not?

A Yes.

Q You have looked at its plant with that in view, to find out a good answer for it, have you not?

A Yes.

Q You have thought about it?

A Yes.

Q You have brought your thirty years of experience to bear on the situation?

A Yes.

Q And can you say now, tell the court now if there is anything in it that—from your study of it—that indicates that someone is negligent or careless or the company is reckless in the matter?

6396 Mr. Jackson: I object to that as incompetent and immaterial.

The Master: I will let it stand.

Mr. Jackson: Exception.

A No, there is no—there is absolutely nothing to indicate any negligence or any bad management.

Q You have not been able to account for any of this unaccounted for, have you, that is, to lay your finger on it and say "Here, we have got some of it there".

A Not except through general investigation of the whole system. I know that you can spend a certain amount of money on consumers' meters and make the meters run correctly, where they are now running slow.

Q More nearly correctly?

A Yes.

Q As a rule—

A They are now running slow.

Q Isn't that a fault of all meters, anyway?

A It is the tendency of all consumers' meters to run slow.

Mr. Hill: From the point of view of the company. The consumers think the other way.

The Witness: And, by the way, that is another way these heavier oils that are now being used are causing—they are carrying with them a gummy substance which deposits on the consumers' meters, valves and makes them drag and makes the meter tend to go slowly.

Mr. Jackson: That can be corrected, can it?

6397 The Witness: I don't know whether it ever can or not.

Mr. Jackson: Don't you know that this very company has corrected it recently?

Mr. Moran: General, in my direct examination—you may take the witness——

Mr. Jackson: I don't believe you should have his incorrect statement on there. He says they are now running along slow. Don't you know this company has corrected these meters in regard to the slowness recently?

The Witness: I don't believe for a fraction of a second that the

company could have corrected 10,000 meters in February when they were running slow. I don't believe it. Of course they have not, it is impossible.

Mr. Jackson: Well, you haven't any information upon that?

The Witness: I know it is not possible, yes.

Mr. Jackson: You don't know to what extent they have corrected them?

The Witness: What?

Mr. Jackson: You don't know to what extent they have corrected them?

The Witness: I know it only to a small extent, because I have the operating expenses and I know what it would cost to correct
608 them, and I know they have not spent the money to correct them.

Mr. Jackson: Have you inquired if they corrected them?

The Witness: I have not. I have looked at the operating expenses, I know the money has not been spent to correct them, so I did not have to inquire.

Mr. Moran: I am through. You may ask.

Cross-examination.

By Mr. Hill:

Q. How much did they spend for correcting meters in 1919?

A. (Witness refers to paper.)

Q. Wait a minute. Didn't you say you knew?

A. Yes, I do know. I have got the figures right here. I don't carry these figures all in my head.

Q. Didn't you know, when you answered General Jackson's question?

A. I did not have the exact figure in mind. I knew it was not sufficient to cover the repairs of 10,000——

Q. Well, ——

A. Don't interrupt me, please.

Q. Yes I will too, because you are answering my questions now. Wait a moment.

The Master: Just a minute.

Q. Do you know whether it is 2,000 or 10,000?

A. 2,000 or 10,000 what?

Q. Spent on repairs of meters in 1919.

A. I am speaking of repairs.

609 Q. Don't you know whether it is 2,000 or 10,000?

A. I am speaking of repairs to meters since February. That is what I predicated my statement on.

Q. Do you know in 1919 what the repairs to meters were?

Mr. Jackson: Without looking at the paper.

A. It is $22,900.98.

Mr. Jackson. You insist on looking at the paper.

A. (Continuing.) Spent for repairing meters in 1919.

Q. I could have got that fact by looking at the paper. I have the same paper here.

A. All right.

Q. What produces a uniform heat in the gas?

A. A uniform heat in gas?

Q. Yes.

A. The regulation of the proportion of water gas and oil gas in the fixtures.

Q. What variance should there be in the heat units not to cause inefficient results with the ordinary appliances?

A. I could not testify to a fraction of a point.

Q. I don't ask you to.

A. Theoretically we ought not to have any variation; it is very much better to have a perfect gas.

Q. I did not ask you about that.

A. Practically that that is impossible.

Q. Wait a minute. I did not ask you that.

The Master. Wait a minute. Let the witness answer the question the best he can.

610 A. Practically it is impossible.

Q. How great a variation should there be and still have efficient results?

A. For perfect efficiency there should not be any.

Q. Well, up to what point would be reasonable efficiency?

A. I never experimented in that. I have not testified to that.

Q. Would a variation of ten be t n be reasonable?

A. It depends on what you mean by reasonable. Commercially it could not be—you could not work to less than ten.

Q. Would twenty be reasonable commercially?

A. Well, it would require pretty close manufacturing operation, and I doubt whether you could maintain as close as they regularly.

Q. How close should they maintain?

A. I think they can keep it within about thirty to forty between the extremes.

Q. That is, beyond that there becomes marked inefficiency?

A. Well, I would not say necessarily marked inefficiency, but the efficiency falls off anywhere when you get away from the exact point at which you are set.

Q. Did you hear Mr. Klumpp say yesterday *sag* it should be within twenty or twenty-five?

A. Up and down, I think he said.

Q. Between twenty and twenty-five.

A. Up and down.

611 Q. A variance in all of twenty or twenty-five?

A. I think he meant twenty or twenty-five from the mean, which would be about forty spread. That is what I understood him to say.

Q. Well, take the sheets of this company.
A. (Witness refers to papers.)
Q. I call your attention to the variance. I call your attention to 1919. Take January 3, 1919, what is the variance?
A. It is about 74.
Q. That is, the low is 540, isn't it, and a fraction?
A. Practically.
Q. And the high is 614.
A. Practically.
Q. Take the 10th of January, what is the low?
A. 542.
Q. What is the high?
A. 575.
Q. You had better look again.
A. Oh, at eight a. m. 592 practically.
Q. Is there a 640 there?
A. What date is this?
Q. January 10th.
A. Oh, I am not looking at that. 640 and 548.
Q. Can't you read figures?
A. Sometimes I can. Sometimes I get on the wrong line. I was on the wrong line that time, and I was reading the figures from the line I was on, so I read the figures correctly, but I was in the wrong place.
Q. All right. There is a variation of 92 b. t. u., isn't 612 there?
A. Practically.
Q. I call your attention—now, go to February, 1919. I can take some in between that are above 40. If you don't think so, I will do it.

Mr. Moran. Well, you are on the wrong track, Judge. You are going to take considerable time and not get anywhere. One question will straighten it all out again.
Mr. Hill. You mean your question or his answer ought to straighten it out? The two together will, I admit. Each of you is good, and together you are fine.
Mr. Moran. We have worked together before.
Mr. Hill. Why, yes, you have been with the octupus over here, the general gas octupus every since 1888.

Q. What about February, 1919?
A. Oh, excuse me. February 19th, 1919. Let me get on the right line this time. That is right, isn't it. That is 568 and 647–648 practically. That is a spread of 80
Q. March 1st.
A. That is 554 or 555 practically, and 628.
Q. March 5th.
A. That is 613 and 696.
Q. You are giving them the benefit of the fraction all the time, I notice, aren't you, Colonel?

A. No, I am not. I am reading to the nearest figure each
613 time, and I give you the benefit of just as many fractions as come your way.

Q. Well, I appreciate that and thank you.

A. Apparently somebody else can't read figures.

Mr. Moran: Give the Judge all the breaks, Colonel.

Q. March 6th.

A. Is 576 and 637.

Q. March 10th and 11th. I will group these.

A. 593 and 630, 565 and 602.

Q. That is, the first two figures were the 10th and the last two figures were the 11th.

A. The first for the 10th and the second for the 11th.

Q. 14th.

A. 621 and 579.

Mr. Hill: Now, I can shorten this possibly, shorten these——

The Master: Of course, all these sheets are in evidence anyway, so that they can be——

Mr. Hill: All right.

Q. Now, I wish you would look at—turn to 1920 and tell me the low daily average of July 2nd, the daily average of July 2nd?

A. Daily average is 500.04—500.

Mr. Moran: No, that is not the average, is it?

The Witness: Isn't that the average? Yes, that is the daily average.

Q. It is 500.04. Now, turn back to January 2nd and give me the daily average.

A. 603.35.

Q. Do you have a daily average as low during the month
614 of July, the recent month, this present month of July of this year, as 493?

A. Yes, 493.6.

Q. And do you have as high during that month—well, a 500 and a fraction, anyway?

A. Yes.

Q. Do you get a variance between the 27th of July and the 28th of July, two adjoining days, of pretty nearly 40 points?

A. Yes.

Q. 38?

A. 38.

Q. Would that variance in b. t. u. have any effect on the service that the consumers get?

A. Yes, some effect.

Q. Wouldn't it cause, without changing their meters—wouldn't it cause them to lose markedly in the amount of heating power there was in the gas, even above the difference in the variation? By that I mean, if their appliances were set for a certain b. t. u. and

they switched 40 degrees in a day, daily average of 40 degrees or pretty near, wouldn't that be a lack of heat—wouldn't that cause a lack of heating power above the variance in the b. t. u. standards.

A. I have never made any tests, as I stated, to get certain figures, but my belief is it is not good to have any more variation than necessary. Just how much loss there is, in exact figures, I don't have.

Q. But you think that would cause a complaint to be made to this company, don't you?

A. I think it is liable to cause complaints from certain
615 neighborhoods that the gas is bad.

Q. And it also causes loss to the consumer?

A. Well, the consumer——

Mr. Jackson: You don't hesitate to say that, do you?

A. (Continuing.) —does not use the gas as efficiently—no. I don't think these consumers are losing anything. I think they are getting something they are not paying for.

Mr. Jackson: If it is poor——

The Witness: If it is poor gas, it is not a loss.

Q. That is, you think the 80-cent rate is not high enough?

A. Yes, and they are not losing anything under the poorest gas they are getting, they are getting more than they are paying for.

Q. You are basing that on the theory that they are in the aggregate——

A. They are not paying for what they are getting.

Q. They are not getting the same amount of heating power from this gas, with the wide variance in the b. t. u., that they would if it run within the 40-degree limit that you have mentioned.

A. That is correct, yes; that is correct.

Q. You gave some figures as to how many cubic feet of gas a pound of coal would make.

A. Yes.

Q. And that was how many?

A. 20 to 20½ feet to the pound.

616 Q. Will you compute how many feet of gas would be made from 33.7 pounds.

A. It would be somewhere between 674 and 691.

Q. And will you compute the amount of gas which would be made from 3.6—that is, how many feet of gas will a gallon of oil make?

A. Around 80, in the neighborhood of 80.

Q. Did you say from 70 to 75?

A. I think not. I think I said from 75 to 80.

Mr. Jackson: He said 75 to 80.

The Master: That is what he says.

Q. You said 75 to 80?

A. Yes.

The Master: I understood him to say 80.

The Witness: That on a basis of 80 would be 288 feet.
The Master: What does that mean? You mean ——
The Witness: 3.6 gallons of oil would make 288 cubic feet of gas.
The Master: Yes.

Q. How much does that make?
A. That makes 979 feet, together.
Q. That is assuming the highest, your highest estimate of coal.
A. Yes.
Q. And your highest estimate on oil?
A. Yes.

617 Q. What kind of oil does it take to make that highest amount?

A. Well, there is a good deal of variation in the efficiency of a machine and in the management, and I have known of cases where we have gotten as high as 85 feet to the gallon.

Mr. Hill: I move to strike that out as not responsive to my question.

The Master: I will let it stand. If you want to ask him further on the thing, you may.

Q. I want to ask you what kind of oil is it—what kind of quality of oil, as to good or bad, that makes the highest quantity of gas, in cubic feet.

A. The highest quantity of gas?

Q. Yes, from a gallon.

A. Well, I don't know, really. I never have been through any very wide variety of oils.

Q. You said there was a range from 75 cubic feet to 80 cubic feet from a gallon of oil, didn't you?

A. Yes; at times up to 85.

Q. Did you in your direct examination say that there was a range from 75 cubic feet to 80 cubic feet of gas from a gallon of oil?

A. Ordinarily, yes; ordinarily that is the range.

Q. Does a poor quality of oil make 75 cubic feet, or does the poor quality of oil make 80 cubic feet?

A. Well, it may not make either. It depends a great deal on the handling of the oil in the plant.

618 Q. Yes. If you made 80 cubic feet of gas from a gallon of oil, assuming the operating conditions about the same, would you think that oil better than if you made 75 cubic feet from a gallon of oil?

A. It would depend entirely on the quality of the gas being made. You can make—taking a crude oil for instance—you can make a pretty good volume of gas of pretty poor quality. So that you have got to take into consideration the quality of the gas when you get through.

Q. Yes, but if you get 80 cubic feet of gas from a gallon of oil, operating conditions being normal and proper, do you think that that shows a good quality of oil?

A. It depends on the quality of the gas entirely.

Q. That is, you could make 80 cubic feet of poor gas?
A. Yes.
Q. Now, these people made——

Mr. Jackson: May I ask a question there? Will you let me?
Mr. Hill: Certainly.
Mr. Jackson: I would like to see the witness answer the question.

By Mr. Jackson:

Q. Is the tendency of the poor quality of oil to make a larger volume of gas than the so-called better quality of oils as you have been mentioning, better and purer quality of oils in the gas
619 business?
A. I do not think it is.
Q. What is the tendency?
A. I think the tendency is not to make a larger quantity.

By Mr. Hill:

Q. That is, they will make, if they get poor oil down here—you can look for a greater volume of gas per gallon; is that the idea.
A. That is not what I testified.
Q. Well, is the opposite true?
A. I think it is.
Q. If they get poor oil you may look for a smaller quantity of gas.
A. I think——
Q. Per gallon.

Mr. Jackson: Well, do you know about it?

A. I think that is the fact. No, I don't know.

Mr. Jackson: All right.
The Witness: I have never run a gas machine with this quality of oil that is now being used.
Mr. Jackson: And you have not informed yourself as to that point during all the time you were in the gas business.
The Witness: I do not know that anybody has ever informed themselves on that particular point.
Mr. Jackson: It is a simple proposition.
The Witness: Because this class of oil——
Mr. Moran: Wait a minute now.
The Witness: Because this class of oil has never been
620 used until the last few months.
Mr. Jackson: How many months?
The Witness: How many? Since December I think it was.

Q. Of 1919?
A. Yes. The nearest I ever used to it was the Texas crude oil. I used a very large amount of Texas crude oil.

Mr. Jackson: Well, since December, 1919 to date, you mean to say that you have not been informed of experiments as to the comparative volume of gas from a poor quality of oil as compared with the better quality of oil?

The Witness: I doubt whether any man in the business knows it.

Mr. Jackson: And you call yourselves experts?

The Witness: Well, I think I am.

Mr. Jackson: And you have not found that out yet?

The Witness: I am quite able to find it out.

Mr. Jackson: And have not found it out?

The Witness: It is not a thing you are looking for. There are lots of things we can find out that we do not look for. I do not think you will find this figure of 80 feet per gallon scattered around——

Mr. Jackson: Well, I can find out what quality of gas I will produce when I get a new quality of oil.

621 The Witness: You might be able to find out, and perhaps some other people would not.

Mr. Jackson: Perhaps there are some reasons they do not find them out.

Mr. Moran: There are lots of things in the gas business that probably you don't understand.

Mr. Jackson: I am trying to learn more about it than I do.

The Witness: Well, there is plenty to learn.

Mr. Hill: It is a fact, isn't it——

Mr. Moran: What is the complaint, General,—that he should use——

Mr. Hill: The claim is that you are getting a good quality of oil, good quality of coal——

Mr. Moran: I sensed that from your question, that that is what you would claim, when you said we were getting a poor quality of oil, we were not getting a poor oil because our results were so good.

Mr Hill: You saw what I meant.

Mr. Moran: But the General drove right across the lot in another direction, you know. But to judge speaking of that, I do not think really that you meant that, because our results here are not due to the good oil but to the good management.

Mr. Hill: And the good plant, and the efficient plant.

622 Mr. Moran: And the efficient plant, yes.

Mr. Hill: You have the idea.

Mr. Jackson: Your theory is perfect.

Mr. Moran: I think if there is an issue on the quality of oil, that we had better have it examined.

Mr. Hill: At any time.

Mr. Moran: Because the reasoning is dangerous on it. Well, if you will——

The Witness: In one process they made about 166 feet to the gallon.

Mr. Hill: Whose question are you answering now?

The Witness: I am just telling you how many cubic feet you can make from a gallon of oil.

Mr. Hill: I wanted to know whose question you were answering.

By Mr. Hill:

Q. Isn't it a fact, Colonel, that taking the quantity of oil at the highest rate per cubic feet which you say that it will produce——

A. Not that it would produce, that it ordinarily produces in a gas plant. I do not say the highest that it will produce.

Mr. Hill: I move to strike that out, until I finish my question.

The Master: Just let the Judge ask his question.

623 The Witness: Yes.

(The question was read by the reporter as above recorded.)

Q. (Continuing.) And oil at the highest rate which you said it would produce, that on your computation you still have about 30 feet of gas in every thousand to——

A. (Interrupting.) Taking——

Q. (Interrupting.) Is that so?

A. Taking the average production—yes, the figures that I give are average operating conditions—the difference is 21 feet.

Q. 21 feet?

A. Yes.

Q. That is taking the highest efficiency which you mentioned on your direct examination?

A. Yes.

Q. From both coal and oil, you only produced 979 feet?

A. Yes.

Q. So that there was 21 feet of air or something went in there?

A. No, absolutely no. I have known 166 feet of gas to be made from a gallon of oil.

Q. That was good oil or bad?

A. That was rather poor oil, as judged by our standard of gas oil, but it was not much better in some ways than these heavy oils which we expect to get.

Q. Was the gas good?

A. It was very good gas from a heating standpoint, but it did not have very high illuminating power.

624 Q. Then what they want to buy is poor oil, as you measure the standard poor and bad, isn't it?

A. That is all they can get.

Q. Well, that is what they need, isn't it?

A. No, it is not what they need. If this oil——

Q. Now, wait just a minute. You said they did not need that. Now, that is an answer to my question.

A. All right.

Q. We are all through that question. Now, you said that they produced 75 to 80 cubic feet of gas from a gallon of oil.

A. Under normal operating conditions.

Q. Under normal operating conditions, you said that you have known of cases where they produced 160 feet of gas from a gallon of oil and that the oil was poor, and you have said that the quality

of oil they were getting down here was poor, and they are getting more than the high point that you named. Now, from those facts, if those are facts, would not a person of ordinary intelligence draw the conclusion that what they needed was poor oil in order to get a high quantity of gas?

A. I do not know that they are getting more oil—more gas from this oil than I have stated. This extra gas may come from the coal

Mr. Hill: I move to strike that out as not responsive.

The Witness: Well, I did not state that they were getting
625 more gas from this oil than 80 feet.

Q. Well, taking the highest production of gas per pound from coal, your estimate of the highest production in gas per pound from coal, and your estimate of the highest production per gallon in feet of gas from the oil, if the oil is poor and the coal is poor which they are receiving, isn't that what a gas company needs—poor oil and poor coal?

A. No, it needs good management.

Q. So you think the management is so efficient down there that it raised this 21 cubic feet above your high estimate.

A. I know that is a fact, yes.

Q. Now, if they had a poor plant and equipment, the management would make it good, wouldn't it?

A. Not necessarily, no; but a management can get better results out of a poor plant than a bad management can out of a good plant.

Q. This plant is a very good plant down there, isn't it?

A. This is a very good plant, except it has not the capacity to take care of the business that it is handling. It is not properly equipped, it is not fully equipped I should say. What they have is all right.

Q. How many cubic feet of gas will it produce in a year at your rate of 7,400,000 feet?

A. How much would it produce in a year at that rate?

Q. Yes.

A. Why, this plant would not produce economically and
626 properly——

Q. I am speaking of the plant as distinguished from the holder capacity.

A. The plant itself is only good for five and a half to six million feet a day.

Q. Did you swear on your direct examination that the plant as distinguished from the holder capacity——

Mr. Moran: Manufacturing gas.

627 *Mr. Moran: Manufacturing gas.*

Q. (Continuing:) I mean the manufacturing works as distinguished from the holder capacity—was 7,400,000 cubic feet of gas a day?

A. No.

Q. Did you swear that its rated capacity was 9,600,000?

A. No.

Q. Wait a minute. Was 9,600,000, and that in figuring the working capacity of a plant, you assume the biggest machine taken down, and that the biggest machine down there had a capacity of 2,200,000 feet, and taking the 2,200,000 feet out of the 9,600,000 feet, it left the actual working capacity of the plant itself at 7,400,000?

A. Now, if you let me——

Q. Did you say that or that in substance?

A. If you will let me explain, I think I can straighten that out.

Q. Did you say that or that in substance?

A. No.

Q. No, that is all right.

A. If you let me explain, I can straighten that out.

Q. I don't want you to explain.

A. All right.

Q. I will ask you if, with the gas machines down there and all running and all running at their rated capacity, if that plant itself has an ability to turn out 9,600,000 cubic feet a day?

A. Not properly and economically.

Q. Now, I did not ask you that. I asked you at the rated capacity of those different machines. Is the rated capacity of those
628 different machines—does it amount in the aggregate to 9,600,000 feet?

A. The generating machines alone, yes; not the plant, the other as a whole.

Q. What other part of the plant is that that reduces the generating machines?

A. Just what do you mean by that?

Mr. Moran: Reduces the plant capacity, you mean, don't you?

Mr. Hill: Yes.

The Witness: You can reduce the plant capacity——

Q. Now, here—you said that the generators alone had a rated capacity of 9,600,000; taking down the largest one left 7,400,000. Did you say that?

A. Yes.

Q. Of generators?

A. Yes.

Q. What part of the plant is it that makes that plant unable to turn out that quantity of gas?

A. In the first place the connections are small.

Q. Connections of what?

A. The pipe connections between the generators and the various pieces of apparatus.

Q. Just a moment. Did your company build that?

A. Yes.

Q. You sold them most everything they have down there, didn't you?

A. I think we did.

Q. Yes.

A. Well, we sold them only two generating machines out of the

five. However, that was sold for a 5,000,000 plant, not for a 9,000,000.

629 Q. Just a moment. Did you put in a plant with a generator capacity—when they were already operating to 9,600,000 cubic feet, and still put in your joints so that they would not accommodate 7,400,000 cubic feet?

A. That plant does not have 9,000,000.

Q. Did you do it or not?

A. That plant has not a 9,600,000 cubic feet capacity. We put in those generators having the capacity, run altogether, on 9,600,000 feet; and we put in connections for a plant having a 6,000,000 cubic feet capacity, and that is the capacity of the plant as a whole, 6,000,000 cubic feet.

Q. Is there any sort of rule in this gas game that the amount of gas that is produced from the holders is the total number of holders with the largest—total number of generators with the largest generator down for rechecckering and relining?

A. Usually we allow——

Q. Is there any rule of that kind?

A. There is a rule in addition—no, not that only one is down; but there is a rule that one and sometimes two—always at least one.

Q. Yes.

A. Sometimes two.

Q. But anyone that said that the daily workable production was the full generator capacity with the biggest generator down—anyone that said that is wrong, aren't they?

A. No.

Q. Oh, they are right?

A. Certainly. They are right to an extent. Maybe you

630 would want more down. But understand these machines have additional—did not have this capacity when they moved in; the capacity has been changed.

Mr. Hill. I move to strike that out as not responsive.

The Master. The witness is doing the best he can to explain. You see he may not entirely understand your question. If you want to clear it up, you go ahead.

Q. If Mr. Elsman has testified that the capacity of those generators, the workable capacity, the practical capacity—I don't know whether I have used the right word, but I have tried to—is 7,400,000 feet. That is, that it is the 9,600,000 feet with the biggest down; he is mistaken, is he?

A. No, he is not mistaken.

Q. But he has only told part of the truth? You have said that you take down the largest one, but the two largest ones; is that your theory?

A. No, absolutely not.

Q. What?

A. No.

Q. Well, that is the rule, to take down the largest one, is it?

A. At least that much.

Q. Now, if it were the rule to have the largest one down, so far as generators are concerned, if it had a capacity of 7,400,000 feet a day in generators, you would have something like two and a half billion cubic feet in a year, wouldn't you?

A. No.

631 Q. How much does that multiply to? I had that multiplied out?

A. You do not sell the same gas every day in the year, you only sell——

Q. I said so far as the generators are concerned, didn't I?

A. If you want to know the largest amount of gas possible, if you are making gas to blow in the air—if you want to know what 7,400,000 times 365 is, I may multiply it out; but that does not mean capacity in the gas business.

Q. It means generator capacity, doesn't it?

A. No, not in the gas business; you can't use the gas.

Q. Just multiply it out.

A. Certainly.

Q. 7,400,000——

A. That makes a total of 2,691,000,000—the multiplication by 365 days of 7,400,000.

Q. That is what I had in mind.

The Master: Let me see if I understand what you are getting at. The witness has stated that in his opinion this gas plant has a capacity of between five and six millions a day. He has also stated that the plant itself can manufacture up to 9,600,000 a day, and that the usual management of a gas plant requires that one of the generators at least be held in reserve, either for repairs or for an emergency, and that that would reduce the capacity, the possibly capacity of this plant to something over 7,000,000 a day.

Mr. Hill: 7,400,000.

632 The Master: Now, his position has been, has it not, that while it had a possible capacity of 7,400,000, nevertheless it was built as a plant with a capacity of between five and six million. Well, now, is your examination directed to show that he is wrong in his statement that this is a five to six million capacity plant?

Mr. Hill: If you will permit me——

The Master: Or that he is wrong in his statement of the usual condition in the gas business of keeping one generator in reserve—or in just what particular is your examination directed?

Mr. Hill: Here is my thought about it: If your Honor will permit me to go into that, all the witnesses have said, as I recalled it, that the practical producing power of generators was the total amount which they could produce, less that amount which the largest generator will produce. The witnesses have also said that they need new gas machines in there, among the other expenditures which they want, which they desire to have the Court take into consideration.

Mr. Moran: Will you just permit me right there——

Mr. Hill: Yes.

Mr. Moran: Not if we have an additional holder. No witness

has said if we had a new holder there.—We have gas ma-
633 chines there enough. Am I not right?

The Witness Yes, that is right.

Mr. Moran That is the trouble.

Mr. Hill All right, then I will pursue that argument. If in some minor detail that would correct that plant, I am attacking their figures of $800,000, when they don't need any new gas generators, and I am further attacking their figures of $800,000 that they have got to spend in the next few months, which this witness has said will not be ready until the 1st of March under the most favorable conditions, and which will only help them there till next fall, and then they are going to spend $1,000,000 to build a gas holder, that is, they have got enough generator capacity down there, if all the witnesses stated—if what all the witnesses have stated is true. Now, they require a larger scrubber or a larger condenser or something of that kind, if they need more boiler capacity, I wanted to arrive at that thought as bearing upon the amount of money they wanted to expend. Now, also to attack the wisdom of spending a million dollars down there on the work simply as a makeshift to get them through the winter, when this witness has said that they can't have it ready till March, and the winter is substantially over then—my thought being that minor changes to the works down there
634 in substantially minor detail, minor machines, is all the correction they need but their real correction and their real added facility which they needed is an additional holder.

Mr Moran May I make a suggestion? I will take the testimony of any qualified expert that Judge Hill will call on that subject. I think it would be better than to try to break Col. Miller down because he has testified about this matter before the Public Service Commission, he has made affidavits before the Supreme Court of New York, and in this case, and I don't believe they will succeed in breaking him down on that, especially as we have the order of the Commission ordering the very work here that we are going to do, that he has testified to. And I would suggest, to shorten the trial that Judge Hill call his own experts and establish that fact, establish his contention about that. If he has inquired of some expert, if he has some expert who will so contend and go on the stand here and stake his reputation that this plant does not need these improvements, I think we will get along a great deal faster. Experienced judges have told me to prove my case by my own witnesses, and not by the other fellow's, and I think we are simply wasting time, if you
635 are trying to break down Col. Miller's testimony, or any of my witnesses. I know they won't fall for it. It will shorten the trial a great deal if you let him put on his own witness.

Mr. Hill I don't contemplate being unreasonable at all.

The Master You are entitled to cross examine him and proceed with your case in your own way, unless it is carried to too great an extent. So far as that goes, if you should want to cross examine Mr. Miller on this subject, you are entitled to do it. I see what you are driving at.

Mr. Hill: Do you see my thought?
The Master: Yes.

Q. What is the boiler capacity of that plant capable of doing in million cubic feet of gas?

A. That at once comes back to the design of the plant. As the plant is now designed, the boiler capacity is not sufficient to take care of the load, of the maximum load it has had properly—to properly take care of the maximum.

Q. Assuming the plant to be as properly equipped in other respects as it should be, what is the boiler capacity in million cubic feet per day on the boilers?

The Master: You mean, that is assuming that they have plenty of holders and everything else?

636 Mr. Hill: Yes.

A. I should say that it would safely take care of about 6½ to about seven millions a day, if your plant were properly—were fully equipped and you had plenty of holder capacity.

Q. You know how many boilers they have down there, do you?

A. I have forgotten *in* number.

Q. How many boilers have they down there?

A. I just stated I have forgotten the number.

Q. What is the horsepower of the boilers?

A. I have forgotten the figures.

Q. What figures did you use there in arriving at your answer?

A. I was just looking over the record at the time of their heavy day's consumption. I know what strain they were under at that time, know what the boilers were doing.

Q. Well, don't you think you would be able to answer that question better, if you knew how many boilers they had down there?

A. I know just exactly what they had today, and what they could do. I did know and do know in a general way what everything is that is there. I have appraised every detail of all of this plant; but just don't recollect at the moment, what the horsepower of the boilers is.

Q. So far as you say then, the boilers might—so far as any information you may now have, the boilers might have an

637 ability to turn out 8,000,000 cubic feet, might they not?

A. It depends on what you mean by turning out. You can make a tremendous effort for a single day under high pressure. But I know the boilers that they have there could not consecutively for three or four days turn out eight million.

Q. Well, the information which you have when you answered by question was, as you stated, that you thought that they had turned out seven million in a day?

A. They turned out 7,100,000 one day.

Q. One day?

A. A single day, but very much less the day before and the day after.

Q. Well, that was the information you had when you answered

my question as to the number of cubic feet of gas at which those boilers were capable of, wasn't it?

A. I had that information, in connection with a lot of other information.

Q. What information about the boilers?

A. The information about the strain under which those boilers were in the last winter, and the pounds of coal they used per thousand cubic feet of gas, and the amount of gas they made.

Q. That is, you considered that they had a high number of pounds of boiler fuel per thousand cubic feet—you took that into consideration?

A. I took into consideration exactly what they did have, and the strain under which the plant was run. I know that the
638 boilers were run four months and that they could not shut them down and clean them.

Q. Did you have anything to do with the engineering of putting in the boilers, or advising them about the boilers?

A. No.

Q. And wouldn't you have expected they would put in boilers that had the same capacity as their generators?

A. No, the generating capacity of the plant greatly increased—those generators were put in for a very much less capacity than they now have, and they have been rebuilt. As I understand it, the boiler capacity that was actually put in was limited by the funds available, not by the boiler requirements.

Q. But you say they have got a capacity of seven million?

A. I should say that. If the plant were fully equipped throughout, that they could probably get through with 6½ to 7,000,000 with those boilers.

Q. The corrections that are needed down there are a new condenser and a new scrubber?

A. It is practically and extension of everything in the plant except the generating machinery, assuming that they can get a holder fast enough, but not having, not being able to get the holder fast enough what they need is an extension of practically everything in the plant.

Mr. Moran. In the works?

639 The Witness. In the manufacturing plant of the works, yes.

Q. You know that there is a greater importation of oil from Mexico now? That is yes or no.

A. No, I don't know that there is a greater importation.

Mr. Moran. Just what is that?

Mr. Hill. I asked him if he does not know that there is now a greater importation of oil from Mexico than there has been in the past.

Mr. Moran. He said he did not know?

Mr. Hill. He said he did not know that.

The Witness. No, I don't know.

Q. Mexican oil is not susceptible of use as coal oil—in gas companies?

A. Well, that is what the companies are trying to use. They have not been able to do anything with it.

Q. But some companies—some companies do use some kinds of it?

A. I do not know of any company actually using it now. And we have known of some experiments being made with it, but I do not know of any company using it or its practical operations.

Q. You can make gasoline from the Mexican oil, can you not?

A. I believe they make small quantities. I do not believe that they get any large quantity of gasoline from it.

Mr. Moran: Well, a large part of the Mexican oil is fuel oil?

640 Mr. Hill: Mr. Moran, just a moment.

Mr. Moran: You are talking about the Mexican oil importations.

Mr. Hill: Well, I know, but who is examining him?

Mr. Moran: Well, when I examined, everybody did.

Mr. Hill: I beg your pardon. I sat here mumbling my praise and admiring it.

Mr. Moran: Thank you.

Mr. Jackson: You are perfectly proper, Judge, and I was the guilty one.

Q. Well, if it was a fact that the last month the importation was at the rate of a hundred million barrels of oil from Mexico as against half that a year ago, wouldn't you think that that Mexican importation of oil might solve some of the shortage there on gasoline, and if it helped on gasoline——

A. I do not think that they are able to use to any great extent for gasoline, it is so very heavy that it is difficult to crack.

Q. Well, some of the companies are trying to use it as gas oil?

A. They are experimenting with it only hoping to be able to use it. There is so much sulphur in it that they have not been able to do anything with it as a practical proposition. But we have hopes that some day we will learn how to use it.

Q. And that you would expect a reduction in the price

641 of oil from that?

A. If we ever learn how to use it, we hope we will get a reduction; but we are not banking very largely on it now. It is pretty remote.

Q. The prices of oil have varied largely over periods perior to this time, haven't they?

A. Nothing like what they have within the last two or three years in my experience.

Q. But they have had periods within the last two or three years when there has been a marked reduction in price, haven't they?

A. In small quantities, yes.

Q. Well, take this company here, they reduced from 7 cents a gallon—7 and a fraction cents a gallon to five and a fraction cents a gallon. What were the figures?

Mr. Elsman: 7.495 to 6.08 and from 6.08 to 5.96 for a short period.

Q. That is, during six months' of time, it came down from nearly eight cents to just a shade under six cents, during six months of time during the past year and a half. You knew that, did you, Colonel?

A. I knew of all their prices they paid.

Q. So the prices of oil—the fact they are paying it is no evidence they will continue paying?

A. Taken alone, no, but taken in connection with the whole oil situation, there is very strong evidence, in my opinion.

Mr. Moran: That they what? Just finish.

642 The Witness: That the price will not go down.

Q. And the fact that they are restoring discipline over the Mexican situation to such an extent that things are partially settled down there, compared with what they were previously, you do not think will have any effect?

A. Not taking into consideration the tremendous demand for fuel oil, and that is where this Mexican oil is going to, fuel oil to satisfy what is practically a new demand.

Q. But you think it does not affect it at all?

A. No.

Q. Don't you think it will have some effect?

A. No, because the demand has increased faster than the importation.

Mr. Hull: All right. I do not think of anything further.

The Master: Is the witness qualified, Mr. Moran, has the witness been over all those figures on Plaintiff's Exhibit 6?

Mr. Moran: Yes, he has had them in his possession for some time; in fact, he went over the 1919 figures last winter very carefully.

The Master: Won't you explain to me the item, plant withdrawn from service which is marked at an arbitrary figure of one cent per thousand cubic feet of gas sold?

The Witness: That is intended, that is written up as a
643 reserve, and is intended to cover the replacements that a company makes from time to time. Practically that is rather a lower figure. In taking the Consolidated Gas Company, for instance, over a period of 30 years, it has spent 3½ cents per thousand feet of gas in replacing mains, meters, services and manufacturing plant that has been withdrawn from service. You see, if a particular machine breaks or a particular piece of pipe breaks or a service gives out, they charge that to repairs; and when a complete gas meter gives out, or a complete block of main is abandoned, or the complete gas generating machine is abandoned, or the complete exhauster or condenser is abandoned complete, then it is withdrawn from service and that amount is reserved, set down to replace that when the time comes necessary. Sometimes those accounts become—have the balance on one side, and sometimes on the other. I don't remember at the moment how the Kings County Company

But generally a company sets up some amount so that they do not charge into repairs of a given year the particular piece of plant that is withdrawn from service in that year, but spread it over a period.

And that is what that cent is intended to cover, and I think
644 that you will find in the case of the decision of Judge Hand that there was a larger amount involved.

Redirect examination.

By Mr. Moran:

Q. And you are of the opinion—it is too low, it is not enough.

— ——.

Q. That cent a thousand is not enough in this company?

A. I know it is not enough.

Q. How large should it be?

A. About four cents.

Q. Per thousand cubic feet of gas sold?

A. Per thousand cubic feet of gas sold over a long period of years.

Q. Just make that a little clearer. These statements show the expense of repairs to the property?

A. Yes.

Q. Charged in as actual operating expenses?

A. Yes.

Q. That is, if the meter is taken in and repaired and put back in service, that is taken care of through repairs?

A. Yes.

Q. If the generators are relined that is charged to repairs, and properly so?

A. Yes.

Q. Boilers, if boiler tubes are inserted in place of ones corroded that is proper; is that the idea?

A. Yes.

Q. Now, a plant can't be maintained, can it, through ordinary repairs of that can—indefinitely, I mean?

A. It can, if the plant you start with was adequate.

Q. Well, that is, if the community does not grow?

645 A. If the community does not grow and the plant is adequate, and the oil does not change at all.

Q. You keep on repairing these gas machines—they can be repaired indefinitely?

A. Until there is not a piece of it there that was there originally, and yet the form is still there.

Q. Yes, through repairs. Now, to illustrate here on this plant withdrawn from service, you spoke about connections here that were too small?

A. Yes.

Q. Gas connections?

A. Yes.

Q. Now, Mr. Miller, will this clarify the point raised by the Court—if those pipes that connect those different parts of the machine are taken out of service and larger ones put in——

A. Those would be charged against this account, plant withdrawn from service.

Q. That is, the smaller pipes taken out?

A. Would be charged against this account.

Q. And the amount that would be charged would be the original cost of that?

A. Smaller pipe.

Q. That is taken out?

A. Yes.

Q. And less the salvage, of course?

A. Yes.

Q. Now, we could take another item of the property just the same way if it becomes necessary?

A. Yes.

Q. Or through inadequacy, or any other cause, to take out a piece?

A. Yes.

646 Q. We have to have something to defray that expense?

A. Yes.

Q. And that is properly chargeable to expenses of operation spread over a period of years?

A. It is properly.

Q. It is properly, that is the practice of companies?

A. Yes.

Q. And you think that the plant of this kind over there ought to have—ought to charge into expenses annually approximately three per cent—three cents a thousand per cubic foot sold, in order to have enough to pay for this plant that is taken out of service from time to time?

A. I think that you will find as a matter of practice that that about covers it. I do not think that the company ought to build up any big reserve, and I think that they will find as a matter of fact, that they will take from three to four cents to cover it. But I do not think for a moment that the company ought to charge the consumer this amount and build up a big reserve if it finds that it is not actually needing this amount. I think that reserve ought to be kept very low, and just the company ought to protect itself by making charges as it finds it actually need them. But I think it will take three to four cents in the long run.

Q. In your opinion, then, this expense ought to be increased at least two cents a thousand cubic feet to provide for renewals and replacements, in addition to what we have here.

647 A. Over the long run that is what they will have to have.

Q. You would say in 1919 and 1920, these two years—you would say these expenses ought to be that much?

A. I thought that they are probably running about that.

Q. And taking into consideration the rapid growth of the community out there, the pronounced increase in consumption?

A. Yes.

Q. That brings about the necessity for more rapid retirement of units?

A. For extensions, and when you make extension, it is very often a better engineering proposition to retire some of the material you have and put in something new in its place than it is to build a whole new house, with a new equipment in it.

Q. Well, this plant over there has been well maintained?

A. Has been very well maintained, considering the strain it has been under.

Q. I know, but of course——

A. Just taking—well, answering that question, without considering the work on it, I would say no, but considering the work it is doing, and the inability to get the individual machines, to shut them down to repair them, I say yes.

Q. This strain came on this past winter?

A. Yes.

648 Q. You were familiar with the plant in the prior couple of years, were you not?

A. Yes.

Q. You have been familiar with it ever since it has been built?

A. More or less.

Q. You were very familiar with it in the winter of 1917 to 1918?

A. Yes.

Q. It was then an adequate plant for what it was doing?

A. Absolutely.

Q. And was sufficient for what we might have expected this winter?

A. Yes.

Q. This has been unprecedented, hasn't it?

A. Yes.

Q. Due to what, do you know?

A. Due to the extreme cold weather and the very high price of coal and very low price of gas.

Q. That is, the consumers of the company use this gas for heating and cooking instead of getting coal which they formerly did?

A. Yes.

Q. And that is due to the difficulties in getting deliveries of coal and the low price of gas?

A. The high price of coal, the low price of gas, the difficulties in securing coal.

Q. You think if the price of gas was raised out there, maybe they would use a little more coal and not be so free with the gas?

A. Yes, I think there would be some disposition of that kind. That is the only salvation of the company.

Q. Now, going back to the capacity of this plant——

649 The Master: Just a minute. Mr. Jackson, have you got any cross examination?

Mr. Moran: I thought you had finished, Mr. Jackson.

Mr. Hill: He had not started at all.

Mr. Moran: I beg your pardon. I thought you hadn't any cross examination. How did I get started?

Mr. Hill: If you don't mind—did you ever stop?

Mr. Jackson: I don't want you to make me feel any more inconsequential here than I do.

The Master: Do I understand that this item, plant withdrawn from service, is claimed to be the equivalent of an account which is permitted to set up by the Public Service Commission?

Mr. Hill: Amortization.

The Master: And which is not in any sense a capital item?

Mr. Moran: That is right, yes. That is what we intend it for.

The Master: Is that correct?

Mr. Jackson: Well, that is the way I have understood it.

Cross examination.

By Mr. Jackson

650 Q. Are you actively engaged in the production and sale of gas now?

A. No.

Q. In certain companies?

A. Well, I am the President of the Hyattsville Gas & Electric Company, which is a very small company. In that I am actively engaged.

Q. That is the only——

A. But that is, primarily my business is a manufacturing business, and consulting engineering.

Q. But you are actively the President of that company?

A. President of the Hyattsville Gas & Electric Company, yes.

Q. How many consumers does that serve?

A. About 2,000.

Q. You spoke of the higher class of labor necessary to handle this poor quality of oil, that is, Mr. Moran construed your answer in that language, but you said that it would take more skill to handle the poorer quality—that does not mean, does it, that you would have to have more skillful or more expensive a class of laborers, does it?

A. Yes, I think it will mean more expensive class of labor.

Q. In what respect, now?

A. A more intelligent class of labor.

Q. Now, in just what respect?

A. As far as we have gone, we have reason to suppose that you have to keep the temperature of the gas machines very much more uniform.

Q. At the present time who attends to that?

A. What?

Q. At the present time, who attends to that?

A. The gas makers.

651 Q. That is what they are called—gas men?

A. Gas makers.

Q. The gas makers?

A. Yes.

Q. Will you have to have a more intelligent gas maker and a higher priced gas maker to attend to a different degree of temperature?

A. I think so, yes. I think it will require more intelligence and much more care to keep the temperature within a variation of 25

or 30 degrees than it does to keep it within 100 or 150, and I think we will have to pay for it.

Q. Will you have to have a more skillful Vice-President and General Manager?

A. I think that if the Vice-President and General Manager organizes his plant to use that, he will be worth more anyhow.

Q. Well, you think you would have to discharge the present officers of the company and *higher* more skillful ones at higher prices to attend to this difference in temperature?

A. No; I think if anyone is going to use this oil, I think the present manager will, and I think he will be entitled to more than he is getting, and I think he is now entitled to more than he is getting for what he is doing.

The Master: Well, let us suspend until two o'clock.

(Whereupon, a recess was taken until 2.00 p. m.)

652 Afternoon Session.

Cross-examination continued.

By Mr. Jackson:

Q. Are you not engaged in the equipment business in some way? I did not quite catch that.

A. Yes, my concern manufactures practically everything except the running machinery in a gas plant.

Q. What do you mean by the running machinery?

A. The steam engines, turbines, blowers and exhausters, pumps and what might be called the auxiliary machinery.

Q. What then do you manufacture specifically, or generally?

A. We manufacture the gas generating apparatus, the pipes, the scrubbers, condensers, purifying boxes, gas holders, oil tanks, valves—that is the largest gas valves.

Q. What is the name of the company?

A. The Bartlett Hayward Company of Baltimore.

Q. And you are an officer of it?

A. I am Vice President of the Company.

Q. How long have you been engaged in that, with that company?

A. Five years.

Q. Five years?

A. Yes.

Q. Are you a stockholder also?

A. Yes, and a director.

Q. Your company furnished a part of this Kings County Lighting Company's plant?

A. Yes.

653 Q. Do you recall specifically what it did furnish?

A. We furnished two of the water gas machines; we furnished the oil tank, the condenser and the purifying boxes, and I

don't remember whether it was more than one holder or not, but we furnished the two million holder. I do not remember whether we—I believe we built the half million holder. I am not quite certain. It was before I was connected with the company, and I am not certain at the moment. And probably a good deal of the connections.

Q. How many times have you visited the plant within the last—well, within 1919 and 1920, to figure upon what their requirements were?

A. To the best of my recollection only twice in 1919 and 1920.

Q. Did you visit them in 1919?

A. I think not. I think I was only there in 1920. I think I have been there twice in 1920.

Q. How close an examination did you make of their requirements; how long did you stay there at the plant?

A. I did not stay there very long.

Q. How long?

A. I was perfectly familiar with all the apparatus in the plant.

Q. How long?

A. Probably not over two or three hours. It is not necessary to stay there in order to determine the required capacity of the plant; it is not necessary——

Q. It would not be necessary for you to stay there very long?

654 A. No, knowing the plant as I do.

Q. Did you make any notes of your observations?

A. No.

Q. On either occasion?

A. No.

Q. You know the plant well enough so that that was not necessary?

Mr. Moran: Just a moment.

A. I had a complete inventory of the plant. I had a complete inventory that I had made of the plant, and I had a complete description of every piece of apparatus in it.

Q. When did you make that inventory?

A. That inventory was made in 1917 or 1918, I forget which, 1917, I think.

Q. Do you know whether any attempt has been made by this company to arrange for the supply of any of this equipment that you say is necessary?

A. They have discussed it, but as to—and have assured us that what stood in their way was funds. What attempts they have made to raise funds I have no personal knowledge.

Q. Who told you that they discussed it?

A. Why, I discussed it with myself, with Mr. Elsman.

Q. Well, that does not quite answer my question. I asked you if you knew of any attempt that the company had made to acquire this equipment that you have described as necessary?

A. Well, Mr. Elsman discussed with me the acquiring of the equipment, and stated that he would acquire it——

655 Q. How does that constitute an attempt by them to acquire it; I do not see the connection.

A. He must have some knowledge of the cost of the necessary equipment before he can go to the financial end to find out whether he can get the money.

Q. How does it constitute——

A. (Interposing.) He obtained from me——

Q. Will you let me ask this question?

A. No, he obtained from me and my company information as to the value of the required equipment, and went off, as he told me, to secure the funds. He has never ordered the equipment, and I take it he has fallen down in his attempt to secure the funds.

Q. Then your idea is this: As you understood it, his attempt to acquire this equipment by discussing it with you consisted in this, that he discussed with you—as a representative of your company?

A. Yes.

Q. That is what you mean? And with the idea that if he had the funds he would place the order for the equipment with your company?

A. He stated if he could secure the funds he would place the order.

Q. With your company?

A. Yes. That is for the holder.

Q. Well, anything else besides the holder?

A. No, he did not say that he would give us an order for anything else than the holder. He did have up with the United Gas

656 Improvement Company in my presence, the question of getting certain apparatus from them, and as I understood from him he was not able to raise the money to buy that.

Q. And that holder you estimated would cost about how much?

A. To the best of my recollection at the moment it was somewhere from $800,000 to $1,000,000. I do not remember the details at the moment.

Q. Have you submitted any figures upon it to him?

A. I think I personally did not.

Q. That is in writing?

A. I personally did not, but I think that figures were submitted.

Q. By your company?

A. I think so; I am not absolutely sure of that.

Q. As to what matters of equipment?

A. I think that holder.

Q. Nothing else?

A. I do not recollect. I have no knowledge of anything else having been submitted, and I am not sure that a written proposition was made of that holder. It was discussed several times, but I am not sure that we ever got to the point of a written proposition.

Q. I do not like to spend too much time upon it, but I want one little item of information still, as to a matter that is working in my mind. I want to know what cellar you have been in in Brooklyn?

A. I don't know. I could not recall a single one at the moment.

657 Q. Have you ever lived in Brooklyn?

A. No.

Q. Have you ever visited an apartment in Brooklyn?

A. Yes.

Q. Whose?

A. Mr. Darby's—William Darby.

Q. Who is he?

A. He is Mr. William Darby.

Q. Who is he?

Mr. Moran: I object to it.

Mr. Jackson: I beg pardon?

Mr. Moran: I object to the question.

Mr. Jackson: No, I want to know.

Q. Did you go to his cellar?

A. No.

Q. Can you recall an occasion when you went in a cellar in Brooklyn?

A. Yes, I went out with Mr. Elsman or Mr. Blanchfield, I guess—Mr. Blanchfield, and he showed me some of the cellars in Brooklyn.

Q. When was this?

A. At the time we were valuing the company's property in 1917, I think it was.

Q. For what purpose did he show you the cellars?

A. To show the condition of the gas services and gas meters.

Q. How many cellars did you have to go into to see that condition?

A. I went into several. I do not remember how many.

Q. Two?

A. Several of them. More than two.

Q. Three?

A. Yes, I think more than three.

Q. Was that about the number?

658 A. Probably half a dozen, I am not sure.

Q. Not more?

A. I did not stop to count. I would not swear there were not more, and I would not swear there were not less.

Q. You did not have for that purpose to go into more than one, did you, to see what was typical?

A. I wanted to see more than one, and I asked him to take me to more than one, so that I could answer just the kind of questions you would ask me.

Q. Would your recollection be that it was half a dozen?

A. Yes; possibly more and possibly less.

Q. Have you had any examination of the flats and apartments in Manhattan as to the condition of meters?

A. I have never made an examination as to the condition of meters. I have been in a good many of them and have talked to the representatives of the company.

Q. So your information about that comes from representatives of the company and not directly from observation?

A. Not direct observation of the meters. I had charge of the setting of meters in Manhattan for a period of seven or eight years, and I talked to my men and we discussed the situation, and yet I did not personally go out and examine them.

Q. I see.

A. But I was familiar with the conditions.

Q. Now, please do not add that, because you have shown how familiar you were and that is better evidence?

A. Yes.

Q. When was that that you acted in that capacity?

659 A. From 1894 to 1902.

Q. You have an item of unaccounted for gas in your company that you are president of, your gas company?

A. Yes, sir.

Q. What did that amount to in 1919?

A. I think it was about ten per cent.

Q. I do not ask you to think, I ask your knowledge?

A. I do not know exactly. My recollection is it is about ten per cent.

Q. For 1919?

A. That is my recollection.

Q. That is high, is it not?

A. No, it is not.

Q. Why do you say No?

A. Because it is not high.

Q. What do you mean when you say that a thing is high or low, as you are testifying here?

A. I mean——

Q. Don't you mean comparatively, with the results of other companies?

A. I mean—when I say leakage is high, I mean that a figure which indicates carelessness or bad management on the part of the company, and that good management and care upon the part of the company would at a reasonable cost reduce it. The leakage has got to be taken in connection with a very large number of other operating expenses, and it cannot be taken alone; therefore I cannot say high or low, without taking it in connection with the other operations.

660 Q. We all appreciate the defects of it, and whatever other merits there may be. Pardon me. When you say that any item is high, wouldn't you be understood as saying that it is high as compared with the result achieved in other companies?

A. Not without taking into consideration all the surrounding conditions.

Q. Well, did you have to add that; wouldn't we all understand that without you stating it?

A. I do not think the record would be clear if I did not state it.

Q. Would we expect to take the results of any other company

without having it understood that we have to consider the surrounding circumstances of that other company?

A. If I had answered it yes, I think you would have.

Q. Won't you let me ask the question?

A. If I had answered it yes, I think you would have.

Q. Won't you let me ask the question?

A. Yes. Excuse me. I thought you had.

Q. Yes, but I had not quite.

A. Excuse me.

Q. Have you informed yourself as to what other companies have achieved in the results of gas unaccounted for in 1919?

A. I have seen the figures, yes, in a number of cases.

Q. Perhaps you might enumerate to us such of the companies as you have in mind, and the results that each attained?

A. I do not have in mind the exact figures.

Q. Of any company?

A. Of the various companies.

Q. No, I won't ask you for the various companies. Have
661 you the exact figures for one company?

A. No, I have not.

Q. And you have not the exact figure even of your own company?

A. I have not. I do not recollect it at the moment. It is attainable, but I do not have it before me.

Q. Whatever the figure was in your own company, it was not the result of any bad management on your part as president?

A. I think that the figure of about ten per cent. which it was approximately, was not the result of any bad management by me as president, or by my superintendent.

Q. You would not imagine that if you had attended a little closer to the work of president of that company, you might perhaps have achieved a little better result and less loss?

A. Yes, I might by increasing expenses, elsewhere have reduced that, yes.

Q. No, if you had spent a little more time directly at that company's headquarters, and doing the work of that company, don't you think you could have kept track a little better of that gas?

A. As the loss was entirely mine, I handled it in the way I thought best. I handled it as I thought best. It was my own personal loss, understand, and I handled it in the way I thought was the best way to handle it. I owned that company in connection with Dr. Humphrey.

Q. I would like to be perfectly clear as to just the capacity in which you in your own mind feel that you appear here,
662 whether you feel that you appear here as an impartial expert upon these questions, or as a bidder for the company's work in case they may be permitted to gain the opportunity and the facilities and the financial ability to order from your company?

A. I appear here to bring the facts as nearly as I can determine them to this Master.

Mr. Jackson: I think that is all I have.

Redirect examination.

By Mr. Moran:

Q. Col. Miller, your attention was called to the variations in the measured heating units in the gas supplied in 1919 and 1920. I will ask you if you know at what point on the service that gas was tested?

A. Yes.

Q. Where is it?

A. It is tested on the pumping line between the small gas holder at the plant, and the storage holder at 65th st.

Q. The testing apparatus is down at the works?

A. Yes.

Q. Do the variations appear in the b. t. u. content of the gas as measured there indicate the variations that will obtain at the point of consumption?

A. No.

Q. Why not?

A. Because this little holder at the plant is emptied two or three times an hour. The gas as actually made on any gas machine varies very greatly from the beginning of the run to the end of the
663 run, and if two or three machines get in step, so that the beginning and end of the run coincide, then the gas will vary very rapidly in this small holder. Now, when this varying gas over small periods is pumped to the large holder, it gets an opportunity to mix, so that there would not be anything like as much variation in gas going out from the large holder as there is in gas going into the large holder.

Q. Gas at the works, then, would naturally show a wide variation if it is measured——

A. (Interposing.) If it goes into a holder of any particular size, yes.

Q. Yes, it is impossible to——

A. Oh, it is a very wide variation, to test it right from the machine.

Q. Even the run, the period of flow, or whatever it is, will vary?

A. The heating power of the gas during the run will vary all the way from 300 to seven or eight hundred heat units.

Q. A word about plant capacity. You have stated that the working capacity of something out there is 7,400,000. What is it?

A. I stated that the working capacity of the gas generating apparatus, assuming the balance of the plant big enough to take care of it, would be under regular conditions that a gas company operates under about 7,000,000, about around 7,400,000.

Q. When you say the rest of the plant, do you mean the rest of the works?

A. The rest of the works and holders.

664 Q. Now leaving out the holder entirely is this 7,400,000 capacity our works there?

A. Leaving out the holder?

Q. Yes, and taking into consideration——

A. (Interposing.) No.

Q. What then is it that is a 7,400,000, just the gas machines alone?

A. Just the gas machines alone.

Q. That is four of the five gas machines?

A. Yes.

Q. But there is some point in the works that is not equal, or that has a capacity equal to the generator capacity?

A. Yes.

Q. What is that?

A. I say practically everything.

Q. The boilers?

A. The boilers, piping and condensers, the purifiers. I do not think the meters have that capacity. The exhausters have not, and practically there is nothing in the plant except the gas generating apparatus.

Q. And then on the same theory that a chain is no stronger than its weakest link, this works has a working capacity of how many thousand cubic feet of gas a day?

A. About five and a half to six million.

Q. And that is not due to the inadequacy of the holder alone; just confining yourself to works, it won't go over six million a day?

A. Not economically.

Q. And the holder, does the holder capacity limit it still further, or will the holder capacity and consumption take care of it?

A. There is not enough holder capacity for even six mil-
665 lions a day, no. And of course the generating capacity with that holder capacity could not go up to 7,400,000 a day, because you cannot run at that rate uniformly during the day. Your holders get full and you have to shut them down. There is not any piece of machinery in a plant that you cannot crowd very much for a short time, but it is uneconomical and the results are bad.

Q. You spoke about the boiler capacity there, as to how much gas could be turned out with that boiler capacity, and I think you gave a figure, did you not, that 7,000,000 could be turned out some time?

A. Yes.

Q. In figuring out the average working capacity as a gas making boiler plant, have you taken into account the fact that it is used in part to pump gas up to the holder?

A. No, I did not take that into account. I just take it as a manufacturing plant, and do not allow for the boilers that are used for pumping the gas out of the plant.

Q. Tell me, does that require a substantial part of that boiler capacity, to handle that pumpage?

A. Well, under normal conditions it would take at least a sixth.

Q. Of the boiler capacity?

A. Yes, assuming that you could give the gas a chance to get properly cooled off and——

Q. Working a plant to its capacity, are additional power requirements needed?

A. Yes.

Q. There is back pressure, so to speak?

666 A. The gas when it is hot is saturated with water vapor, and it occupies a great deal larger volume than it does when it is cooled off, and it requires more power to handle it, to handle this greater volume, than it requires if the gas has been cooled before it is sent out, or rather before it is pumped through the purifiers and before it is pumped through the transmission mains.

Q. Colonel, in your opinion, can there be any reasonable question or dispute about the necessity of making the additions to this plant that you have testified to?

Mr. Jackson: I object to that question as immaterial, irrelevant and incompetent.

The Master: Objection sustained. No, objection overruled; I will let him answer the question.

Mr. Moran: I would like to ask the position that——

The Master: I will overrule the objection.

Mr. Jackson: Exception.

A. From the point of view of the customer, and the public, absolutely not. I think there is a question whether the company can do it if they are not going to be allowed to earn on it.

Q. I mean as to the necessity of doing it, is there any question?

A. And as an engineering and commercial proposition, absolutely not.

Q. And there is grave danger if it is not done?

A. Absolutely.

667 Q. Would you be surprised if any engineer disputed you on that; would you think him qualified?

A. I would not expect for a moment that any of them would. I would not only not expect it, but I think it would be a mark that he was not qualified.

The Master: Mr. Miller, in connection with this unaccounted for gas, is there any significance to be found in the fact that the company has adopted a system of making heating gas, rather than the candle power gas?

The Witness: No, except that would somewhat tend to reduce the amount of condensation in the mains, and therefore tend to reduce the unaccounted for gas.

The Master: You mean that if a candle power gas, 22 candle power gas had been made, there would be an increase or decrease in the unaccounted for gas?

The Witness: An increase, a tendency to an increase in the unaccounted for.

The Master: Why is that?

The Witness: Because a greater proportion of the volume of a 22 candle power gas will condense in the mains than of a 575 to

590 heat unit gas. There are more condensible hydro-carbons in the 22 candle power gas.

Mr. Moran: I am through.

668 Recross-examination.

By Mr. Hill:

Q. How much does the holder, the small holder at the plant—what is the capacity of the small holder at the plant?

A. 100,000 cubic feet.

Q. You say the measurement is made right near that?

A. The gas is pumped out of that small holder into the transmission main, and it is taken off this transmission main right at the office.

Q. The daily average would tell you something about it?

A. If they had an average, if they took it every fifteen or twenty minutes during the day, and averaged that, it would tell something, yes.

Q. They keep these records with an idea of knowing something about it, don't you think?

A. I should assume so.

Q. That is, they are not keeping these records to kid themselves with them, are they?

A. I should not think so, but I would not like to base very much on them in that shape.

Q. If you found that the daily average on May 6th, 1919, was 546 b. t. u.'s and on May 7th 1919 the next day it was 608 b. t. u.'s as the daily average—

A. (Interposing.) The daily average is simply the result of two tests and then it does not mean a whole lot.

Q. Is it two?

A. Or three.

Q. Or four?

A. In some cases there were two, and some three. I do not remember the four. Of course, the more made the more import-

669 ant it is.

Q. There is three in the average?

A. And it is a pretty small number to check up, a rather widely varying commodity.

Q. But you think that might show there was some variance there between those two days, don't you?

A. It would tend to show it. It would prove it beyond peradventure, to my mind.

Q. If on February 1st b. t. u.'s were 619, the daily average, and on February 2nd, they were 564, on February 3rd it went back up to 614, that would tend to show you——

A. (Interposing.) It would indicate it, but it would not be proof by any means.

Q. In order to know or in order to have any idea—or in order

to know what the b. t. u. of that gas is, how many tests should they make per day?

A. Well, if they would make two or three tests on the outlet of the big holder, I think they would get a pretty good idea.

Q. Don't you think they are afraid to do that?

A. No, I do not think so.

Q. Then why do they do it down here at some point where they cannot tell?

A. Why, I think the idea is that they want to keep as close to the plant as they can, and they do not want to spend the money to put up any testing apparatus at the big holder.

670 Q. Don't you think they ought to have one?

A. They ought to have one at the plant to get some indication, anyhow, and they ought to have one at the big holder too.

Q. Is the one at the plant any good at all?

A. Oh, I think — is some indication.

Q. It is the only one they have, is it not?

A. In connection with the man running the plant. I do not think it is much of an indication as an absolute result, but in connection with the man running the plant, knowing how many machines are on, and what the conditions are at the moment, I think you can get some idea of what is going on. But as a permanent record I do not think it is very perfect.

Q. But if you take the average per day it would amount to more than the individual high and low of the day, would it not?

A. Oh, it means more, yes. The more tests you make the more it means.

Q. Now, in regard to the kinds of soil on Long Island, it is a matter of knowledge to me that sometimes in a clay soil there would be a leak in the pipe, and it would follow along the pipe in the clay encasement, and at a manhole or some place where it could find an exit, it would come out just *as* the same as it will through the sand, the sandy soil of Long Island. What do you say as to the reasonableness of that?

A. I do not think that that is a fact. Of course I have seen a pipe so corroded in soft clay soil, that the pipe itself was prac-
671 tically gone, and the gas was coming through the hole just as it did before, and not leaking. But a clay soil packs on the outside of the pipe, and I do not think that the gas does follow along the pipe in a clay soil.

Q. It does not you think?

A. I do not think so. I have never seen it.

Mr. Hill: That is all.

(Witness excused.)

ROBERT M. SEARLE, called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follow:

Direct examination.

By Mr. Moran:

Q. Mr. Searle, you live at Rochester?
A. Yes, sir.
Q. What is your business?
A. I am president of the Rochester Gas and Electric Corporation.
Q. What does that company do?
A. That supplies the City of Rochester with all of its electricity and all of its gas, and the City of Canandaigua.
Q. What is your output down there of gas yearly?
A. About 3,000,000,000.
Q. About twice as large as our company?
A. Approximately, yes.
Q. And the Canandaigua?
A. Oh, thirty millions, I guess, a little outlying company.
672 Q. You have been down there how long, Mr. Searle?
A. Fifteen years.
Q. Fifteen years?
A. Yes, sir.
Q. With that company?
A. Yes, sir.
Q. Around the works there and making gas and selling gas?
A. Well, I went there as general manager and then as vice president, and recently as president. I intended to qualify here. I began as a boiler fireman in the gas business, and I have filled every position in the gas business to and including president.
Q. When did you start?
A. In 1886.
Q. How old a man are you?
A. 51.
Q. What companies were you in besides the Rochester company?
A. I have been with the United Gas Improvement Company of Philadelphia; the Consolidated Gas Company of New York, Westchester Lighting Company, the Atlantic Light Company, then controlled by the United Gas Improvement Company, Johnstown and Gloversville Gas Company, the Allentown Gas Co., the Sag Harbor Gas Company. I guess that is all.
Q. You have been actively engaged in the industry all these years?
A. For practically my entire life.
Q. Have you given any attention to the bigger problems that confront the communities generally?
A. I have been chairman of some of the most important committees, and executive of some of the large companies, and I
673 have been sole executive and solely responsible for the management of the companies that I mention. Those are responsibilities enough. I do not think they were even as great as they are today.

Q. Do you know the Kings County Lighting Company?

A. Yes, sir.

Q. How long have you known about that company?

A. Why, I have been over there a number of times in the last eighteen or twenty months, visiting Mr. Elsman.

Q. Have you looked over the statement of the company's operations for 1919 and 1920?

A. Yes, sir.

Q. Briefly what have you to say about the quantity of coal and oil used by this company?

A. I think they show excellent management.

Q. The quantity of coal and oil is the minimum, is it?

A. Yes, sir.

Q. And what would you say about the other expense account?

A. Comparatively, with my own, they all show up in good shape. It is good management under the circumstances.

Q. And the rising cost?

A. Yes, the rising cost, and the tendency of the time.

Q. Have you looked into this matter of unaccounted for gas?

A. Yes, sir.

Q. That is a problem that every company has?

A. Yes, every company has it. Yes sir.

674 Q. That every company has to contend with?

A. Yes.

Q. It is brought about by what factors or conditions in the operation of the company?

A. Well, one of the things I consider dangerous in the use of these reports is the use of percentages.

The Master: Is the use of what?

The Witness: The use of percentages in the unaccounted for gas. For instance, one of the things that will bring about a marked change in percentage, would be—well, one large industrial concern, for instance, our own company at Rochester, has a comparatively low leakage, around six or seven per cent, but if we were to lose two or three of our large customers, that would change materially the percentage. The amount of gas leaking per cubic foot would be constant. For instance, we have the Bausch Company which use about 700,000 feet a day making glass. They have a welded pipe line between our plant and their plant, which is next door to us, and then we have a group of meters which we are continually testing, groups of them, so that we keep the percentage of unaccounted for on that large customer at a minimum. You can realize that 6 per cent on that bill would be quite a loss, and if we can keep it down by keeping the meters accurate, every one of them, by testing groups instead of testing one large meter, and having it come slow, we would thereby get more revenue.

675 Q. You have a number of large customers like that in Rochester, have you?

A. Oh, yes, quite a number of them.

Q. How is it that you have them and we do not?

A. Well, we have a large industrial and manufacturing city, and as I ran over the Kings County situation, I see that it is a residential section.

Q. So the percentages are misleading to a certain extent, you think?

A. To a certain extent. You have this: If you started out with a large and scattered territory, you have a certain fixed constant, and as the business increased and as the residences increase there would be more industrial uses, as the percentages declined, naturally.

Q. What is there about the registration of consumers' meters? Is that different in different companies?

A. Oh, very much so.

Q. Will you explain that, Mr. Searle?

A. Why, in a situation such as I went over in the Kings County Lighting Company, riding around and noting the two family houses—I did not go to any cellars, but I was told by the meter department that meters are in the front walls of the cellars—and comparing that with Manhattan Island, where, it has been brought out, there are here a large number of meters in apartments where the temperature rises. For instance, in the kitchen a prepayment meter, the temperature of it will rise the minute the stove is lighted and the gas begins to flow, and that brings that meter to practical uni-
676 formity of measurement. But if that meter sat on the cellar wall, there would be a wide difference in the variation due to the difference in temperatures. That is one of the chief causes of loss, and another loss that I think is accumulating and will accumulate in the Kings County situation, from my study at the works, is by the fact that this big load is going on, and these unsaturated vapors, these light oil vapors, will bleach the diaphragms and the meters are steadily creeping up to slow, slower position, and it won't be but a short time before you will have to do as I have to do with the company under my jurisdiction, renew every diaphragm. That costs a great deal of money. It would be a holocaust. I went through that to the tune of 6,000 meters in the City of Yonkers.

Q. I presume a percentage of the unaccounted for is due to leakage at joints of mains?

A. At joints of mains and the characteristics of the oil, and there is quite a bit of unaccounted for as the business grows in the tapping of mains and where the men work, a loss of a great deal of live gas. They make a tap and they screw the joints together, but there is more leakage, and of course the more of that you do, the more loss you have. The loss through an orifice of a main tapped is more serious for the time that it remains open than it is through a pipe.

677 Q. In this 1919 figure, are you aware of the fact that the gas sold is for a period different than the period for which the gas is made?

A. I was told over there that the index year was 361 days and the make of course was the fiscal year.

Q. This make here represents the make of 365 days while the sales represent sales of——

A. 361.

Q. 361 days?

A. Yes.

Q. And will there not be also a tendency to an increase unaccounted for in a growing company, where the production is increasing from year to year?

A. Well, there has been an increase in leakage as to mains as extensions were made, and perhaps a constant percentage if the meters are kept tested regularly. And then the other causes reduce the percentage, but not the volume. You have it here. You have got an illustration of that. The leakage for 1919 is 279,000,000 and for the six months of 1920, 141,000,000, that is about half. The percentages dropped 2.2 per cent. You see the percentages are misleading.

Q. You have canvassed this Kings County situation pretty carefully, have you not?

A. Why, yes. I am a friend of Mr. Elsman, in fact responsible for his appointment to his position—recommended him; and I have been sort of a father confessor to him. He has asked me to come in in his troubles and consult with him. I have stayed at his
678 house a week at a time, and have gone into this thing with him in a general way, and from every slant.

Q. Have you tried to account for this unaccounted for?

A. Why, I have accounted for it as I have outlined here. Then he asked me what recommendations I could make. At the time in 1919, when we discussed it, I felt that if he spent the money, provided he could get it, to make a general overhauling of the mains to reduce that, that the amount he would spend would eat up the savings, so his best bet was to save the money if he could get it and make a plant and not spend it on finding the unaccounted for.

Q. You would advise that the meters be overhauled, did you say?

A. Oh, yes, they must be.

Q. And to make a drive in that direction, to head off anything there?

A. Yes. One of the first steps I would take would be to get an adequate plant.

Q. Did you understand that he had made a drive on these meters?

A. I understood he made a drive on his meters as far as his capital would let him go.

Q. Taking into account everything, do you see that this unaccounted for indicates carelessness or negligence or inefficient management?

A. No, in no sense. I think it is simply a question of having a certain amount of money to do a certain amount of work with, and spending it wisely, circumscribed—no man could cut that
679 leakage if he did not have the money to stop it. He would go as far as he could.

Q. When you say the leakage, I assume you mean the unaccounted for?

A. Unaccounted for, yes.

Q. It is a rough term.

A. Well, it is the same thing, it is a leak.

Q. But not a physical leak?

A. No, not a physical leak, but it is a leak in money. That is what we are really dealing in.

Q. Have you given any attention, particular attention, to the matter of candle power versus heat unit gas?

A. I have given considerable study to that since 1907. I was the chairman of the original committee appointed by the Commissioners of the Second District to study the b. t. u. and candle power situation, and then I had to give that up, that chairmanship, to go abroad and make studies of plants abroad. Then I came back and acted, after three months' absence, with the committee for six years, and I am now working on another committee and advising with them with reference to a number of cases in connection with the b. t. u. standard, and have patented water gas apparatus with a view of making b. t. u.'s, which we did not know in the early part of the art, for seeing that the b. t. u. would come, and the necessity of its coming, and I presume I have given that study, given that subject as much study as any man in this country.

680 Q. This committee, what was the name of that?

A. Let me see. I think it was the calorimetry committee, the joint calorimetry committee of the State of New York, Second District.

Q. It was made up of gas men and——

A. And the Commission's experts.

Q. And the Commisson's experts also?

A. And then two outside experts.

Q. That Committee investigated and reported on the question of whether it was advisable to use candle power gas or b. t. u. gas?

A. Yes.

Q. And that Committee made its report some time ago, did it not?

A. Yes, sir.

Q. In fact it was two or three years ago?

A. Oh, longer ago than that. I should say six years ago.

Q. Did the Commission up there take any action after that report was made?

A. Yes.

Q. What was it?

A. They gave us the authority to make a 585 b. t. u. gas in lieu of candle power.

Q. Before that time it was candle power. In the second District I believe there were different regulations?

A. All over the State, yes.

Q. Cities of the second class had a statute fixing their candle power, I believe?

A. Yes.

Q. And in villages they had another thing?

A. And they had one for coal gas and one for water gas.

681 Q. And your committee investigated all of that situation?

A. Yes, very thoroughly.

Q. And recommended a b. t. u. gas?

A. Yes, sir.

Q. The Commission exercised its authority up there and promulgated a rule for 585 b. t. u. gas?

A. That is right absolutely.

Q. And abolished the candle power throughout the Second District, did they not?

A. Yes, sir.

Q. Has it taken action on that since?

A. Since last week they have authorized the appointment of another committee to study further and make a further recommendation of the b. t. u. system, to lower it.

Q. To lower the b. t. u. content?

A. To lower the b. t. u. content on account of the conservation of oil that is necessary.

Q. It takes less oil in the b. t. u. gas than it does for the candle power?

A. Above 300 b. t. u. gas, which would be roughly 313 b. t. u. of half CO and H, carbon monoxide, and hydrogen, or the b. t. u. content is brought up by oil, by hydrocarbon.

Q. In your study up there, in your recommendation, did you have in view the interests of the companies, or the interests of the consumers?

A. Oh, the public interests. Any economic question is for the public interests.

682 Q. How is the public interest conserved by the furnishing of b. t. u. gas?

A. First in getting its quality, a uniform mixture, a uniform heating power, which gives them when an appliance is adjusted, the most economical service.

Q. Due to the fact that gas appliances have to be adjusted to take care of gas of different b. t. u.'s, is it considered desirable to have a uniformity in the heating quality of gas supplied?

A. Absolutely, yes, sir.

Q. Was that the position taken by the experts for the Commission in that matter?

A. Yes, sir.

Q. There is no dispute about that among qualified men, is there?

A. None whatever.

Q. Then uniformity is essential, and with which gas can you get the greater uniformity?

A. Why the modern b. t. u.

Q. With the candlepower gas it is difficult?

A. It is utterly impossible.

Q. Impossible?

A. Impossible.

Q. That is one of the great objections to the candle power gas, is it not?

A. Absolutely.

Q. Have your studies informed you as to what is the condition throughout the United States in that regard, as to what kind of gas is used?

A. Well, 60 per cent of the gas made in this country is water gas, but I imagine——

Mr. Hill: I object to a statement about what he imagines.

The Witness: Yes.

683 Q. Which kind is supplied, or do the regulations require in other States or other places, do you know?

A. I think now it is mostly all b. t. u., except New York City and Brooklyn. Philadelphia has recently gone to 530 b. t. u. by recommendation.

Q. Have you looked over the charts here which show the kind of gas the Kings County Lighting Company made in the last year and a half?

A. Yes, sir.

Q. Is that a gas that would give a reasonable efficiency in its use?

A. It would give a reasonable efficiency for that b. t. u. It would give still more efficiency had that b. t. u. been lower.

Q. Been lower?

A. Yes, sir.

Q. Because it would be more uniform, you mean?

A. It would be more uniform; yes, sir.

Q. Is this gas as useful and serviceable to the consumer as the 22 candle power gas?

A. More so.

Q. You would say it was?

A. Yes, sir.

Q. And without increasing his bill?

A. Yes, sir.

Q. That is, he can boil as much water and cook as many steaks with the same money as though it were candle power gas, can he?

A. Yes, sir.

Q. How?

A. Yes.

Q. Is the candle power gas as serviceable or superior in service to the b. t. u. gas for any purpose?

684 A. Only where an open flame burner is used; what is known as an open flame jet the slit burner. And those are obsolete.

Q. Am I right that even in the mantle burner, the heating quality is necessary?

A. Absolutely, all that lights a mantel is heat.

Q. It is the incandescence brought about by heat in the mantle, is it not?

A. Yes, sir.

Q. But with the open flame burner, you say it is different?

A. It is the incandescence of carbon in suspension, by the burning of CO and H gas, the carbon becoming incandescent furnishes the light.

Q. It is combustion?

A. Yes, sir, it is combustion.

Q. In the process of combustion, the carbon first becomes incandescent?

A. In the process the carbon first becomes incandescent and throws off the light in carbonic gas.

Q. I think you said that it required more oil to make candle power gas than b. t. u.?

A. Yes, sir.

Q. How much more on the average would it have taken this company if it turned out 22 candle power gas?

A. It would depend on the oil and it would depend on the candle power. The quality of the oil and the amount of the oil.

Q. Take the amount that we start in this——

A. It would take better that a gallon more to do it.

Q. It would increase the expenses by approximately the
685 cost of a gallon of oil?

A. Yes, sir.

Q. There might be a little saving in coal?

A. Some saving, yes.

Q. In other words, in the testimony we heard this morning here it produced a certain amount of gas?

A. Whatever that ratio is to gallons, it would take that. It would be direct there.

Q. Have you looked into the question of the adequacy of the plant for its present load?

A. Yes, sir.

Q. We have had that gone into pretty thoroughly. I wish you would be brief on it. Is it adequate or is it not?

A. Oh, it is inadequate and there is a catastrophe ahead for the company.

Q. A what?

A. A catastrophe ahead for the company this winter.

Q. Due to what?

A. The inadequacy of the plant and the character of its supplies, its goods, its oil.

Q. What would be the nature of this catastrophe?

A. At the rate that their business is growing, and the capacity of the plant, and the grade of oil they get, they are going to have a shut down. They are not going to get enough in my judgment with the price of coal that there will be, and there will be a grand rush to stoves, and you cannot stop a man from sneaking a stove into his house and hooking it on to his light.

686 Q. Would that be a catastrophe?

A. It would be a catastrophe, and might result in the death of infants or a family. And if the gas goes off in the town it may mean almost anything; it may mean the death of one person or it may mean the death of a hundred.

Q. Can't they get it on in a few days?

A. They may or they may not; but it will only go off again.

Q. Do you know the population that is served out there?

A. I do not recall, no.

Q. Mr. Searle, what would you advise the company to do?

A. I have already suggested to Mr. Elsman that he put in three new machines at once, and he brought up the question whether he had not ought to build a holder. I told him that a holder did not make gas, and that his one best bet was to get something to make gas. That was the best place to spend the money anyhow. You cannot do anything with a holder that is empty.

Q. They will need a holder by and by, will they?

A. Oh, the growth of the territory warrants a holder now.

Q. Of 6,000,000 cubic feet capacity?

A. Yes, sir.

Q. And you would say there should be three more gas machines down there and the auxiliary apparatus?

A. And auxiliary apparatus.

Q. How soon should it be started?

A. It should have been begun last January. You cannot
687 antedate it, but just as quick as it can be done. That is a question of money.

Q. Is it possible to avert this catastrophe that you contemplate?

A. I think with its present consumers — no. I do not think it is possible at the present time.

Q. If we got right out and got to work on it, do you think we could get it done in time?

A. If they worked day and night I think they may.

Q. But if we carry for thirty days we are goners, are we?

A. I think so; yes, sir.

Q. That is your judgment?

A. That is my judgment, yes, sir, and I want to make that very emphatic.

Mr. Jackson: You mean that it cannot be avoided no matter what is done now; we have a catastrophe coming?

The Witness: Why, it can be avoided in this way — by refusing all new customers and by shortening the pressures, and you cannot avoid a consumer sneaking in a stove now and then. He won't believe when he sees the gas in the holder that he is not entitled to it. They have done that in the anthracite strike on me, and I know what it means. Then we were not circumscribed by the quality of material that we were getting, either. And this is just what will happen. That demand will come, they will bat that oil as fast as they can into those machines and that will plug the machines, and they will simply have to shut down, lay down. That is all there is to it. You see, with the maximum day and the
688 maximum minute, if another consumer took one foot of gas he would do that.

Mr. Hill: May I inquire what question this answer is directed to?

Mr. Moran: It is the question of the inadequacy of the plant and the necessity for improvements. I told him to be brief about it, that we had heard considerable on the subject.

Mr. Hill: I move to strike out the answer as not being in accordance with the direction of counsel, then.

The Witness: I think the General ought to know this.

Mr. Jackson: Is there an objection pending?

Mr. Moran: That is all, you may examine.
Mr. Jackson: Do you suggest that we cross-examine?
Mr. Hill: Yes, you examine.
Mr. Moran: I am through.

Cross-examination.

By Mr. Hill:

Q. The fact that the company went through last winter all right and with substantially no increase in the takers because they have not been able to give them service, might you not modify slightly your prophecy as to this disaster?

A. I do not think the company went through all last winter all right.

Q. Did they kill any babies or children over there last
689 winter?

A. We do not know.

Q. Well, there is none charged against them, is there?

A. Well, there is none charged against them, but what I mean is this——

Q. But that is enough, Mr. Searle. Don't you think that your friendship for the very charming and delightful vice president and general manager of this company has caused you to put rather high lights on the danger of the deaths of people of the 30th and 31st wards of the City of Brooklyn?

A. No. I think my sympathies are entirely with the residents of that territory, not with the vice president of the company.

Q. Now, go to the unaccounted for. It is cold up our way in the winter time, isn't it?

A. Yes, sir.

Q. And we do not even have furnaces, we have fire places and stoves?

A. We are better off in Rochester.

Q. What?

A. I say we are better off in Rochester.

Q. But you have one family houses standing out in the lot up there in Rochester, where they do not have any furnaces in the cellar even; isn't that right?

A. Yes, sir.

Q. A good many of them?

A. Yes, sir.

Q. And in Canandaigua that is true, is it not?

A. Yes, sir.

Q. They commence to skate on that lake up there pretty early in the fall, do they not?

A. Pretty early, yes, sir, a brutal winter, I might say.

690 Q. You have a 6 per cent loss, you said?

A. Yes, sir.

Q. How many takers do you have up there in your company?

A. 80,000.

Q. What is your average per meter?

A. Three billions divided by eight.

Q. And that is, they have about 40,000, you have about 80,000, and your output is about twice theirs?

A. Yes.

Q. So your average per meter is about their average per meter, is it not?

A. Yes, it would average about twice.

Q. And your unaccounted for is about a third of theirs?

A. Yes, sir; no, no.

Q. 6 and seventeen?

A. I think I said six to seven and fourteen to eighteen in the last six months.

Q. Well, in 1919, it was seventeen.

A. In 1919—well, I have not got the 1919 figures. I have the figures of the Rochester and I think we were nine per cent in 1919. I think we were nineteen.

The Master: What reason did you give for the reduction in the percentage in 1920.

Mr. Hill: He says they lost the same amount of gas.

The Witness: They lost the same amount of gas.

Q. But they sold more?

A. They sold more, and that is why your percentages are more or less misleading.

Mr. Hill: Six months might not be very good, but a year or two would.

691 The Witness: Of course in 1919 there is 2 per cent to come off up here roughly, due to that index year.

The Master: I do not understand that.

Q. 2 per cent?

A. Yes, about 2 per cent.

Q. 4 is 2 per cent of 365, is it not?

A. No, but the number of cubic feet put on there. 4 times that day, whatever those days were. The meters are read in 361 days, and the gas sent out and unaccounted for was for the physical year 365.

Q. You have 369, don't you, sometimes?

A. When we go out of business.

Q. You lose four days?

A. It is shifting back and forth.

Q. Will you explain that loss to me?

A. For instance, the meter readings check off for 361 days send out, and they made gas according to their books for the *physical* year 365 *years*, which was more gas made. All of the gas made on those four days was charged to unaccounted for, for that year.

Q. I did not understand it. Will you tell it to me in words of one syllable?

A. For instance, they read meters and during their meter readings they took in 361 days for the year.

Q. Didn't they read that for the whole 365 days?

A. No, not what they call the index days. They work
692 off an index day on their index month, and that takes in 361 days. But they actually made gas 365 days. But that takes in all the gas they made in those four days.

Q. That is about one per cent?

A. That is one per cent of 365, but the amount of gas might easily be more than that by 2 per cent, because it was all of the gas for the four days. Not 18 per cent of 7,000,000 a day. Suppose there was four days or 27,000,000 feet; it would not be 18 per cent of the 28,000,000 feet, but it would be 100 per cent of the 28,000,000 feet. It would be 22,000,000 cubic feet. It is four days' reading.

Mr. Moran: They have read their meters in 1919 on the 22nd of December, and in 1918 they read them on the 26th of December.

Q. Then in January you read them for the last four days in the year, didn't you?

Mr. Moran: Oh, surely.

Mr. Hill: So that at the first of January, 1919, you read for some of the days in 1918, didn't you?

Mr. Moran: Yes, read for five days. How many days in December—31? We read five days of December, 1918, but we missed nine days of December, 1919.

693 Mr. Hill: Then what day in 1919?

Mr. Moran: The 22nd of December. We have missed four days of gas.

Mr. Hill: Then in 1920 you did have in already eight days' reading. That accounts for your better showing in 1920. Then you have nine days in already of the 1919 make in your 1920 sales, have you not?

Mr. Moran: Just a moment. What day did these meter readings end on your sheet here for June?

Mr. Hill: You say you read December 22, 1919?

Mr. Moran: Yes, December 22, 1919.

Mr. Hill: Then you have got five days of the 1919 make read as sold in 1920.

Mr. Moran: Yes, it just varies the percentage. It reduces the 17 and takes the percentage off there and puts it on to the others.

Mr. Hill: That will raise, raise your 1920 rate above your 12 per cent., won't it?

Mr. Moran: It will raise it a little bit.

Mr. Hill: It will raise it the five days, the entire five days of December.

Mr. Moran: Not the entire five days.

Mr. Hill: Why not?

Mr. Moran: Yes, it will.

Mr. Hill: You have read those five days in December.

694 Mr. Moran: It will raise it the five days in December, yes.

Q. People that have open flame burners in Brooklyn are suffering by this loss in candle power, are they not?

A. That is voluntary on their part.

Q. But just a moment, people that have open flame burners and believe they have a right to have them under the statute of the State of New York are losing candle power by this cutting down of the candle power of the gas?

A. Not necessarily.

Q. Do they get as much light from an open flame as they would if the standard was maintained in accordance with the statute?

A. I could not say unless I saw the burner. That is an evasion.

Q. The open flame burner——

A. If you will let me explain why I can shorten up the answer and make it quite clear.

Q. Yes.

A. Because I think I owe it to the customer and counsel.

Q. Yes.

A. A gas having 22-candle power and an open jet flame, say three inches of pressure and burning eight feet might get 14 or 15-candle power from that burner, and light another one and get enough light, and he would be burning 16 feet, and a man might have a 16-candle power gas at one pressure burning five feet an hour and get full 16-candle power from it. It depends; that
695 is why I tell you it is uneconomical.

Q. It depends on what?

A. It depends on the pressure, the character of the burner, the way it is operated and its condition, the condition of cleanliness.

Q. I am talking about that open flame burner.

A. So am I.

Q. That is just a hole, through which the gas is consumed?

A. No, there are all sorts of open flame burners.

Q. But just a moment. Assuming the same pressure and the kind of open flame burner that was contemplated by the Legislature when they made it 22-candle power—now, you probably know what kind of an open flame burner that was from your deep study.

A. Yes. Well, that would be 100 per cent., you get 22-candle power then.

Q. And he has that kind of a supposititious burner now.

A. Yes, if he has it.

Q. He is not getting as good results from this company as he would if the company obeyed the law.

A. Not for lighting purposes, no sir.

Q. Did you say something about getting a better result by low b. t. u. rather than a high b. t. u.?

A. Yes sir.

Q. Why did you say that?

A. No, you get better results by uniformly low b. t. u. than you get from a gas made for candle power.

696 Q. You would get better results from a low b. t. u.?

A. Yes, that is for heating and cooking, uniformly low b. t. u.

Q. Well, how low?
A. 525.
Q. Than you would from the candle power?
A. Yes sir—uniform candle power.
Q. 22-candle power will carry necessarily 620 b. t. u.'s?
A. Yes, sir, or maybe higher.
Q. But normally it would carry 620 b. t. u.'s.
A. About that, I should say.
Q. Under normal conditions?
A. A little higher than that, as I recall it.
Q. A little above 620.
A. Yes.
Q. B. t. u. means that theoretically or actually 620 candle power gas—that one cubic foot of it will raise 620 feet of water one degree—or raise that——

Mr. Moran: Gallons.

A. Pardon me. Let me make this clear, it will save a lot of time. Here is what really happens in practice. A candle power gas made to maintain a uniform candle power is a seasonal gas. That is, in winter you put in a lot of oil, to be sure, and have the candle power. As the temperatures in the holder change, the sun getting on them, and the atmosphere, the temperature, changes, a lot of vapor is picked up from the holders and mains and meters and is
697 carried to the appliance, and that is deposited in the form of lamp black and carbon. That is an insulator of heat. If it happens to blacken a mantle, as you have seen, a gas mantle, a man will light one or two or three; if it puts a hole in his mantle he buys another, and he will save money by having a uniform candle power quality. Then take that not carrying the seasonal vapors. Every gas is adjusted to that. He does not have a deposit of lamp black and it is not insulated. He does not have a long flame under the utensil and the flame crawling up the side because of these seasonal variations, giving a greater flame area, because he can not adjust for these seasonal variations and he does not carbonize his mantles.

Now, a man might easily drop——

Q. You are figuring it now solely from the lighting standpoint. What about heat?

A. No, I am talking about the vessel on the stove and the water heater, the two greatest consumers today are the water heater and the gas range, with a variable gas made to maintain seasonal 22-candle power, and per thousand feet seasonally. The hydro-carbon contents that that customer gets changes so rapidly that there is no adjustment for his appliance burner, that is with the range or the water heater. Those are the characteristics of that, I want you to understand.

698 Q. If the customer purchases a gas of a uniform b. t. u. standard of 620, would it do more work than if he purchased a uniform gas which had 520 b. t. u.'s?

A. If he had a uniform 620 gas light, natural gas, and it is a

constant vapor, my answer would be no. He would get more out of the 620.

Q. He would get more out of the 620?

A. Yes, if he had a uniform flow he would get more heat.

Q. That is, he would get substantially one-sixth more?

A. Yes, surely.

Q. How much do you say that the b. t. u. gas may vary, in that standard of b. t. u., and still get efficiency from appliances which are set for——

A. (Interposing.) The 525 I testified to?

Q. Yes, any kind. Yes, set for 525.

A. That would depend on the length of variation.

Q. Tell me what you know about that.

A. For instance, I should say that the daily variation should permit of 25 b. t. u.'s both ways.

Q. That is 50?

A. Yes, and it takes in account a breakdown of machines. For instance, if you had three machines in steps in a plant and something went wrong, you could not get your oil pump suction to work, it froze up, plugged with this heavy mud they have got, and you had trouble all day, you should have that variable allowed
699 and it should be subject to explanation—that they had something cause it and it might be low today and high tomorrow, and get back the next day to uniform. It might very easily be done.

Q. Through the day how much should it vary?

A. It will vary all over the map. It does if you have not a holder capacity enough to do it by the law of diffusion.

Q. You have been having accidents to the plant in your answers. Take the stand of the customers. He is getting 620 b. t. u. gas today and he gets 490 b. t. u. gas tomorrow. What is he going to have?

A. All kinds of trouble.

Q. And if he gets above 25 or a variation of 25 he is going to have trouble, isn't he?

A. It depends how long it lasts.

Q. If it lasts a day.

A. Yes, he would have trouble, noticeable trouble.

Q. If it lasted a few hours.

A. He would have a noticeable trouble. In other words, you cannot operate to 100 per cent. He has got to go along with it.

Q. How much oil do you under- is used to make a 22-candle power gas?

A. Why, I think about 4.6 gallons, with this quality of oil.

Cross-examination.

By Mr. Jackson:

Q. In looking at this plaintiff's exhibit 6 you said that
700 these rates shown appear to you to be reasonable.

A. Under the operating conditions over there, yes. Which is plaintiff's exhibit 6? I have it exhibit D here.

Mr. Moran: What period is it?

Mr. Hill: This is 1919.

The Witness: The generator fuel is reasonable and the operating conditions as I observed them for boiler fuel, are reasonable, and the oil is excellent.

Q. What are you looking at when you say that it is reasonable?

A. Why, comparisons with my own experience.

Q. Specify the figures that you are looking at when you say they are reasonable.

A. That 32.3 pounds per M made for generator coal, boiler coal, of 18.8 pounds, and gas oil at 3.43 gallons per M.

Q. Well, there would be a certain variable space between figures where your judgment as to the result being reasonable would likewise apply, would there not?

A. I don't really understand that question.

Q. Well, for instance, the first figure mentioned, 32.3 pounds of generator coal. Somewhat less than that may still be reasonable.

A. Not with the quantity of—yes, it might be.

Q. I just wanted to get it about. You do not mean that this figure in this line is reasonable alone, but I want to get within what limit you would give that same opinion as to its being rea-
701 sonable. Say how much below that amount and how much above that would you consider reasonable?

A. Why, it might operate with a pound less if he had a coal of that much less ash.

Mr. Moran: And how much higher might he have gone and still be within reason?

The Witness: As a matter of fact, in my own company with a fuel that we were able to obtain we got along and instead of his 33.70 it took all of 41.3 pounds.

Q. It depends on the quality of your fuel, does it?

A. Yes sir.

Q. Do you have in mind the particular quality of fuel that this company is using?

A. They have been getting broken anthracite.

Q. Were you not informed about that?

A. I know the eastern coals that are shipped into this market are generally pretty good coals.

Q. Is that all the information that you had about this?

A. I know they are pretty good coals.

Q. Is that all the definite information that you had about the coal this company was using?

A. Yes.

Q. That this company is usually furnished good coal.

A. Yes sir. I know he got good coal from his efficiency.

Q. And you say how much less than that would be rea-
702 sonable?

A. For the amount of oil that he has used he might, as I say, if he had a fine coal like the Cross Creek, which I believe is unobtainable—he might run on 31.3 pounds. We figure that 41.3 pounds, with the quality of fuel we got in Rochester, was very reasonable, although it clogged our machines and we had to work on it day and night, give it the water cure to get it out of the generators, where we clinkered.

Q. Take the next item, 18.80 pounds of boiler fuel, how much lower than that would you say might be reasonable?

A. If he had the proper plant I think he might cut 3 pounds off of it.

Q. Well, even with the same plant, what would you say?

A. I think that is very reasonable under the conditions under which he is operating.

Q. And within what limit would your judgment or opinion still apply, below or above that?

A. He might easily—if he had a cold winter and lots of hot gas to pump, and dirty boilers where he had to blow them off every hour to keep the tubes from blowing out, he might go on 21 pounds for six months. You would have to take each plant and type of plant, the characteristics of the fuel, and the operating conditions under which they operate, to qualify that.

Q. What I mean is this: If you were shown these figures
703 as you have been shown, instead of 18.80 pounds as you see in that item, if it read 17.80 pounds, would you still say it was reasonable?

A. Yes sir.

Q. And would you say 16.80 pounds was reasonable still?

A. Yes sir.

Q. And then how far above it would you have said it was reasonable?

A. Not knowing the character of the oil he used and knowing the way the boilers were fired when I was there, I would say that 16.80 was reasonable. I was over there pretty nearly a week with him, and in the boiler room pretty near every day, and with the fuel you could get and that he was getting and the labor, the green firemen shifting all the time, green boilers blowing down every few hours, the inadequacy of his hot water heater for the load, that this might be expected to be very reasonable. That average would come down in the summer months, too. The heating comes out of that and some of those losses. The divisor increases.

Q. Take gas oil, 3.43 gallons.

A. That is excellent. That shows very skillful management; there is no question about it.

Q. How much less or how much more than that figure would your opinion that it was reasonable or excellent still apply to?

A. It depends entirely on the oil he got. With a good oil

704 it is an excellent figure—an excellent figure, running his machines as he does. We ran under similar conditions in Rochester for six months at 3.51, and we have a good oil.

Q. For what candle power would you say it was excellent?

A. About 18 to 20.

Q. In the matter of the changing of diaphra-ms of meters, if all the meters are changed at once in that respect, it would be somewhat costly.

A. Very. I have been through it, I know.

Q. How much per meter about?

A. At the present price it would cost him at least $3.00 a meter or $3.50 a meter to pull him out.

Q. Pre-war prices?

A. About $1.45 or $1.50.

Q. There is a renewal in the diaphra-ms of meters that is ordinarily and constantly going on, is there not?

A. Oh, yes.

Q. So that those diaphra-ms are ordinarily changed in the course of about what period?

A. Well, not all the diaphra-ms. The meter is tested approximately once in from five to seven years and the meter expert determines whether that needs a new diaphra-m or not. That is what I predicted, that the character of temperatures going out of there and the unfixed luminants would have a tendency to bleach those diaphra-ms and they will have to have more diaphra-ms and at
705 greater expense, unless he has sufficient capacity at the plant.

Q. What would you say was the period of time in the ordinary course of renewing the diaphra-ms of all the meters, when all the diaphra-ms would be renewed?

A. To give you an answer that I am thoroughly qualified on—I could only get at that—in Yonkers we sent hot gas, a million feet a day out of 100,000 cubic foot holders. In less than a year our unaccounted for gas rose so rapidly that we had to get busy and find out its cause, and we determined it arose from bleached diaphra-ms, and out of 600,000 meters there we easily put in over 500,000 diaphra-ms in about 18 months.

Q. That was in what year?

A. 1906, and that was due entirely to the temperatures and the inadequacy of the plant. That is where we learned our lesson. I was called on to the carpet for that, and I have never forgotten it.

Q. In the ordinary circumstances what percentage of the meters have their diaphra-ms renewed every year?

A. I could not answer that offhand.

Q. Approximately.

A. I think the original record will show.

Q. Have you a record of that in the company?

Mr. Moran: Of the number of diaphr-ms that were put in?

The Witness: No, the meters renewed. The number of
706 diaphra-ms replaced.

Mr. Moran: We have the record in our meter changes, yes. I could not say offhand.

Q. These meters are constantly being overhauled and back in the shop all the time.

A. Yes.

Q. Any time there is a complaint by a consumer there is an examination of his meter, or there is supposed to be, and perhaps the meter overhauled if it seems to need it.

A. Yes sir.

Q. And the diaphragm is replaced by a new one if it seems to need it.

A. Yes, that is all done under the Public Service Commission's inspection.

By Mr. Mill:

Q. You have one plant that furnishes gas to Rochester and Canandaigua?

A. No, that is a separate plant. It is gas of a different character.

Q. On your boiler fuel, when you said it was reasonable for 1920, did you take into consideration the amount of boiler fuel water gas tar that was used?

A. Yes sir.

Q. I get it as something like 28 or 29 pounds.

A. I know that the amount of water gas tar in gallons is almost negligible per day as compared with the amount of fuel that he requires to run his boilers.

Q. We happen to have the data that he used and —

A. (Interposing.) 800 to the gallon.

707 Q. He used a quarter of a gallon for each thousand feet?

A. No, where do you get the quarter of a gallon?

Q. On the extreme right hand column

A. Oh, yes. 2,600 a gallon per M.

Q. And that was some two or three pounds?

A. Yes sir. It was a quarter of about eight pounds. Two pounds.

Q. Did you add that to it?

A. Yes.

Q. When you said it was reasonable.

A. Yes sir. We have to bear in mind also that part of that is water, entrained water, and it requires part of that tar in turn to volatilize that in steam, and that leaves the boiler as superheated steam, tar would really work itself down, instead of two pounds, to a pound and a half.

Q. You think when they set this down they did not know about it.

A. That is an arbitrary figure, that water gas tar, anyway.

Q. They do not measure it at all.

A. They measure it, yes. They get the water contact.

Q. Have you analyzed it for the water content?

A. I know ordinarily what it would contain.

Q. Have you analyzed it?

A. No.

Q. This is one of the things that you just naturally know about.

A. I have analyzed hundreds of thousands of gallons of tar. I was in the tar business and that may qualify me—producing pitches and oils.

708 Redirect examination.

By Mr. Moran:

Q. You know their layout there, that they use this boiler fuel to produce the power to drive the gas up to the———

A. (Interposing.) Yes sir. Mr. Miller covered that very thoroughly.

Q. It takes more of that power, does it not?

A. Yes. It takes more power and it takes more as the temperature varies.

Q. Your company experienced difficulty in getting oil, good oil, did it not?

A. Yes, great difficulty.

Q. The same as we have over there.

A. We have to take what we can get at the price they charge.

Mr. Jackson: You deal with the Standard Oil also, do you?

The Witness: Yes, with the Standard Oil, the Sinclair, White, Oklahoma—we have a contract for buying spot oil.

Q. What are you paying for oil?

A. We are paying 14.3 cents.

Q. Have you a contract?

A. We have a contract but we are buying spot oil.

Q. You mean the Standard cannot deliver the oil?

A. They do not deliver always.

709 Q. Have you made arrangements up there so that you are converting your gas machines and adjusting to take care of and handle the heavy oil?

A. Yes, our estimate involved about $1,000,000. Yes sir, and a new machine, and then of course, we intend to go on and build a coal gas plant, because that is the ultimate outcome and that will require $3,000,000 more.

Q. You anticipate that your company will have to get itself into position to take care of this kind of oil?

A. Yes sir.

Q. And you think that the Kings County Lighting Company will too?

A. Yes sir. I have been since last November making a study of the oil situation, because it is a menace to my own property and it is a very serious situation, and with the oil as it is today you have got to do everything that will suggest itself. We have one advantage, we have a non-competitive business, and we sit in and discuss this with each other, and we all realize the danger ahead; we have got to get our house in order to handle whatever the oil companies offer us, whatever it is.

Q What do you say is a non-competitive business, the gas business?

A. The gas business. For instance, Mr. Elsman might discuss this with me over the table, but if we were clothiers we might not.

Q That accounts for the high degree of perfection in gas management, does it not?

710 A. Yes sir, solely. We avail ourselves of a thousand engineers gratis.

Mr. Jackson: Mr. Searle is now testifying to his own plant, is he not?

The Witness: Yes sir. He asked me about my own plant, about my getting my house in order, and I told him yes.

Q This is not a temporary condition, then, as to the oil?

A. Why, I am assured by the oil people that we must get our house in order, because here is what they told me—if I may get that thing correct, because I would rather have the record correct for my case, because I do not want my record garbled as in another case. The oil people told me that for each rise of a cent in gasoline they can take the oil we are now getting and give it another crack; that is, put it into another still and pull off more gas that will volatilize in an internal combustion motor and furnish power. For each rise of a penny they can give it another crack. This is what it is composed of: A good oil today would be one and a half per cent of free carbon. The oil of the Kings County Lighting Company ran up to 14 per cent. That is absolutely inert. Anywhere from six to fourteen per cent. of that oil is inert. For every time that you hit that oil a crack you get out more per gallon the carbon in-

711 creases, so we are that much worse off. We are going to design our water gas apparatus. They look like freaks compared to the old machines. There was another disaster. We ran a machine 1800 hours and it took three days to cool it, checker it and put it into service. It should come down to 600 hours and that takes three days. Three days of 1800 hours is 4 per cent., but the other is 12 per cent., and that is the carbon filling up the interstices of the brick. It is cumulative. The machine is fine at the beginning of the 600 run, but at the end of the fourth week it is flooded.

Q That is, would require a larger generating capacity?

A Yes, very much larger. It is a circumstance over which the gas companies have no control, and I think the oil companies are justified in getting as much as they can for the oil.

By Mr. Hill:

Q What is your contract price on the oil?

A There is no contract price. We had a written contract.

Q No price fixed?

A. No price fixed. The market. We had 8.41 and they absolutely fell down on it.

Q That is, you had a written contract for 8.41?

A. For part of 1920 we had a written contract.

Q For how much during 1920?

A. For the first three months it ran into——

Q. How many gallons?

712 A. We made a contract for 3,000,000 gallons and I think they only delivered 2,300,000 of it and fell down on the rest.

Q. That was for 8.41 cents a gallon?

A. Yes sir.

Q And they have not delivered the rest?

A. They only delivered us 2,300,000 on the 3,000,000 contract.

Q. Who made that contract with you?

A The Standard Oil Company.

Q And the fact that they fell down does not mean that they were responsible?

A That was in the contract, that if they could not deliver they would not be responsible. They foresaw all this.

By Mr. Moran:

Q. You do not have a pipe line delivering to you, do you?

A. They have a pipe line delivery I think to Buffalo, then we have tank cars to Rochester.

Q. There is a differential in transportation that favors your city over ours?

A. It comes in from Indiana and northern Pennsylvania, and I think it is only 130 miles to there, in transportation by tanks.

Q. And the freight charges are very much less?

A. Oh, yes. I will have another wrestling match with them tomorrow.

By Mr. Hill:

Q In coal gas, the manufacture of coal gas, you do not use any oil, do you?

713 A. No, not unless it is candle power requirement. If you had a 22-candle power requirement you would have to bust.

Q. How much b. t. u.; what will be the b. t. u. standard of coal gas manufactured without any oil?

A. With a good grade of coal you would get about 580 b. t. u.'s.

Q. You would get about 313 with your water gas?

A. Water gas, blue water gas, hydrogen and carbon monoxide, I think one is 326 and the other is 300 and something.

By Mr. Jackson:

Q. Have you started the construction of your coal gas plant?

A. We are operating coal gas 50-50. We produce just about the same amount of water gas as the Kings County Lighting Company does in a year.

Q. Have you enough water gas to take care of your whole product?

A. No, just half of it.

Q. Are you contemplating enlarging on it?

A. Yes sir.

Q. Immediately?

A. Well, we expect to start in 1921 and it requires a great deal of money.

Q. You expect to have it ready when?

A. 18 months to 2 years. We started a plant and finished it in three years; that is the present one, just prior to the war we started.

By Mr. Hill:

Q. That is, you saw the necessity of going into coal gas three years ago?

A. No, not the necessity, but we saw this, we had a good
714 market for coke.

Q. There must have been a necessity or you would not have undertaken it.

A. No, there was no necessity for it, but we had a good market for coke.

Q. But there is a good market for coke where coke is produced in sufficient quantities to market it, is there not?

A. But not in Rochester. We felt we could compete with anthracite, because of the pool in Rochester on coke, but we could not sell coke in Syracuse or Buffalo.

Q. Do you know that they sell coke here?

A. The coke is very difficult to sell.

By Mr. Jackson:

715 Q. If they had coke to sell they could sell it, could they not?

A. If they had anything now to sell they could sell it. They will pay any price for fuel.

Q. Does not the Government recommend coke as a fuel in preference to coal?

A. Good coke.

Q. And to the anthracite that is produced?

A. A good coke is a better fuel than coal.

The Master: I think we are getting very far away from the question of the statute.

Mr. Jackson: It depends upon the question, Mr. Master, of the *providence* of the Kings County Lighting Company in providing against the prospect, as they are contending, of a constant high price, also the tendency of the continuance of the high price of oil. The competent management for seeing such a condition when it was foreseeable and providing against it to that extent.

By Mr. Moran:

Q. The investment in a coal gas plant is much larger than in a water gas plant, is it not?

A. Oh, very much larger.

Q. Three to one, is it not?

A. Yes, three to one.

Q. Instead of having $5,000,000 over there we would have $15,000,000?

A. Yes, sir.

Q. Then we would have the trouble of finding our market
716 for the coke, would we not?

A. Yes. You must first know that you have a market. You could not build a coal gas plant in Kings County and turn up that lot of coke, 50,000 tons of it, and get a market right off.

By Mr. Jackson:

Q. That would not be good management, though, would it?

A. Yes, in a country where they use much coal, but it would take the Kings County Lighting Company about three years to develop a coke market in normal times.

Q. But not now?

A. Against the competition. Now, I have been offered $21 a ton for our coke in Rochester.

By Mr. Moran:

Q. What is your unit cost of manufacturing and distributing gas in Rochester in the year 1919?

A. I have not got that. I can furnish that.

Q. Never mind, I thought you had it handy. I will withdraw the question.

A. It is something like 74 cents. That was making very cheap coal gas. With the coke credit, we made gas at 22 cents a thousand—one half of our gas—without the capital expense charged in.

Mr. Hill: You wanted an increase on the rate just the same, didn't you?

The Witness: We have got to have it.

Q. What is your rate up there now?

A. 95 cents now and 40 cents a meter per month and we have just stipulated with the City for 45 cents a thousand increase
717 on a valuation.

Q. What would that be, $1.75?

A. $1.45 and 40 cents a month for meter service charge.

Q. That makes $4.80 a meter per year?

A. Per year.

Q. And that is added to the consumption?

A. That is a service charge. That is practically the scientific way that rate making is going to obtain. We have learned enough in the business today to know what it costs to render the service without furnishing the commodity. For years 60 per cent of our business carried the other forty. Today by putting that service charge into effect, it tends to lower the average to every one in the selling price.

By Mr. Hill:

Q. But you did make coal gas at 22 cents?

A. Yes, in 1919. The last month it cost us a dollar. We paid $11 and $12 for coal and we had contracts and could not get it.

Q. That is what the Kings County Lighting Company would have done if they had seen the opportunity or the necessity as you saw it three years ago to put in a coal gas plant?

A. That does not necessarily follow.

Mr. Moran: You did not see any necessity of a coal gas plant, did you?

The Witness: Not the necessity, but we saw the chance to make some money and it was not necessary because all we would have had to do was to go on and make water gas and assert our
718 rights, but we found there was a good coke market, and we took the capacity of one half our plant and took a chance on developing the coke market. I do not want to throw any boquets, but I have been complimented a good many times on our foresight. That does not follow that it was foresightedness, but it is a study of conditions. I would not recommend coal gas for a plant until I sat down and studied the whole equation.

The Master: Have you anything further of this witness?

Mr. Moran: No.

Mr. Hill: I am through.

(The witness was excused.)

(Further hearing adjourned to Tuesday, August 17th, 1920, at 10 o'clock A. M.)

718½ United States District Court, Southern District of New York.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Before Hon. Gordon Auchincloss, Special Master.

Transcript of Reporter's Minutes.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York.

Barclay, 8477.

719 KINGS COUNTY LIGHTING CO.

VS.

NEWTON et al.

61 Broadway, New York.
August 17, 1920—10.00 a. m.

Met pursuant to adjournment.

Present:

The Master.
Mr. Moran.
Mr. Hill.
Mr. Jackson.
Mr. Deegan.
Mr. Judson Hyatt, Assistant Corporation Counsel, in behalf of Harry E. Lewis, District Attorney, Kings County.

JOHN B. KLUMPP resumed the stand.

Cross-examination.

By Mr. Hill:

Q. Mr. Klumpp, in the event there should be increased importations of oil from Mexico, would it relieve the oil situation in this country, in connection with gas making?

A. We do not believe so, because a very large majority of the Mexican oils have so much sulphur in them that we can't use them for gas making purposes.

Q. But can you not derive gasoline from those oils?

A. There is a small quantity of gasoline taken—I believe that is taken off before the oil is used as a fuel oil.

Q. But one of the causes of the scarcity of gas oil is the increased demand for gasoline, isn't it?

A. Undoubtedly.

720 Q. So that, if the gasoline is derived from Mexican oils, wouldn't that have a tendency to relieve the situation somewhat?

A. I doubt if the relief will be enough, because the increase in the consumption of gasoline for the last two or three years, more than compensated any increase of gasoline obtained from the Mexican oils. The Mexican oils contain very little gasoline, and if the quantity is very small, it does not pay to top it; but if it is sufficient—ten per cent—why, they top it and they use the residual for fuel oils.

Q. What effect will that have on the price of coal in gas making—I mean boiler fuel?

A. Why, I don't think the question of fuel oil has very much

effect on the price of coal? And I think the price of coal is worked the other way.

Q. Gas which is 22 candle power—does it, in order to have the 22 candle power necessarily have a b. t. u. standard?

A. Not any certain b. t. u. standard.

Q. If they made a 22 candle power, wouldn't it have a b. t. u. standard above 600?

A. I would say an average 22 candle power, would have an average b. t. u. produced at the same time above 600.

Q. About what would that average be?

A. Well, it has been shown to be anywhere from probably 610 heat units to 660 heat units.

Q. It would be fair then to say 635 as an average?

A. We produced it of about 620 at one of our plants. The
721 Brooklyn Union figures were 637, I think, from the City's test, when they made that investigation.

Q. Take the last three months as shown by Exhibit 18 offered by the plaintiff. If the b. t. u. standard average, b. t. u. average of the plaintiff was 559 in May, 524 in June, and 530 in July; then it is a fact that this company, by reducing the candle power have likewise furnished their consumers gas of a lower heating quality, have they not?

A. Yes.

Q. In order to know whether the candlepower is necessary from a lighting standpoint, you would have to know whether people of the area covered by this plaintiff used open burners or Welsbach burners, wouldn't you?

A. Candle power—the only effect that candlepower has giving illumination in the open flame burner.

Q. So that if they used open flame burners over there, they would want candle power, would they not?

A. If they used open flame burners, they would want some candlepower—not necessarily 22.

Q. Now, one of the causes of increased expense of production, you have ascribed to difficulties of transportation, of the raw material?

A. Well, I don't know that that necessarily would be an expense. I don't think the freight is any higher because the transportation is delayed. The difficulties of transportation cause difficulties
722 of operation by not receiving materials. Undoubtedly, they cause—they might cause increase in expense, if you have to pay bonuses to get them through, or have increased labor costs, because you can't get the material.

Q. But the difficulties and any attendant expense along that line is being improved at this time by the increase in the improvement of railroad facilities, is it not?

A. Well, I would not say that the expense is reduced because the facilities are improved.

Mr. Moran: Well, are they improved?

The Witness: Some sections; I don't know as they are improved everywhere. We have not been able to stock up coal for the coming winter; we are running from hand to mouth in most of our plants.

Q. What do your companies pay a gallon for oil?
A. Why, we are paying now from 12½ cents to 15 cents.
Q. Have you any contracts?
A. We just made a contract for Syracuse beginning with August 1st. We were unable to—we had contracted from the Vacuum Oil Company of Western Pennsylvania—Olean—and our contract last year was nine and a fraction cents. We have just purchased from them 500,000 gallons at 13½ cents f. o. b. Olean, and the other half of our contract from the Standard Oil, f. o. b., New York, 14 cents—or f. o. b. Syracuse, 14 cents.

Q. That is a contract running to what time?
723 A. That runs from August 1st of this year to January 1st—that is as far as they would make it—of next year.
Q. Up to August 1st, what did you pay?
A. Why, nine and a fraction. We are under contract for nine and a fraction cents, but that did not carry us through, and we bought some spot oil between to fill out, running from 13 to 15 cents.
Q. You buy of the Standard Oil Company of New York?
A. At times we do. We try to get the lowest bidder, of course.
Q. The big company of the Standard Oil group is the Standard Oil Company of New Jersey, is it not?
A. I think it is, yes.
Q. Do you know whether the Standard Oil Company of New Jersey quote a different price, lower price than their subsidiary company, the Standard Oil Company of New York?
A. No, I do not. I know the price varies on the quantity we want. We are not able to buy from small companies, sometimes, because they can't give us all we want, and we often have to pay a higher price for a larger quantity of oil, which is opposed to general——
Q. (Interrupting.) That is, if you want a large quantity you go to the Standard Oil Company?
A. Not necessarily. We have a contract with the Gulf Refining Company and with the Texas Company. Those three com-
724 panies are probably the only companies that can supply.
Q. The Gulf Refining, the Texas Oil and the Standard Oil?
A. And the Standard Oil are the three big companies that can handle big contracts.
Q. You have how many meters at Syracuse—how many services?
A. Why, about 45,000.

Mr. Moran: Meters?
The Witness: Meters, yes.

Q. Substantially the same size as this company over here, then?
A. Practically. Our output——
Q. (Interrupting.) How do the freight rates there compare with freight rates here, in the oil case?
A. Well, I can't say exactly. This is water front, you know. But

I should say that the freight rates probably on oil might be a half a cent to a cent more.

Q. At Syracuse?

A. Yes.

Mr. Moran: How is that? Just a moment, now. You say it is higher.

The Witness: I don't know.

Mr. Moran: For oil?

Mr. Hill: At Syracuse.

Mr. Moran: They pipe it to Olean, they pipe it to Buffalo.

The Witness: I don't know exactly. It depends on where the oil comes from, Judge. Now, this 13½ f. o. b. Olean, we con-
725 sidered was practically the same as 14 cents delivered by the Standard Oil from New York; and I presume that they might have shipped their oil from New York, or they might have shipped it from Pennsylvania.

Q. That is, you paid 13½ for your spot oil?

A. No, for contracts.

Q. For your contract oil from August 1, 1920?

A. From August 1, 1920, yes.

Q. You paid 9 and a fraction up to August 1, 1920?

A. Contract made going from—for the first of this year, the first seven months.

Q. And it is your honest belief, Mr. Klumpp—you have stated so—that the Mexican oils, if the importations from Mexico increase, will not relieve the situation?

A. That is my honest belief. We have tried the oil, and we have had to give it up.

Q. Well, I know, I understand that possibly it could not be used as gas oil?

A. Yes.

Q. But wouldn't it, as I have suggested—I don't want to be guilty of undue repetitions—but wouldn't the fact that they can take gasoline off that oil successfully, tend to relieve the present gasoline situation a bit, thereby helping the gas oil?

A. Of course, every little bit helps, but the increased pro-
726 duction, is not keeping up with the increased demand.

Q. We have had the increased demand up to this time, and it is just directly since Mexico has settled down a bit more, that the production does increase some, and it is likely to be reflected in the price of gasoline, isn't it?

A. It has nothing with the oil situation, and I doubt if it will affect the gas oil situation.

Q. But you have seen from the quotations of prices that it has relieved the fuel oil situation?

A. Fuel oil situation.

Mr. Jackson: May I ask a question now, because I have to go away?

Mr. Hill: Absolutely. Finish it up.

Mr. Jackson: I have only a question or two.
Mr. Hill: Go right on.

Cross-examination.

By Mr. Jackson.

Q. On that question of the Mexican oil, any increase in the supply of oil for any purpose will tend to decrease the supply of oil for all purposes, will it not?
A. Tend to increase the supply of all oils – increase or decrease?
Q. Any increase in the supply, I meant to say, if I did not say it?
A. Yes.
Q. Any increase in the supply will tend to decrease the price?
A. Well, that is the tendency, whether it is a fact——
727 Q. Any increase in the supply of oil used for any purpose tends to relieve the strain upon the consumption of oil for all purposes, does it not?
A. That is a tendency.
Q. Pardon me?
A. That is a tendency.

Mr. Moran: In other words, you contend, General, that the law of supply and demand, controls the oil market?
Mr. Jackson: Well, I don't contend that at all. I contend that it might control it, if there were not some arbitrary control that we have not quite got control of.
Mr. Moran: Well, that is just what I wondered, whether you—the other counsel generally have been contending right along that there was a huge trust and that they regulated the price of oil to the gas companies at their pleasure. Now, from your question I would take it that you were not an advocate of that trust theory, but rather you were going back to the fundamentals of law of supply and demand.
Mr. Jackson: You haven't the slightest warrant for taking it that that was my theory whatever.
Mr. Hyatt: May it please your Honor, I would like to interpose a statement right here. The District Attorney of the County of Kings, one of the party defendants in this action has asked
728 the Corporation Counsel to represent him in the action, to appear for him and to defend the case. I have served notice of appearance on all the parties concerned, and presume that my status in the case is regular on that account. The Corporation Counsel has requested me to appear in the proceedings in behalf of District Attorney Lewis of Kings County.
Mr. Moran: The District Attorney of Kings County has not served any answer, and his time to do so expired, I think, on the 14th or 15th day of June. The bill has gone against him pro confesso.
Mr. Hyatt: What date did you say, Mr. Moran?
Mr. Moran: I think on the 15th of June.
Mr. Hyatt: Of course, your answer – your Honor, we move for leave to file an answer in that proceeding. We have received a copy

of the bill of complaint. We move to file an answer and also request your Honor's permission to appear in these proceedings.

Mr. Moran: The motion for the appointment of a Master was made upon the pleadings, and in the affidavit of counsel for the plaintiff it was stated that the District Attorney had not appeared or pleaded, as required by the rules. The affidavit also stated the necessity of having a Master appointed and a prompt disposition of the case. That affidavit and notice of motion were served upon the District Attorney and he did not appear upon that motion. He has taken no part in the proceedings at all, and plaintiff objects to any appearance from him here. It is entirely out of order, and he has no right to come in here at all. I object to his appearance in any way.

729

The Master: Has there been a default judgment against the District Attorney of Kings County?

Mr. Moran: No, there being other parties in the cause. It is just simply because there was no answer filed within the time required by the rules.

The Master: Why don't you move the District Court to open the default?

Mr. Hyatt: Does your Honor mean to rule that that would be a *commission* precedent to our participation in behalf of the District Attorney of Kings County in these proceedings?

The Master: Is there any question—do you question the fact that the District Attorney of Kings County is in default?

Mr Hyatt: Well, I am not concerned with that phase of it, your Honor. The District Attorney is sui generis up to this point, that is, up to the point he requested the Corporation Counsel to appear for him. Whether he is in default or not, I do not know. — would like to have a ruling from Your Honor on this question a to whether you make that motion a condition precedent to our participation in these proceedings.

730

Mr. Moran: Let me say, the gentleman is apparently here to get material with which to open his default, and I think it is sufficient for the Master to sustain my objection without making any suggestions, as to what the District Attorney might or could do. He is improperly here. This matter was referred to here, and the order recites the issues—they are recited right in the order—the issue raised by the answer of the other defendants has been referred to your Honor, and not anything else has been referred to your Honor. Now, it is not proper for him to seek from your Honor some suggestions as to what he might do, and then use those in the District Court with the implication that the Master was willing to have him in, but he must go to the District Court as a condition precedent.

Mr. Hyatt: Well, your Honor, as I understand, the District Attorney of Kings County is restrained from enforcing the penalties provided by statute. He stands in the position of being restrained, and of course, that would make him a party to this action, irrespective of the question of the answer being filed.

731

The Master: The order of the District Court appointing me Special Master recites that the defendant Harry E. Lewis, as District Attorney

of the County of Kings having defaulted in pleading to plaintiff's complaint, and accordingly I will sustain plaintiff's objection to the appearance at this time after the hearing is more than half completed, the testimony having been taken during the course of last week, plaintiff's case, having been, I am told, practically completed. I will sustain the plaintiff's objection to the motion of Harry E. Lewis, as District Attorney of the County of Kings for leave to appear at this time.

Mr. Hyatt: May it please your Honor, will you kindly state what the powers of your Commission are with reference to hearing this case?

The Master: As I take it, my powers are comprised in the order of reference, order appointing me Special Master.

Mr. Hyatt: Have you got a copy of that here?

The Master: Yes. You can see it if you want to.

(Handing paper to Mr. Hyatt).

732 Mr. Hyatt: Of course, your Honor, I take exception to that ruling which you have just made, sustaining the plaintiff's objection, and ask your courtesy with reference to taking an exception on the record.

Mr. Jackson: While you are considering that, Mr. Hyatt, do you mind my asking a question or two? Because I have got to get to another motion, and I would prefer to go ahead.

Mr. Moran: I don't think we have to consult Mr Hyatt's convenience. I don't mean that out of courtesy, but he is not in the case.

The Master: Proceed. The motion is denied.

Mr. Jackson: I did not want to interrupt him in his statement.

Mr. Moran: Oh, of course, I know.

Mr. Jackson: I just wanted to ask a question or two right here.

By Mr. Jackson:

Q. Have you any knowledge of any chemical analysis of this Mexican oil?

A. Why, I have seen the analysis made by our own chemist and I have talked with him and a number of our operating force, who are working under me.

Q. Is sulphur the only objectionable quality in it?

A. Why, that is the absolute objectionable quality, it is one of the objectionable qualities, the one we can't overcome.

Q. What are the others?

733 A. Why, heavy viscosity, a large amount of carbon in it, and solidification at low temperatures.

Q. The other objectionable qualities besides sulphur could be taken care of with not much trouble?

A. I would not say with all of the Mexican oils. The Mexican oils vary greatly. Some of them probably would be too viscous for use, for us to handle commercially. A large quantity of the oil we could handle by heating it up, but it has got the sulphur in it.

Q. What percentage of sulphur is ordinarily in Mexican oil, do you know?

A. Well, it will run from one per cent to three and a half per cent probably.

Q. Can't that be, by a simple process, extracted?

A. No, sir.

Q. Why not?

A. Because the sulphur compounds formed in making the gas are what we call fixed sulphurs, and cannot be removed by the commercial practice of purification.

Q. Don't you know that it is well known among oil men that a very simple process will make this oil available for gas oil?

A. No, sir. They told me to the contrary.

Q. Have you taken the opinion of any chemist on the correction of this Mexican oil so as to make it available for gas oil — any other chemist than your own chemist?

A. I have only in conversation with other chemists of other gas companies who have tried it.

734 Q. Then you have tried it, haven't you?

A. I have conversed with other chemists.

Q. And your opinion is formed from that conversation also?

A. Undoubtedly, yes.

Q. But the present time is a somewhat early time in the experimentation to determine those things, is it not?

A. Why, I *belief* that if our oils become scarce and used up so we can't get them for gas-making purposes, that something might develop.

Q. Harder problems than that have been solved, have they not, in chemistry?

A. Possibly.

Q. How long has this heavier oil that the gas companies have been troubled with been coming to the gas companies?

A. Why, I should say it has been coming in for probably the last year. We have not received any large quantities of it previous to the last six months or eight months.

Q. That oil, as you understand it, comes from the same wells that the better quality of oil came from?

A. I don't understand it that way, except that in some cases, it might be the better qualities of oils reduced, with the gasoline taken out of it.

Q. Well, that is the point.

A. Yes.

Q. Generally, do you think that that has been the trouble with that poorer quality of oil that you have been receiving during the last year, that the gasoline has been taken out of it?

735 A. I think so, without doubt.

Q. Is the gasoline taken out of what is known as Fuel oil?

A. Well, fuel oil means anything that the companies have to sell that will burn. All oils will burn. All oils will put—all oils could be cassed as fues oils, but as we generaly understand it, fuel oil is the oil that they have for sale for fuel purposes.

Q. Well, has the gasoline been taken out of that, do you know?
A. In large quantities, in large percentage it is. It is not fit for gasoline or it would not be sold for fuel oil.

Mr. Moran: Well, isn't there Mexican oil that comes directly from the oil fields, in the state of nature, right here, practically used for fuel?
The Witness: There is some.
Mr. Moran: A big bulk of it.
The Witness: Some crude Mexican oil used for fuel.
Mr. Moran: Without any gasoline being taken from it at all.
The Witness: Without any gasoline being taken from it.

Q. Gasoline having been taken from the fuel oil, it is still valuable as fuel oil?
A. Yes, it is valuable as fuel oil as long as it will flow.
736 Q. Yes.
A. As long as they can pump it, spray it.
Q. Fuel oil generally, as you understand it—and you don't pretend to be an oil expert, I suppose?
A. No, I have not qualified as such.
Q. Your knowledge of oil just goes generally to your information in the gas business?
A. I have handled oil for gas-making purposes for 25 years.
Q. Yes.
A. Well, asking you upon that basis—not as an oil expert, but as a part of your general information as an expert in the gas business—if the oil companies have taken what gasoline they could out of the gas oil, probably they have taken out what gasoline they could out of the fuel oil, haven't they—gasoline being in such demand?
A. They have probably carried it as far as it is commercially practical at this time, although when you say the oil companies—there are some companies that have oil that have no refineries, you know, and they would sell it direct without going through the process that some of the other companies have.
Q. I see. Well, the fuel oil is still valuable after the gasoline has been taken from it for fuel purposes?
A. Yes, sir.
Q. And it is valuable for fuel purposes because it has heating quality?
A. Yes, sir.
Q. That is because it contains b. t. u.'s?
A. Because it will burn, give heat.
737 Q. Well, if it burns without giving heat, it is not of much value, is it?
A. It could not burn without giving heat, that I know of.
Q. Well, some things burn with more or less heat, don't they?
A. Yes, sir.
Q. And it is because of its heating qualities, and not just of its burning qualities, that it is valuable as fuel?
A. That is true.

Q. Now, those same heating qualities are valuable in a gas for heating purposes?

A. Yes, sir.

Q. And fuel oil, or any oil with the gasoline extracted, would be valuable in gas for heating purposes, if you could handle these other substances, such as you mention, the sulphur and carbon and so forth?

A. You can't classify all liquid oils. Now, an oil having ten per cent carbon and 12 per cent carbon is very satisfactory for fuel oil, but it is broken down—the carbon is in the form of carbon, there is no gas in that; you can't break it down. If it is in the form of light hydrocarbons, why, we can break it down, you see. And when I say break it down, we produce gas from some parts of it, and carbon from the others. Now, we can't gasify tar, and that is what the residue of the oil refining process is. Gas is taken out of it, but there is plenty of heat left in the tar, and it can be burned as a fuel.

738 Q. The trouble in getting gas oil that you have mentioned has only been experienced in certain localities, hasn't it?

A. My information leads me to believe that the scarcity in the middle part of the continent is not as great as it is on the eastern coast and recently on the California Coast.

Q. And that difficulty has been experienced mostly during the past year?

A. The past year, yes, sir.

Q. And you ascribe that difficulty then, primarily, to trouble in transportation?

A. And increase in freight rates.

Q. Well, difficulties over transportation?

A. Difficulties in transportation.

Q. And those difficulties in transportation have been due to the war and its immediate consequences, in disarranging the transportation facilities, have they not?

A. I would not want to say what the difficulties in transportation have been due to.

Q. Well, isn't that your general information, that the war disturbed all our transportation facilities, that is, in so far as ordinary commerce was concerned?

A. The national relation of the railroads has as much to do with it as anything else.

Q. Now, that was due to the war, wasn't it?

A. Yes, sir, indirectly.

Q. What?

A. Yes.

739 Q. And there has been trouble in readjusting, getting back to the ordinary basis, or an efficient working basis, which would smooth out all these transportation difficulties? You know that there has been difficulty constantly?

A. Oh, I know that there have been difficulties—could not get it.

Q. That has been due to the disarrangement of the war of our ordinary transportation facilities, hasn't it?

A. I presume so; you said so.

740 Q. Well, that would be the best of your judgment, wouldn't it, and information?

A. The best of my judgment.

Q. Was a matter of 150,000 gallons of some product or residue, which the plaintiff did not call tar, but which we will call tar just to designate it,—that was cast aside by the plaintiff—was that called to your attention,—a derivative of this poorer quality of gas oil had in 1919—wasn't it, Mr. Elsman?

Mr. Elsman:, 1920.

Q. 1920, yes.

A. Well, he did not call my attention to any 150,000 gallons. I was there when this stuff was being produced, and I saw it over in the yard and being carted away.

Q. Did you examine it?

A. Yes, sir; physically.

Q. Now, from your experience in matters of this kind, how would you describe it?

A. As an emulsion of tar and lampblack and water.

Q. Of what consistency?

A. Well, it had—in different parts of the pile it was different consistencies. Some of it was a kind of liquid pitch, the rest of it was like lampblack floating in water, and the other was a mixture of tar and water. We called it an emulsion, you might say.

Q. Have you ever had chemical analysis of such a product made?

A. No. We could pretty well get at what it was from its

741 looks.

Q. Well, did you ascertain in any way the percentage of of tar in it?

A. No.

Q. If the water were dried out it would burn, wouldn't it?

A. Why, I believe if that stuff was allowed to settle and drained off, and possibly pressed, it would burn; it would not burn any other——

Q. (Interrupting.) Well, there was oil in it, and there was tar in it, and there was carbon?

A. I don't know how much oil in it. There was tar and carbon, of course.

Q. Well, there was a thick oil——

A. It could not be burned in its present state.

Q. But a simple process of evaporation might make it suitable for fuel?

A. Not very simple.

Q. By the evaporation of water?

A. Not very simple. I don't know whether that stuff would be reclaimable. It might, if it would be put aside and exposed to the air and allowed to dry out and settle—it might some be used as a fuel.

Q. Is there any other purpose that that might have been used for?

A. Not that I know of.

Q. You know that there has been a poor quality of oil used in road making?

A. Well, I tell you, road making—it is a very fine specification. You have to be very particular in the consisteney of the ma-
742 terials you use; and if you once get off what we call an abso-lute specification, the road goes to pieces, and that is the reason there have been so many failures in road making. That stuff was not suitable for road making.

Q. This very viscous quality, and this emulsion you are speaking of did have a vi-cous quality, didn't it?

A. Yes.

Q. Generally that terms means a thick oily—oiliness?

A. Well, generally, yes. It means ability to flow. I won't give the scientific definition, because I might slip up; but I mean——

Q. I have in mind an idea of thick oiliness?

A. Well, every liquid has a viscosity.

Q. Is that what you mean generally, when you speak of something being viscous?

A. Inability to flow as a liquid, that is what I mean. Water has a viscosity, and a heavier oil has a viscosity heavier than water. It is all compared with the viscosity of water.

Q. Then perhaps, to complete my meaning, and have an understanding with you, if I said oily viscosity, we would complete the whole, wouldn't we? That is, inability to flow and oily quality with it would be an oily viscosity; is that it?

A. I don't understand an oily viscosity, because——

Q. (Interrupting.) Well, we are distinguishing viscosity in water from viscosity in oil, so I think of an oily viscosity?

A. It is a different degree. Of course oily viscosity does
743 not mean——

Q. It is a different material; I am trying to——

A. That has nothing to do with viscosity.

Q. Well, I am trying to lay the basis for a further question.

Mr. Moran: What do you want to do, General?

Q. (Continuing:) And if you understand what I mean—I know; I will refer to it?

A. I understand what you mean by viscosity, I think.

Q. So this tar product, or tarrish product, had an oily viscosity?

A. If you want to call it that, yes.

Q. Just so that we may understand each other?

A. Yes, you may call it that.

Q. Well, of course the viscosity did not make so much difference then according to your interpretation of the term, but the oiliness did, didn't it? Now, it had a quantity of oil in it?

A. I would not say it had any oil to speak of. I could not distinguish the oil. It had been through the machine. If there had been any gassifying quality of oil, it probably would have been broken down.

Q. Now, if the water had been out of that tar, you haven't the least idea in your mind that if you lighted a match to it, it would not burn, have you?

A. It would not burn if you lighted a match to it, unless you——

Q. (Interrupting.) If the water were out?

744 A. If the water were out of it, it would burn if a fire was kept under it. What I meant, it would not burn by its light oil.

Mr. Moran: It is not inflammable, in other words.

Q. In other words. It would depend upon the degree of temperature that was applied to it, to start it?

Mr. Moran: Not only to start it, but to keep it going.

Q. Keep it going.

A. If it was sprayed. It could be sprayed.

Q. Well, coke will go out if it is left alone and hasn't the proper draft and such facilities for burning?

A. Yes.

Q. Will it not?

A. Yes, but coke enables the air to go through it.

Q. Well, you could not touch a match to a piece of coke and set it afire, could you?

A. No.

Q. You have to start it with a higher temperature and a more continuous temperature, and then perhaps give it the oxygen and the draft to keep it going and help the combustion?

A. Yes.

Q. Do you think some similar process with that dried out emulsion would make it available as fuel?

A. I think that some kind of treatment—I don't know how expensive it would be—would make this material so that it would burn in conjunction with some other fuels. It would not burn itself, but it would burn with a mixture.

745 Q. Now, would you say that the very identical qualities that that emulsion showed to your observation there, such as you had of it, would make it an ideal material for road surfacing?

A. No, sir.

Q. Well, have you gone into that question as to just what is the best material for road surfacing?

A. No, but we are manufacturing high grade road material.

Q. What material?

A. Material called Ugite. It is a coined word.

Q. And you don't want any other material to enter into competition with it?

A. Sure we do*d*. We can't pave all the roads of the country.

Q. Well, yours is the best material, I take it?

A. Surely.

Q. Certainly. I did not intend in this way to suggest for a moment that material that was going to enter into competition.

Mr. Moran: Senator Thompson says that Tarvia is what they use, and that Judge Miller, candidate for Governor, is being put forward so as to secure a monopoly in the use of that material.

Mr. Hill: Well, I see I am running into complication along that line, so I guess I will desist.

The Witness: We have got a good many contracts in New York State for rebuilding, repaving the roads.

Mr. Moran: I suggest we confine ourselves to the gas busi-
746 ness as much as possible.

Q. Well, how many gas companies are you directly interested in the management of?

Mr. Moran: Forty.

A. Forty cities, about 30 gas plants.

Q. That is, in what way are you interested—to what extent?

A. Well, the U. G. I. Company is the principal stockholder in these companies, and we are operating—a holding and operating company.

Q. That is, you are interested in an incorporation. In what way beside your individual capacity, that is, I mean are you an officer or director of any of these companies personally?

A. I am assistant general superintendent of the gas department of the U. G. I. Company, the operating company.

Q. Yes, and that operates forty companies, that is the idea?

A. We are operating about 30 companies.

Q. You may have said it before, but I do not——

Mr. Moran: Supplying about forty cities?

The Witness: Supplying forty cities.

Q. And a part of your duties in that official capacity is general superintendence, inspection?

A. Well, inspection—I have a force that go around and examine and report, and they look after extensions.

Q. You have supervision of that force?

A. Yes.

Q. And to a certain extent, to a large extent, then the re-
747 sponsibility for the efficient management of those companies is upon your shoulders?

A. Yes, sir.

Q. To what extent is the efficient management of those companies upon your shoulders?

A. To the extent that the general superintendent reports to—is responsible for the operation, keeping gas on the town, the costs, keeping the costs down, and keeping material supplied, and keeping the operating forces working efficiently.

Q. And those are all your responsibilities?

A. Well, I have a general superintendent who is directly responsible, and I am his assistant. The work goes through me.

Q. And according to the usual custom in such things, the general superintendent shifts those responsibilities to your shoulders so that you are the directly responsible one?

A. Well, he——

Q. (Interrupting.) The really responsible one.

A. Well, he works indirectly. We kind of work in. He may detail one or two companies particularly in trouble to me to concentrate on while he is supervising the rest of them.

Q. You being the assistant, he does not intend that he shall do all the work and you do none of it yourself?

A. No.

Mr. Moran: The general superintendent might read this record, and you can't expect Mr. Klumpp to belittle his activities in it.

748 Q. Now, with the responsibilities of the forty gas companies upon *on* your hands——

Mr. Hill: He said thirty.

Q. (Continuing:) Thirty—well, ten more or less would not make any difference to a really competent man, would it?

A. No.

Q. With thirty gas companies upon your hands, you still have time for the road making business?

A. Not personally; I haven't anything to do with that, of course.

Q. Well, you know a whole lot about it?

A. Very little except as I sit at lunch with my associates.

Q. Well, you were just telling us something about the availability of material in road making, because of your experience in the road making business?

A. Yes.

Q. Which is a present experience?

A. Yes.

Q. So that you are engaged in other business besides the gas making business?

A. Testifying.

Q. Well, that is another branch?

A. Yes.

Q. What branch is the business of testifying—I suppose in rate cases?

A. How much of my time?

Q. What branch? I suppose the testifying you mean is in rate cases?

A. This is the only rate case I have been in.

Q. Well, in what other way do you testify?

749 A. Well, I have testified once or twice, probably three times this year before Commissions on heat unit standards, candle power standards.

Q. That takes up quite a bit of time, doesn't it?

A. Well, it has taken up four or five days this year, may be eight this year.

Q. And those days when you were testifying your presence was in some other city and absolutely taken away from the gas companies?

A. Yes. You understand we have an organization—each one of these gas companies, a complete organization, probably similar to the Kings County organization, that if a lot of them could not

operate without my being there, why, we would have to revise the organization.

Q. Is that statement directed to an argument that the thirty gas companies can get along just as well without you?

A. I would not want to say that. Maybe they could.

Q. Well, I would not want to say it either.

A. If I did somebody will run them.

Q. That was your contention. I don't get it just clear in my mind—gas of 22 candle power does not contain less b. t. u.'s because of its having 22 candle power?

A. I don't know what that means exactly, Mr. Jackson.

Q. Well, think it over. I think it is fairly clear.

A. Contains less b. t. u.'s because there is 22 candle power?

Q. Oh, no.

A. Just read the question.

750 Mr. Jackson: I like it that way.

Mr. Moran: Suppose?

Mr. Jackson: No; it expresses what I have in mind, and it is understandable.

(The question was read by the reporter as above recorded.)

A. No, nor for more either.

Q. Well, thanks for the addition, but I did not ask it. It does not contain any less?

A. No.

Q. Then it is a perfectly simple matter to furnish all desirable heating quality in gas at the same time you are furnishing candle power?

A. No.

Q. It is not?

A. No.

Q. Is the furnishing of candle power made necessarily at the expense of any heating quality?

A. No.

Q. But you can furnish heating quality in gas cheaper than furnishing candle power?

A. That is the only—that does not mean anything to me.

Q. Well, you know my idea. You state it so it means something to you?

A. In furnishing a 22 candle power, the heat units in commercial practice will vary probably a hundred heat units. Now, if you want to furnish a quality, or equivalent value heating value of useful gas, and do not include the candle power regulation in, you can furnish that more economically, the same heat units,

751 than you can if you include the candle power.

Q. Why more economically?

A. Because you can make it uniformly.

Q. Then the economy is in uniformity?

A. One of the economies, yes.

Q. And why is there an economy in uniformity?

A. Well, because the gas can be used more efficiently with the uniform quality.

Q. Why? Explain it?

A. Well, now, if you adjust an appliance to burn gas at say 560, 550 heat units, the quantity of air necessary for perfect combustion remains pretty nearly constant; and if any consumers' appliances are adjusted to burn that gas, they will stay in adjustment, and the gas will be burned with equal efficiency.

Q. So there is less trouble in adjusting?

A. Yes.

Q. And there is a more uniform flow?

A. More uniform flow and more useful work done.

Q. But what I mean to ask is the considering uniformity and all other elements—and another element that I mention is the use of oil?

A. Yes.

Q. Heating quality can be furnished cheaper than maintaining a candle power?

A. What heating——

Q. For instance, the statutory 22?

A. What heating value?

Q. Pardon me.

A. What heating value?

752 Q. Now, can't we generalize, as I have suggested; can't we say that in the gas making business as a general proposition, and the proposition of economy and the lower cost—that is what I mean by cheaper, the lower cost to the company, of production and getting gas to the consumers' burners—that it is cheaper, lower cost to the company, to get a heating quality gas to the consumer than to get a gas that has the required, the statutory candle power, say 22?

A. Not necessarily.

Q. Now, I can imagine that there are exceptions, but as a general proposition that is so, as I state it—as I questioned, is it not?

A. In this city I believe the companies have the option of supplying 650 heat units or 22 candle. That 650 heat units, I don't believe is being supplied here, the 22 candle power is being supplied because the 650 heat unit standard was much too high and would not give good service.

Q. Now, much too high—why was it much too high?

A. Because it compelled too much oil being used, and the gas could not be maintained you know, uniformly.

Q. And it was more expensive?

A. More expensive, yes,—more oil.

Q. But to go back to my question again. You can furnish a heating quality, from the gas company's standpoint—you can furnish a heating quality in gas, of such b. t. u. as the gas companies think is sufficient for domestic heating purposes, at less expense to 753 the gas companies than to maintain a 22 candle power?

A. Yes, sir.

Q. Yes, and that is the reason primarily, from the company's

standpoint, why they prefer to furnish b. t. u.'s than 22 candle power, is it not? That is why the companies are all figuring, from their standpoint, upon replacing the candle power with the b. t. u. standard?

A. That is one reason. Of course, the difficulty——

Q. (Interrupting.) That is the prime reason that you are figuring upon it as a gas man, is it not?

A. I would not say it was.

Q. The economies in the manufacture?

A. That is one of them.

Mr. Moran: Good service is the other, conservation of oil?

The Witness: Conservation of oil is another one.

Mr. Moran: Is it waste of oil——

Q. (Interrupting.) Now, if you were figuring primarily upon the conservation of oil, you would use coal, wouldn't you,—make coal gas?

A. Well, it depends upon my investment.

Q. Certainly it depends upon your investment.

A. If all the companies tried to put in coal gas at once, it would take them ten years.

Q. Well, you know that such a thing probably would never
754 happen, that all the companies across the country would not be doing the same thing at once; if they were doing the same thing at once, all the companies, including the Kings County, would be profiting as the Rochester Company is profiting, because it took up that question in time. You know that the Rochester Company has its plant 50-50 on coal gas production?

A. We built the coal gas plant for them.

Q. Well, then you know it?

A. I don't know the 50-50 end of it.

Q. So Mr. Searle testified.

A. Did he? Well, that is true then.

By Mr. Hill:

Q. Have you a plant where you know the freight rate to be substantially the same as the Kings County Lighting Company on coal?

A. I don't know their coal freight rate.

Mr. Elsman: Could I tell him?

Mr. Hill: Surely.

Mr. Elsman: $1.85 from the mines to tidewater, without boat transportation. I can tell you that too, if you want it. That is not including taxes.

Q. Taking that into consideration?

A. Yes.

Q. What price are you paying for coal?

A. Why, we are paying—Oh, just now——

Q. Generator coal?

A. Just now we are paying, I should say from $12 to $14 a ton

for anthracite. Some of it may be ten dollars in some places,
755 but I doubt if we get——

Q. Ten dollars at the place where you have got a $1.85 *frequent* rate?

A. Well, I could not say to that. I figure our anthracite coal is costing us about $12 a ton delivered in most of our properties; the western property it gets up to about $14.

Q. That is on account of the higher freight rate?

A. The higher freight rate, yes.

Mr. Moran: You mean the difference is on account of the higher freight rate?

The Witness: The difference is on account of the higher freight rate.

Q. Do you know what the freight rate is at the $10 a ton point?

A. No, but I should say that the freight is running around— We are paying—put it this way: We are paying probably $6 or $7 at the mines. Now, that includes the handling charges, and the freight rate and the dealer's profit.

Q. That includes——

A. No, I mean the $12 includes it, so it means about $5.

Q. You are paying $5 at the mine?

A. $6.

Q. About $6 at the mines?

A. About $6 or $7 at the mine, yes.

Q. Whom do you buy your coal of?

A. Well, I could not tell you just now. We buy from Parish, Phillips, here in this city, we buy from Newton, Philadelphia.

756 Q. Have you a company that is served from, we will say, Perth Amboy by boat?

A. We have not. We haven't any companies there.

Q. What number of pounds of boiler coal do you use per thousand cubic feet at Syracuse?

A. Well, I haven't got that figure right off, right on hand here; but I should say that we were running about fifteen pounds, from my observation and memory.

Q. And what number of pounds of generator coal do you use per thousand cubic feet at Syracuse?

A. We are running about 32 to 33 pounds. Of course, that will vary from month to month.

Q. What average candle power do you furnish at Syracuse?

A. Well, we don't make a candle power gas; we make——

Q. Do you test for that at all?

A. No. We are making 585 average heat units.

Q. What number of gallons of oil per thousand cubic feet do you use at Syracuse?

A. Why, I should say that we probably averaged 3.4 gallons, and sometimes when we get a little poorer grade of oil it will run three and a half—3.3 to 3.5.

Q. Have you in mind the ordinary variance in b. t. u. standard of your gas served from one day to the other?

A. I have not.
Q. How high a variance?
A. Would I look for?

757 Mr. Moran: Are you permitted by the order?

A. (Continuing.) Oh, it is a 5 per cent reduction. In other words, the 585 is an average that we must maintain, I think for three days, and we maintain that for the month. We are permitted to drop to 5 per cent below that in any one day, so that is about 28 heat units, 28 or 30 heat units, and we live within that. I was some time ago looking over our records, and we were living practically within that variation.
Q. And you go how much above it?
A. 585, I mean.
Q. How much above 585?
A. Well, right offhand I could not say, but I don't suppose we go over 15 or 20 heat units above it. We catch that pretty quickly.
Q. How does the price for coal you are paying now compare with the price you paid a year ago at Syracuse, for generator coal?
A. I haven't those figures here.
Q. Do you have it in mind, substantially? Is it substantially higher?
A. We are using the same—practically the same quantity of boiler fuel up there——
Q. I am speaking of price per ton now?
A. I was going to say the same quantity, and I could give you the cents per thousand.
Q. Oh, yes. You are using about the same amount of generator fuel as the Kings County Lighting Company, but markedly less boiler fuel?
A. You know it is a rather remarkable thing on generator fuel, all well managed companies will run between 30 and 40
758 pounds, and while they might average 35 pounds, the best gets down to 33 or 34.
Q. About the same, you are as they?
A. Yes.

Mr. Moran: They are two well managed companies.
Mr. Hill: You want to change your firm then.
Mr. Moran: What?
Mr. Hill: You want to change your firm then.
Mr. Moran: Why?
Mr. Hill: You are using too much boiler fuel.
The Witness: There has been very little change in our boiler fuel costs there.

Q. In the generator fuel?
A. In generator fuel it has only been a little over a cent, so we practically have the same price for generator fuel in 1919, as we have had here in the six months of 1920.
Q. Isn't it a fact that there is a heavy exportation of anthracite coal at this time?

A. I don't know that.

Mr. Moran: Have you the Syracuse statement for six months?

The Witness: Yes.

Mr. Moran: Do you have outlying holders in Syracuse where you pump your gas?

The Witness: We have one outlying holder, that we do not pump very much gas. Probably it is just a small distribution holder.

759 Mr. Moran: You do not have that—your boiler fuel expense is not burdened with pumpage of gas at high pressure to an outlying holder a couple of miles away, as it is in the Kings County Lighting Company case?

The Witness: No, we do not pump all of the gas; we pump some of it out there, a two pound distribution system, at certain hours of the day, a reinforcing system; but I should say the majority of the gas goes out under normal holder pressure.

Mr. Moran: Well, what I am getting at is the expense of pumping it out included in your manufacturing cost or in your distribution cost?

The Witness: It is included in our—we have a charge here of transmission pumping, but that is .15 of a cent.

Mr. Moran: That is not included in your boiler fuel at all?

The Witness: That is not included in our boiler. Our boiler fuel is included in the——

Q. (Interrupting.) Is that .15 as you understand it including the fuel for the pumping?

A. It does not include the fuel for the pumping, it is miscellaneous expense.

Q. Where are your holders in Syracuse? All at one point?

A. We have four at the works and one outlying holder.

Q. Where are your works located?

A. Why, pretty nearly in the center of the business district.

760 Q. Around what street?

A. I don't know the street.

Q. Adjacent to Salina?

A. Oh, within three blocks of Salina street and the canal, right on the Erie canal.

Q. Near West Onondaga Street?

A. I don't know the streets there. You see, it is off the main street. There are two little side streets in there.

Q. There are four holders there?

A. Works, yes.

Q. The other holder?

A. The other holder is out in the southwestern part of the city,—southeastern part of the city.

Q. Near the University?

A. Yes, out in that direction, north of the University.

Q. That is a matter of a couple of miles up to that holder isn't it?

A. Yes. That holder takes very little of the gas.

Q. What is the capacity of that holder?

A. I could not say. Not over two or three hundred thousand feet.

Q. It serves State street and that section around the University?

A. I could not say.

Q. Now, you had the same experience as this other company in connection with the increase of wages?

A. Oh, yes.

Q. Isn't it your opinion that through the laying off of men by the Pennsylvania Railroad, the American Wooden Company and the other companies that are laying off men, and the increased emigration, that that price will go down?

A. Well, I would not want to express an opinion on that. The price has been going up even right along, and we have
761 trouble in getting labor. In fact, we can't get labor there to change our puncher boxes, and we have had the University students come in and do it for us.

Q. Judging from any *way* other time, the emigration has smartly increased, has it not, in the last two months?

A. I don't know.

762 Q. If it were a fact, given out by the Immigration authorities, that there were 70,000 came in in June, 1920, as against less than 30,000 a year ago in June, that would be a marked increase, in your opinion?

A. I would not consider it a marked increase from what we have been accustomed to.

Q. But it will have a tendency to relieve the situation, will it not?

A. Have a tendency.

Q. And the fact that the railroads are laying off men will have an effect?

A. I do not know that they are doing it.

Q. I don't know that as a fact, it is just newspaper talk, but did not the Pennsylvania just lay off 12,000 men?

A. Yes, but at the same time they are apt to take on 20,000 men on new construction. They will take on more clerks.

Q. You see that the General Electric has laid off a large number of men?

A. No, I did not.

Q. You have seen that Mr. Gompers mentions the fact that the American Wooden has closed down, apparently?

A. Why, from reading the newspapers. I saw a statement to that effect, but it is generally contradicted the next day.

Q. In your assumption as to labor, do you assume that the American Wooden Company has closed down or not?

A. I will not assume anything. I know that it is harder for us to get labor today than anything else. What it is going to
763 be I would not want to say.

Q. You would not want to express an opinion?

A. No, I would not want to express an opinion.

Q. You expressed an opinion as to the expense of the repairs and alterations and enlargements that you said were necessary over there in the plant?

A. Why, I expressed an opinion, because a contracting company, U. G. I. Contracting Company, which was a company associated with our company, had been asked to make a bid to revamp the works, put it in shape, and I went over with the estimates, and also examined the plant with a view to checking that estimate.

Q. Is not the building business at its lowest ebb, and are not their fewer structures being put up now, than at any time in the last seven years?

A. Why, I should say—you mean the number of them at the lowest?

Q. Yes.

A. I should say that is pretty nearly true. I do not know that it is true in our business, but the general building trade.

Q. But unless it is comparatively necessary it is?

A. Absolutely necessary. They cannot get the money.

Q. But that will have a tendency to reduce that expense, will it not?

A. You see, money costs three times what it does normally. When you consider that the rate of interest has gone up fifty per cent, and the cost of construction doubled.

761 Q. But judging the present from the past, if there is less building than there has been any time in seven years, would you not think that that price would eventually come down some. It keeps on decreasing at least?

A. Yes. I do not know where the materials are coming from. There is a scarcity of steel, lumber, labor and everything.

Q. That is, you would expect it.

A. I would expect it. We are holding off for that.

Mr. Hill: That is all.

Redirect examination.

By Mr. Moran:

Q. Mr. Klumpp, has it been true that during the period of the war, you have kept up in additions and extensions to gas plants generally, with the increased demand on them?

A. No. I can truthfully say as to the properties we are connected with that we have not made the increases to plant in keeping with the demand on the business. We have some of our properties right up against it now. We have not been able to get money, and we have not been getting a rate that would warrant us in making expenditures, and if the companies were not on a good financial basis, it would be all the harder.

Q. But this deferred work will have to be done?

765 A. Oh, this deferred work is coming now, and it is coming so fast that a great many of our plants are endangered this winter.

Q. I know, and the construction companies that make gas making appliances, and that sort of thing, are rushed with orders, are they not?

A. There is no doubt about that.

Q. And they will be for a long time to come, to catch up with the deferred work, that deferred work caused by this great war?

A. I should say that is true in gas construction concerns.

Q. And it is more or less true in all other lines, is it not?

A. Yes, sir.

Q. Housing is way behind?

A. The housing is behind, yes.

Q. In one of Mr. Jackson's questions he brought out the idea that the lack of uniformity in the heating quality could all be met and overcome by proper adjustment and readjusting of appliances. Do you recall with reference to that?

A. Yes.

Q. Is it feasible to readjust appliances to get efficiency from gas that is not uniform in its heating quality?

A. It is a great hardship on the consumer and on the company, and it is a great expense, to continually adjust appliances; and it means unsatisfactory service.

Q. You would have to adjust them hourly and daily, would — not to keep up?

A. Pretty nearly. Or weekly.

Q. Does the ordinary consumers pay much attention to the adjustment of his appliances?

766 A. The ordinary consumer does not.

Q. The average consumer lets it go; does he not?

A. Yes, he does.

Q. Until it absolutely refuses to work at all, and then he complains?

A. Yes.

Q. We have to deal with a fixed adjustment practically, do we not, in supplying heating quality gas?

A. The more nearer that you can approach a fixed adjustment or make gas at a fixed adjustment, that will be suitable, the more satisfactory the service would be.

Q. In your experience, I wonder if you have made any inquiry in the ordinary community as to the average unit, whether there is very much gas used for illumination in the open flame burner?

A. Why, we have endeavored to gather that information, and the quantity of gas burned in the open flame burner undoubtedly is very small. It is difficult to say just how much it is. We find that in a great many houses they have a large quantity of open flame burners, but they have never lighted them, they have old fashioned chandeliers, maybe six or eight in the parlor that are never lighted. We find that where they do burn gas for lighting and reading purposes, they invariably use the Welsbach mantel, but in slightly lighted places, such as attics and cellars, you will find the open flame burner, a jet that is lighted infrequently, and they are

767 not depending on getting very much light from it when they do.

Q. So you say there is a small percentage used in the community—negligible almost?

A. Well, it is negligible.

Q. Take a community, or take the matter of gas for illumination in a community where there is electric service illumination, by even the mantel burner, is it not a small percentage of the gas that is used in that community for domestic purposes?

A. Very.

Q. Very small?

A. Yes, sir.

Q. The principal use and the major use of gas in the ordinary community is for what, in these modern days?

A. For some purpose for which the regulating is the dominant feature.

Q. But for burning bon fires or what? Just put it on the record.

A. Oh, no, for cooking is the most general domestic use, and water heating, toasting and gas irons, and Welsbach lighting, and then for the industrial work there is annealing, welding, soldering and baking and other uses for which the gas is burned. That would practically cover it, the entire use of gas.

Q. Does reducing the candle power of gas below 22, to any candle power that you might decide, increase the heat unit of the gas in proportion?

A. No, because candle power is not a qualification that is useful at all in the use of gas other than the open burners. You can
765 get an equal value from gas from coal gas with ten or twelve candles, as you can with water gas at 18 or 20 candles.

Q. You said in answer to one of the questions of counsel, when you referred to the prime reason for the companies advocating the b. t. u. quality in gas because it was cheaper than it was to maintain a high candlepower standard. Do you recall that?

A. I said that was one of the reasons.

Q. As a matter of fact, it is less expensive to maintain a 585 than it is the 22 candlepower standard? Is there a saving in oil?

A. Yes, there is a slight saving in oil.

Q. And there is no saving or advantage to the consumer, as I get it from you, from the 22 candle power gas?

A. No

Q. And more oil is used?

A. More oil is used.

Q. And there is no compensating advantage at all so far as your testimony goes, Mr. Klumpp; am I right about that?

A. Over 585 heat units, that is right.

Q. What is that?

A. Over 585 heat unit gas.

Q. Then I would conclude that it is an economic waste to endeavor to maintain a 22 candlepower or any candlepower standard?

A. It is.

Q. And if there is a shortage of oil, as your testimony would indicate, it would be in the interest of conservation to go to the heating quality gas?

A. Yes, sir.

769 The Master: Mr. Moran, there has been a good deal of testimony with reference to the repairs of the company. Is there any statement showing the amount per thousand cubic feet which is properly chargeable to repairs?

Mr. Moran: You mean to repair expense in the expense——

The Master: Well, I notice the question of repairs occurs all through these accounts, but I do not notice them grouped?

Mr. Moran: No, and that is the fault I found with them. I think they did not run over five cents all told. They did in the old days. This company had an expense of about five cents a thousand.

The Master: Does that include labor?

Mr. Moran: That includes everything.

The Master: Repair labor and material?

Mr. Moran: All the repairs you see on the exhibit includes both for labor and material.

The Master: Is it your conclusion from these statements you spend approximately five cents per thousand cubic feet made in repairs?

Mr. Moran: Yes.

The Master: Does that include plant withdrawn from service also?

770 Mr. Moran: No, that is separate. Repairs is the thing that goes on from day to day and is distributed more or less evenly through the years.

The Master: I just wanted to get it clear in my mind.

Mr. Hill: Is there any place where there is repairs except a heading, "Repair Labor and Material"? Take it for 1919, the item $42,000, and it is 2.74 cents.

Mr. Moran: Right on that same page. We can figure them up in just a moment. Right there there is .053 for miscellaneous repairs.

Mr. Hill: Miscellaneous works expense.

Mr. Moran: I beg your pardon?

Mr. Hill: Then there are six items over on the next page.

The Witness: What are you talking about—what year?

Mr. Moran: 1919.

Mr. Hill: There are six items right there together that include repairs.

Mr. Moran: Repairs to mains.

Mr. Hill: Is there anywhere else?

The Master: There are a lot then on plaintiff's Exhibit 2.

771 I do not want to duplicate. There is production expense also.

Mr. Moran: That is a different group of the same thing, Judge. These exhibits are absolutely in accordance with the uniform system of accounts, grouped as they are in the uniform system of accounts. This one is one we have made up and grouped them to be more intelligible to the layman; that is what we thought, because it shows the tons of coal and that sort of thing. You are looking there at the total gas making labor.

The Master: Can't you group—I do not mean at the present time, but *you* can't you group and state what your allowance for repairs is per thousand cubic feet?

Mr. Hill: Is it anywhere except on that first page, and those six items?

The Master: In other words, would it be possible to ask this witness?

Mr. Moran: Yes, I can get it right out in a moment.

The Master: As to any standard of that sort. Is there any general practice followed by the gas companies with reference to these repairs?

The Witness: Your Honor, I have added this up here for the year and——

772 The Master: Just a minute. Perhaps Mr. Moran will put the question. I am simply suggesting to him that he puts this question and brings it out.

Q. Mr. Klumpp, in reference to repairs, you have examined the statements, the expense statements of the company, received in evidence here, showing the repairs of the different parts of the plant?

The Master: Taking Plaintiff's Exhibit No. 2.

Mr. Moran: Yes.

The Master: Showing the 1919 figures.

Mr. Moran: On Plaintiff's Exhibit 6 is just as good.

A. I got it worked out here, Mr. Moran 1919? Is that what you want?

Q. Yes.

A. The repairs in the production costs were 2.74 cents, and in the distribution cost were 2.29 cents, or a total of 5.03 cents per thousand cubic feet for the total works.

Mr. Hill: That is 5.03?

The Witness: 5.03 cents, yes.

By the Master:

Q. It is your idea that plant withdrawn from service should not be included in that computation, is it?

A. Yes, that is a—yes, that is not repairs, that would be depreciation or amortization. It is not a repair charge.

773 Q. Referring now to Plaintiff's Exhibit 6, I do not know whether you know or not, or whether you are able to answer this question or not, but does the item, repair labor and material, as appears on the first page of that exhibit, figuring out 2.74 cents per thousand cubic feet—should that be figured in with that total that you just gave me?

A. Oh, no, that is the same total. You see, these repairs on the exhibit——

Q. Is that included in the other items?

A. 2.74 cents is the figure that I get. That includes the total repairs production and the same figure is carried in repairs material and labor, 8.0274, and checks on the first page. I got that 8.0274 by adding up the repair items and production expense.

Mr. Moran: We group them here together. That simply allocates the repairs to the different accounts.

By Mr. Moran:

Q. You get the repair expense, as you figured, from those exhibits for 1919 as five cents plus?

A. For the two, from distribution and works is 5.03 cents.

Q. Is that a reasonable expense in 1919?

A. Why, I consider that too low. They have not spent enough money for——

By the Master:

Q. Let me ask you this: Is it ordinarily the practice of gas companies to base their estimates of what repairs should be made on the cost of these repairs per thousand cubic feet?

774

A. Yes, we always figure our repairs——

Q. I mean is this a fair standard; it may not be a fair standard?

A. This is a fair standard but this figure—this is a fair standard to compare them by, but this figure is low.

Q. Have you any idea what your plant at Syracuse figured at?

A. I think I have. Do you mean that we have maintained our Syracuse——. We have in the works practically the same figures for 1919, $.0273 in the works as against $.0274. That is just a coincidence, and the same classification.

Q. Do I understand that the Syracuse plant is about the same size as this plant?

A. It is practically the same size. The Syracuse plant has not been maintained in true efficient shape this last year.

By Mr. Moran:

Q. Have you got there the output of the plant in 1919 at Syracuse?

A. At Syracuse? Why, the output sales were one billion, two hundred million.

Q. The sales?

A. The output about one billion, three hundred million.

Q. Our sales were one billion, two hundred million plus. So we sold as much with 39,000 meters as you did with forty odd thousand.

A. (No answer.)

775

Mr. Moran: Judge, these figures on these exhibits are not estimated, you know; they are actual expenditures for 1919.

The Master: Oh, I understand.

Mr. Moran: The one cent, though, is the amount estimated to be necessary to provide for renewals and replacements which are not covered by ordinary repairs, and Mr. Miller said that that was not adequate, that it ought to be larger.

Q. Would you agree with Mr. Miller on that, Mr. Klumpp?

A. I would agree. I am figuring on Syracuse four and a half cents next year, for repairs where we charged 2.7 cents the last year.

Q. I mean renewals and replacements over and above the ordinary repairs. Would you say one cent was sufficient? It only cost us $12,000.

A. Wait a minute. Over and above, renewals and replacements? No, that figure is not——

Q. Remember, that has not anything to do with the capital account, as I understand it.

A. I understand. Those are the extraordinary repairs. For instance, we repair a boiler right along and keep it going. The day comes when you have to throw away that boiler and replace it with another boiler. I would charge in here the repairs, but when we put a new boiler in there might be a $4,000 or $10,000 replacements.

776 We charge that to renewals and replacements, without charging capital, because we have not increased the size of the boiler at all.

Q. This plant, Mr. Klumpp, until we will say any deferred repairs that occurred in the latter part of 1919 and in 1920, had been maintained, properly maintained and in efficient condition?

A. Why, I should so judge, otherwise you would not have pulled through the last winter the way you have——

Mr. Deegan: I object to that as the witness shows he does not know.

The Master: Well, he is simply giving his opinion. He is simply giving his opinion, from his examination in 1919 and 1920.

Mr. Deegan: Exception.

The Witness: The machines show that they have not been maintained this year, and there is a reason for that. They could not be shut down. They have not been repaired and they have been running to the very top of maximum without permitting the repairs to be made.

Q. You take a gas machine with proper repairs, it would go on for a great long time, would it not?

A. We figure the life of a gas machine as at least 30 years. We have some machines running more than that. Of course, they have to be maintained and relined and parts renewed on them. We remodeled two of the machines that were in use there last year that practically made them new machines.

777 Q. Did you observe the buildings there, whether they were properly roofed and maintained? If you did not——

A. I did not get up on the roof.

Q. No, but from more general observation?

A. Why, the boiler house part I did not think was kept up in shape, particularly. I think the other buildings were.

Q. The construction work was going on in the boiler house then, was it not?

A. There was some construction work going on there. That upset things.

Q. I would take it that expenses for repairs will increase as labor and material costs go up?

A. They will, because the material and labor constitutes practically all repairs.

Q. Did you get the totals for 1920 from our exhibit for repairs?

A. Yes. The totals for the six months at the works for 1920 were 3.36 cents, on page 1, and on the distribution system 3.44 cents, making a total of 6.80 cents.

Q. Is that reasonable in your judgment for this——

A. That is better, but that is not as high as I would estimate for a plant of my own. I would figure today four to four and a half cents for works, and four to four and a half cents for distribution. Probably eight to nine cents total repairs. The figure used to be six cents, but we cannot do it for six cents.

Mr. Hill: When you say "used to be," do you mean——

778 The Witness: Normally.

Mr. Hill: Three or four years ago?

The Witness: Three or four years ago. If we spent three cents on repairs, mains, services and meters, it was a fair figure with pre-war figures. It is now five cents, four and a half to five cents.

Q. Just one other word about candle power. One of the counsel asked you a question to the effect that when they reduced the candle power, they at the same time necessarily reduced the b. t. u., and as I remember it you acquiesced in that statement?

A. Well, with the same kind of gas, and if the reduction of candle power is obtained by reducing the oil, the b. t. u.'s naturally will fall.

Q. The number of b. t. u.'s?

A. The number of b. t. u.'s will be lower.

Q. But it still will be a non-uniform gas?

A. It will be a non-uniform gas.

Q. And will the number of efficient b. t. u.'s be reduced just by changing the candlepower?

A. No, not necessarily. I would say no. You see, if you work on a lower candlepower standard, you have the same objection as you have on a high candlepower standard, lack of uniformity, but you have not got it in the same degree. For instance, if you drop to 10 standard, the gas could be made more uniform than it could on the 22 candlepower. The lack of uniformity would be there, but
779 still not in the same degree.

Q. In supplying a b. t. u. gas and taking measurements for it, is it customary at the same time, to take a measurement of the candlepower and regulating candlepower at the same time?

A. No, it is not.

Q. The candlepower is not considered at all, is it?

A. It is not considered in taking a heat unit standard.

Q. Or in providing a heat unit gas?

A. No, you cannot serve two masters.

Q. So it is immaterial what our gas showed in candlepower if——

Mr. Hill: I object to that as——

Mr. Moran: Let me finish it.
Mr. Hill: All right. Do not answer it until I object.

Q. (Continuing:) —so far as its heating quality was concerned?

Mr. Hill: I will object.
The Master: Overruled.
Mr. Hill: Exception.

A. Will you read the question, please?
Q. So it is immaterial what our gas showed in candlepower, so far as its heating quality was concerned?
A. It is immaterial, yes.

Mr. Moran: I think that is all.

780 Recross-examination.

By Mr. Hill:

Q. This variableness of candle power gas as compared with b. t. u. gas, comes from the fact that there is a condensation of the oil?
A. Yes, sir.
Q. From a gaseous form to its normal liquid form; is that so?
A. Yes.
Q. Is there any other cause for the variableness?
A. You are now speaking of this one quality gas that we have covered, water gas?
Q. Yes.
A. You are not talking generally.
Q. Is the ratio of condensation dependent upon the number of gallons of gas that go in?
A. Of oil, you mean.
Q. Of oil, yes.
A. To some extent. Not entirely, though.
Q. Will the condensation in gas containing four gallons of oil be one-third greater than that containing three gallons of oil?
A. Normally speaking it would, but if it is sent out with the idea of maintaining candle power, it would, judge. If you are not working to candle power you can so manipulate your plant that you can condense those hydrocarbons in your plant. So with three gallons of oil working on a heat value standard, you might only have a third condensibles going in the town that you would with four-gallon oil. You can remove those condensibles at your plant.
Q. Can't you remove your condensibles at your plant from a gas in which you have placed 4.2 gallons of oil, just the same as
781 you can with one in which you place the 3.6 gallons of oil?
A. You can reduce them, but not to as low a point as you can with three-gallon gas.
Q. That is, there will be certain condensation of the oil, no matter how little oil you put in the gas?
A. There will be some condensation; yes, sir.
Q. That is, if there is one unit, whatever that unit may be, if you

put one gallon of oil into a thousand cubic feet of gas, ordinarly there will be four times that unit if you put four gallons of oil into a thousand cubic feet of gas?

A. Working under the same conditions, and the same heats that would be pretty nearly true.

Q. Then would not the difference in variation caused by condensation in gas containing 3.6 gallons of oil, with gas containing 4.2 gallons of oil, be practically negligible?

A. The difference?

Q. Yes.

A. No, I would not say that.

Q. How much condensation is that per gallon of oil in a thousand cubic feet of gas?

A. Well, we would get a—you might get one quarter of a gallon.

Q. That is, out of every gallon you would put in you would get a quarter of it condensed?

A. No, of every gallon you put in? No, of each gallon probably less than one-tenth.

Q. Then there would be a tenth of a gallon of condensation of oil in gas per thousand feet, containing one gallon. And
782 there would only be four-tenths if it contained four gallons?

A. Well, no. You see, you have got a factor there of saturation that you have not brought into account. The gas will carry a certain percentage of it up to saturation; then when it gets beyond that the rest of it tumbles out.

Q. You mean it will only hold in solution——

A. It will hold a certain amount in solution.

Q. How much will it normally hold in solution?

A. I depends upon the temperature, of course.

Q. Well, normal temperature.

A. I would not want to say. That is a scientific fact; I would not want to express it.

Q. I thought you stated to me that the condensation would increase substantially, proportionate to the number of gallons you put in up to four?

A. Yes, it will.

Q. Then it is a fact that if one-tenth of a gallon condenses, or gas that contains one gallon, in gas that contains four gallons there will only be four-tenths of the gallon condensed?

A. That may be true. I would not say those figures.

Q. If that is true, if there is that condensation resulting from the increase in the use of oil, and it is so infinitesimal as those figures indicate, then do you still say that a customer is not losing any heating power when the Kings County Lighting Company
783 only furnished 525 B. t. u.'s as the stand- gas, when you consider that you manufacture 620 B. t. u. gas for 22 candle power?

A. Yes, under those figures they are getting 35 heat units less in the thousand cubic feet of gas, average.

Q. Well, 35 is your numerator and 285 is your denominator.

A. 585.

Q. I mean 585. They are losing that fraction of heating value, are they not, when they reduce the candle power?

A. Now, I don't think that is true or fair, but, of course, if you can increase the efficiency of burning, which we I think have demonstrated, on the 585 heat units, by 5 per cent, you are more than compensated; each heat units of 585 we think is more valuable to the consumer than the heat unit delivered at 620.

Q. Why is it more efficient?

A. Because it can be burned more efficiently due to constant use, and constant adjustment of appliances.

Q. But that results solely from that one-tenth of a gallon condensation, and that additional fraction of a gallon that you have to make 22 candle power; isn't that so?

A. Well, it might and it might not. We know that the richer gas gets the more air it takes. For the perfect combustion your adjustment must be between narrower limits, and if you get down to a 300 heat unit gas, you can have quite a variation in
784 the limits of adjustment and burn with efficiency, higher efficiency all the time.

Q. There is greater condensation in cold weather than there is in warm weather; isn't that so?

A. There is, if the gas leaves the works at the same temperature, yes, it will be condensed in cold weather more than in warm weather.

Q. So there should be an adjustment anyway; there should be an adjustment of appliances in order to get a high efficiency, twice per year anyway, should there not?

A. Not necessarily. If you could treat the gas so it leaves the works at a fairly low temperature, at all seasons of the year, you would have a constant gas.

Q. That would apply to a gas containing a high percentage of oil, the same as it would to a gas containing a low percentage of oil?

A. Not as closely; not as well.

Q. But the only difference would be the one-tenth of a gallon or the fraction, would it not?

A. No, it is the saturation point hanging on to the last heat unit.

Q. And you say you cannot tell me up to what number of gallons per thousand cubic feet the oil is held in perfect solution?

A. There is not any such point, but——

Q. Well, substantially perfect solution?

A. No, I cannot tell you.

Q. That is, whether that point is at 3.6 gallons, or whether it is above 4.2 gallons?

785 A. No, I think it is lower than 3.6. I think it is down considerably.

Q. How uniform in quality would you reasonably expect gas to be made to conform to a heating value standard of 625 b. t. u.'s, monthly average?

A. Well, I should say that you could work within thirty heat units, up and down—thirty or thirty-five heat units.

Q. The same question as to gas containing 535 b. t. u.'s?

A. Well, proportionately less. We could work a little closer.
Q. Thirty-five?
A. Yes, five heat units.
Q. As to 550 b. t. u.'s?
A. We could work closer on that.
Q. Well, how close?
A. Well, may be twenty, may be fifteen. It depends on the quality of the oil. May be 15 heat units.

Mr. Moran: May be I am wrong, but I think you gentlemen are talking about a different thing.
Mr. Hill: Let me see if we understand each other. What I mean is, what will be his variation each way in gas at 625.
Mr. Moran: Now, wait just a moment. It is within what limits can gas of 625 be made and produced as compared with the limits of a gas of 585?
Mr. Hill: That is the thought, but I asked him three questions.
Mr. Moran: Let me tell you what is in my mind. One of you were talking I think about the limits that could be successfully maintained in the manufacturing process, and I think the other was talking about the range at the consumer's burner, which could be efficiently handled. I think that is the idea I get.
786
Mr. Hill: All right.

Q. What is the variation at the consumer's burner of 625 b. t. u. gas?
A. Well, it is—that figure cannot be given definitely.
Q. I know, but your best judgment on it.
A. My best judgment on it I should say, 30 heat units each way.
Q. And still at the consumer's meter, or consumer's appliance 585 b. t. u.'s, is somewhere from 25 heat units up, you say?
A. I say 25. These are purely approximations, understand.

The Master: You ask your question again, Mr. Hill.

Q. How uniform in quality would you reasonably expect gas to be at the consumer's appliance, when the gas was made to conform to a heating value of 625 b. t. u.'s, monthly average.

Mr. Moran: If you will pardon me——
The Master: I think he can answer that.
Mr. Moran: I could not.

A. That was my figure; about 30 heat units up and down.

The Master: Now you ask your question.
Mr. Moran: Will you read the question to the witness again?
787
(The stenographer read the question.)

Mr. Moran: Now, what was his answer?

(The stenographer read the answer.)

By Mr. Moran:

Q. Do you mean that you would expect to get the gas delivered at the consumer's burner within that range; that is it is possible in the course of manufacture to get it within that range, or do you mean to say that the appliance adjusted to the 625 b. t. u.'s will efficiently handle gas with that variation?

A. That is a different subject altogether.

Q. Now, which were you talking about?

A. I was talking about the quality of the gas with the higher heat unit, that the variation is greater.

Q. That is, in manufacturing it, you mean that the higher you get the heat unit, the further away you get from uniformity; is that not right?

A. The higher you get the further the gas varies. The lower the heat unit the less the variation in the quality of the gas. Now, in the utilization of the gas the more efficiency is obtained through a wider variation at low heat units, and if the gas is delivered at a higher heat unit, you have narrower limits of regulation, you are working in the opposite direction.

Mr. Moran: Now you are scientifically accurate, I think. Up to this time you and counsel were talking about different
788 things.

Mr. Hill: Not at all. We were taking the variance of b. t. u.——

Mr. Moran: Judge, as I understand it, if you go up to 625, no matter how you manage your plants, the variance in heat units is going to be wider.

Mr. Hill: He said so.

Mr. Moran: Yes.

Mr. Hill: Thirty or a bit above on 585, fifteen or twenty or above on 550.

Mr. Moran: Yes.

Mr. Hill: He said that.

Mr. Moran: When you get out to the fellow's appliance, and it is adjusted to 625, he cannot handle at that as wide a variation as he could if he was adjusted for 485. He has testified to that.

Mr. Hill: That is all.

Redirect examination.

By Mr. Moran:

Q. Counsel has asked you about the amount of condensation depending upon the quality of oil used, or per thousand cubic feet, and he also asked you what number of gallons of oil could be held in perfect solution, or the particles in suspense in the gas?

A. Yes.

Q. You were unwilling to place a fixed amount, but es-
789 timated it might be less than three gallons. Is that right, Mr. Klumpp.

A. Yes. I do not know but——

Q. I am going to make an assumption.

A. Yes.

Q. Assuming that three gallons of oil can be handled, that is, that the oil will remain in perfect solution or particles in suspense in the gas, you increase the oil to 3.6 and there will be then a certain amount, how much it is we won't say, of condensation?

A. Yes.

Q. Now you increase that to 12 or twice as much, won't you have twice as much condensation substantially? In other words, before you get your factor of difference, you have to take out the three gallons that is held there?

A. Yes, to some extent. It is a very difficult thing.

Q. I know, but it is all difficult, and counsel's questions and your answer were general. Now I think I have discovered something. Am I not right about that?

A. You are right to a certain extent.

Q. To a certain extent?

A. Yes, sir.

Q. The amount of condensation is not proportionate to the total number of gallons used, but to the excess over the amount that would stay in suspension?

A. I can answer that in this way, if that rule followed straight the proportionate rule, we could make any candlepower or any heat unit gas. But we cannot. As we work along to use five gallons of oil and six gallons of oil, we can not get any more in the
790 gas, and the whole thing will fall out. As we did the other day in our plant, it tumbled out altogether.

Recross-examination.

By Mr. Hill.

Q. But you do not know what that point of saturation is in gallons?

A. I tell you no, because that is a variable point, judge. That depends upon what the hydro-carbons are in suspension.

(Witness excused.)

RALPH ELSMAN resumed the stand.

Direct examination continued.

By Mr. Moran.

Q. Just to refresh the witness's recollection, you recall when you left the stand before you had just been asked a question with reference to giving testimony before the Public Service Commission in the winter of 1918?

A. Yes, sir.

Q. Concerning the difficulty your company had in maintaining its service in that cold winter?

A. Yes, sir.

Q. And the fact that you had not been able to maintain the candle power?

A. Yes, sir.

Q. Do you recall that?

A. Yes, sir.

Q. I think you said you gave testimony before the Public
791 Service Commission substantially as you did here?

A. That is correct.

Q. Did you subsequent to that time, the time of giving that testimony, make any written application to the Commission to relieve you from furnishing candle power gas?

A. No, no written application.

Q. You made on written application?

A. No, no written application.

Q. And so far as you know the Commission has never made an order applicable to your case, or applicable to your company, giving you the absolute right to change from a candle power to a heating quality gas—just so far as you know?

A. They made no order except that general order giving us the preference of using a certain heat unit gas against the 22 candle power.

Q. That was the war time order?

A. Yes, which was not accepted.

Q. And it has lapsed by its own limitations long since?

A. Yes.

Q. We have had that put in evidence to show just what it was. Then did the Commissioners request you or command you to restore the candle power in the year 1918?

A. They did.

Q. Just what was done about it?

A. I informed the Commissioners at the time, at this conference, that under the operating conditions it was impossible to re-
792 store the candle power, in view of the fact that the high price of oil, and the other high operating expenses, and the depleted condition of our treasury, made it impossible for us to purchase oil sufficient to make up the 22 candle power gas.

Mr. Deegan: Just a moment. I want to object this as entirely incompetent, immaterial and irrelevant. The Commissioners cannot act informally and authorize you to do this or that. It has no binding effect upon the company, and it is not binding on the defendant Nixon now, as to any informal conferences he might have had with any of the Commissioners. I do not see how it is in any way material to the issues involved in this case.

The Master: I think there is a good deal in that objection.

Mr. Moran: Save only that it shows this company was not doing this stealthily or in any effort to conceal it at all.

Mr. Deegan: Your purpose is to show knowledge by the Com-

mission, isn't it, of the fact that this company was not at that time—is that your idea or isn't that your idea.

Mr. Moran: It happens to be knowledge to the Commissioners, yes, but it is merely as explaining all the facts in the case.

793 Let it fall where it will; it may convict us of crimes, I don't know.

Mr. Deegan: Just a minute. The Master not ruled.

Mr. Moran: You made an objection after the question was asked and answered.

Mr. Deegan: Then I move that it be stricken out.

The Master: Did he not send him some letter or send some formal statement to him?

Mr. Moran: He had these visits.

Q. Did you write any letter to him at that time?

A. Not at that time. I did at a later date. In 1920, I have written them.

Mr. Master: I will strike out the testimony of the informal conversations with the Commissioners.

Mr. Moran: Won't your Honor permit it for the purpose of showing that the company did it in an open and above board manner?

The Master: I will let him say that he conferred with the Commissioners about this matter informally, but I won't let him say what he said.

Q. You conferred with the Commissioners, the members of the Public Service Commission in 1918 about the candle power?

A. I did.

Q. The matter of the quality of gas you were furnishing?

A. Upon their request.

Q. During this period of 1918, or up to 1918, you main-

794 tained the 20 candle power standard?

A. Always, with a very good average.

Q. And since the beginning of 1918, or about the first of the year, or whenever this cold weather——

A. The latter part of 1917.

Q. Well, since that time, whenever this cold weather came on, you have continued to furnish a heating quality gas?

A. We have endeavored to maintain a 585 b. t. u. standard gas.

Q. And you have not endeavored to maintain the candle power?

A. We have not, no.

Q. In 1918, what was your rate, that you were charging to customers?

A. 95 cents.

Q. How much of that was available to you for your expenses?

A. 80 cents.

Q. And the 15 cents?

A. Was impounded in the Empire Trust Company under the Court order.

The Master: When did this begin?

Mr. Moran: The impounding?
The Master: When was your question directed to, the year 1918?
Mr. Moran: 1918, that was when the candle power situation developed.

Q. That impounding had been begun at what time?
A. July 1st, 1916.

795 Q. Then it is since July 1st, 1916, that you have only had 80 cents?

A. Available for operating expenses.

Mr. Hill: Pardon me, so I won't have to examine him, up to this time?
Mr. Moran: What?
Mr. Hill: Up to this time?
The Master: He is going on to explain.
Mr. Moran: Up to the entry of the judgment in the State Court. We are going to furnish you a statement of our expenses for 1918, at your request, and the request of the others.
Mr. Hill: That is very nice, but what I meant was the question whether they are still impounding 15 cents.

Q. You have not impounded anything since the Greenbaum suit, have you?
A. Yes, we have impounded money since.
Q. No, I am calling your attention now to the entry of the judgment, the 29th day of March, 1920. Anyway you are not doing it now?
A. No, we are not doing it now.
Q. You have not done it since you began this action?
A. No.
Q. And for some months before while you were getting ready for this action?
A. That is correct.
Q. In 1918 weren't steps taken to make available or have made available to meet your expenses of operation anything in addition to the 80 cents?

796 A. I don't quite get your question.

Q. Do you recall that a motion was made in that action in 1918?
A. Oh, yes.
Q. For leave to be relieved from the necessity of impounding the moneys?
A. Oh, yes, sir, we made a motion before Supreme Court Justice Pendleton, in which we asked leave to withdraw the funds from the Empire Trust Company, in order that the Company might make such extensions and improvements to its plant as were necessary to keep it in operation for the coming winter. That order was——
Q. Just a moment, to withdraw the funds at the time impounded?
A. That were deposited.
Q. And to be relieved from the further——
A. From further deposits.

Q. And you wanted the funds already impounded to make extensions?

A. Additions and betterments.

Q. Why didn't you sell your securities at that time?

A. Well, we were not able to sell our securities at that time. Our financial showing was such that we showed no return upon any investment.

Q. Was your motion granted?

A. Our motion was granted in part.

Q. To what extent?

A. To the extent that the funds were allowed to be withdrawn and used for capital expenditures, and in substitution for the cash which was deposited, we were asked to deposit our first refunding mortgage bonds.

797 Q. Of a like amount?

A. Of a like amount, withdrawn.

Mr. Deegan. Why not let us have a copy of the order?

Mr. Moran. We have sort of agreed we would not lumber the record up with long papers.

Mr. Deegan. That would not lumber up the record with long papers; it would be an exhibit in the case.

Mr. Moran. I will accept that and put in the order and the opinion of Mr. Justice Pendleton.

Mr. Deegan. I have no objection.

Mr. Moran. All right. I will produce the order this afternoon.

Q. Were you relieved from the necessity of making further deposits?

A. We were relieved from the necessity of making further cash deposits.

Q. But you put up your bonds?

A. We put up our bonds.

Q. You said the funds up to that time impounded were withdrawn to make additions and extensions?

A. Additions and extensions.

Q. What about the funds that you were relieved from impounding in the future?

A. We were allowed to use those funds simply for making additions and extensions to our property.

Q. Were you prevented from using them for operating expenses?

A. We were.

798 Q. Do you recall that you were asked to have them——

A. Yes.

Q. Do you recall that you asked to have them released to you for use for operating expenses?

A. Yes, we asked to have the funds released so that we could use them for any purpose, either for operation or for capital expenditure.

Q. But you were not allowed to use either the impounded funds or the——

A. Or the funds that were to be impounded; we were not allowed to use them.

Q. So then you have only had available for operating expenses 80 cents?

A. Ever since 1916.

Q. Ever since 1916?

A. Yes.

Q. And you say in 1918 your expenses were how much for manufacturing and distributing gas?

A. About 80 cents.

Q. And that was which kind of gas?

A. That was 585 b. t. u. gas.

Q. Of course we have the figures here for 1919 and 1920. Is one of the reasons why you have not supplied the candle power gas the lack of funds to do it with?

A. Why, that is the principal reason.

Q. I think you testified that your consumers have made less frequent complaints about the quality of gas since?

A. Oh, we have had less complaints from our consumers on account of poor gas, so termed in the gas business—from our consumers since supplying 585 b. t. u. gas than we ever had in the history of the company.

Q. Mr. Elsman, attention has been directed to these exhibits numbers 15, 16, 17 and 18, with particular reference to the heat units in the gas supplied in the months of May, June and July.

A. Yes.

Q. You recall that?

A. I do.

Q. And you recall also that the showing there is not as good as it was in the earlier period?

A. I am very well aware of the fact.

Q. Why is that so?

A. I would like to go back. Beginning in December, 1919, we commenced to run into a poorer grade of oil, and in January and February, we had a fairly good supply of oil, running fairly high in gravity and pretty low carbon content. In March our troubles commenced to accumulate, for the reason that the oil that we were getting was very high, thick, high in carbon content, and it commenced to clog up our machine, and in May our plant was practically shut down from the clogging up of our lines between our exhauster, the inlet side of our exhauster, and the outlet side of our condenser, due to this accumulation which was formed in the making of the gas in our machines.

After we had experimented with this oil for the first three or four months, we were practically at a loss as to how to handle it, and the time that I mention when our works were nearly shut down, we were a number of days pumping this sludge, out of our pipes in order to keep the gas going through. At that time I conferred with the Public Service Commission, who sent their engineers to our plant, and there was Mr. Klumpp and Mr.

Searle, and various other noted engineers who were asked if there was any way we could over come the making of this sludge. We looked it over carefully, and we came to the conclusion that there was no way that we could actually over come the making of it, but we could cut it down a certain degree by watching the heats on our machines very closely, and at the same time varying the amount of oil which we put into the machines.

At the suggestion of Mr. Merryfield—I give him great credit——

Q. Who is he?

A. He is the Public Service Commission's engineer. He suggested that we cut our oil to about 2.75. Two and three quarter gallons per thousand, to see if that would stop the making of this accumulation.

Mr. Deegan: Now I object specifically to this and move to strike out anything that Mr. Merryfield may have done as not binding on the Commission.

The Master: I will let that stand. Objection overruled.

Mr. Deegan: Exception.

A. (Continuing:) And I tried that, and for a while it worked out. Then again we found that even with 2.75 oil we made this
801 accumulation. So we found that on some of our machines we would have to keep the heats within ten degrees, and on other machines—I will change that, on some machines we had to operate the temperature at thirteen to fourteen hundred, or even to thirteen hundred and fifty, on other machines we had to carry heat of 1,200 to 1,250, and we were thereby enabled to keep the accumulation of this sludge down to a minimum, to keep the gas going through our pipe lines. We are still making it, however.

Q. Still making which?

A. We are still making the sludge.

Q. That is the sludge is still——

A. But it is in a liquid form.

Q. You do not intentionally make it?

A. No, but it is still being made, it is in a liquid form. We are able to pump it out by means of steam siphons. At the time we shut down the sludge pumped out had to be pumped out by bilge pumps, and it came out like sand, and no steam siphons would move it. We had twenty inches or eighteen inches of this solidified emulsion in a 20-inch pipe.

Q. That filled it up within two inches of the top?

A. That filled it up within two inches of the top.

Q. That still is being deposited in the pipe?

A. It is still being deposited in the pipe, and in a liquid form. We are able to move it with steam siphons.

802 Q. During this period of May, June and July, you had reduced your oil in order to keep the gas going through?

A. My prime object, as I notified the Commission by letter, was to keep gas on the town.

Q. Let me ask you, was this condition aggravated by the fact that you had been running your machine for long periods, long intervals

without relining and recheckering, due to the heavy demand on your plant?

A. Oh, yes, it was further aggravated for that reason, because we were unable to clean out our wash boxes, and blow a certain amount of this carbon deposit out. We found our machines were so dinkered up and so solidified by the deposits there we had to clean them out with electric drills.

Q. When your plant got in this serious condition, that was along in May, was it not?

A. Yes, sir.

Q. Did you notify the Public Service Commission?

A. Yes, sir.

Q. And was Mr. Merrifield there at the direction of the Public Service Commission?

A. Oh, yes.

Q. Just answer yes or no.

A. The Commissioner was there himself, too.

Q. You spoke to Commissioner Nixon himself?

A. Yes, sir.

Q. And he said he would send a man there?

A. Yes.

Q. And one of the men who came there was Mr. Merrifield?

A. Mr. Merrifield.

805 Q. At that time, did one of the deputy commissioners come there?

A. Yes, sir.

Q. Which one?

A. Commissioner Donnelly. He was there a number of times.

Q. Did he review the situation?

A. Yes, sir.

Q. Did he say anything to you about keeping gas on the town regardless of heat units and regardless of candle power?

A. Keep the gas on the town and let the candle power or b. t. u.'s go where they will.

Q. And you have been able to keep it on so far?

A. We have been able to do it with ceaseless efforts.

The Master: We will suspend until 2 o'clock. Let me ask you to think over during lunch time just how much longer the hearings are going to take, how much time is going to be consumed in the cross-examination, because it looks to me as if I would have to go into a case on Thursday, a trial.

Mr. Hill: For about how long a period?

The Master: It might last three or four days.

Mr. Moran: I think the plaintiffs can be through tomorrow.

The Master: I am perfectly willing to sit tonight or tomorrow night in order to get this case in.

Mr. Hill: I am sure you will get your case in Thursday

804 night, and that will give us a little opportunity to look at the record.

The Master: I am perfectly willing to sit, as far as that goes—I

mean if I go into this case Thursday. I think Judge Sheppard in the District Court is sitting from ten to two, I think, and then adjourning. I am perfectly willing to sit from three to six on Thursday and Friday. Thursday, I won't say Friday.

Mr. Hill: If we are ready to go on and can be ready as quick as that, we will. I want to help them out.

The Master: If we can get through this week, that is what I am warning you of. I am practically certain of going into a case on Thursday.

(Recess until 2 o'clock P. M.)

805 Afternoon Session.

RALPH ELSMAN resumed the stand.

Direct examination (continued).

By Mr. Moran:

Q. Does your company receive reports of tests of your gas made by the City?

A. Daily, except Sundays and holidays.

Q. And that has continued since you have been with the company?

A. Oh, yes.

Q. During all this period of 1917, 1918, 1919 and 1920?

A. Yes.

Q. They have sent reports of tests?

A. Daily, yes, sir.

Q. Do you know where they have tested it?

A. Yes. It is on New Utrecht avenue, about three and a quarter miles from the plant.

Q. About how far?

A. About three and a quarter miles from the plant.

Q. They do not send you b. t. u. tests?

A. No, sir.

Q. Just the candle power tests?

A. Yes, sir.

Q. Mr. Elsman, you are interrogated about what effort you had made to get your additional equipment?

A. Yes, sir.

Q. Have you negotiated with any manufacturing companies?

A. I have been negotiating for the past year. We had planned, laid out plans for our works, and for the next four years, deciding as to what kind of a plant we wanted to build, and we had
806 narrowed the new equipment down to — has got to be installed this year; and I have also gone to the point of receiving or getting definite answers, quotations and specifications, just under what conditions the plant will be installed.

Q. Have you negotiated with the Bartlett-Hayward Company?

A. Yes, sir, I have been in correspondence with them, and had negotiations with them for some time.

Q. With the idea of having them supply some particular part?

A. The holder.

Q. A holder?

A. They are bidding also on the purifying boxes.

Q. They specialize on holders and purifying boxes and that part of the work?

A. Yes, sir.

Q. You have not let a contract yet?

A. I have a contract, which is unsigned, on my desk.

Q. From the Bartlett-Hayward Company?

A. No, sir.

Q. I am speaking about the Bartlett-Hayward Company?

A. Not from the Bartlett-Hayward Company.

Q. Have you made a contract for the holder?

A. No, sir.

Q. With anybody?

A. No.

Q. You intend to get that from the Bartlett-Hayward Company?

A. Well, it all depends. I will get it from the lowest bidder, and the one who will get it in the soonest.

807 Q. Now, for any other part of the work have you negotiated?

A. Yes, sir, I have a definite specification from the U. G. I. Contracting Company, as to under what conditions they will install the plant and how soon it could be installed with me here.

Q. You have got their terms here?

A. Yes, sir.

Q. Produce it, please.

A. (Witness produces paper.)

Q. You produce a letter dated July 29, 1920, signed by T. J. Collins, Vice President of the U. G. I. Contracting Company, addressed to you?

A. Yes, sir.

Q. That is what you refer to?

A. Yes, sir.

Q. This is in response to your request as to what they can do?

A. Yes, sir.

Q. In the way of getting it in with the least possible delay?

A. Yes, sir.

Q. And what their terms are?

A. Yes, sir.

Mr. Moran: I offer it in evidence.

Mr. Jackson: I object to it as incompetent, irrelevant and immaterial.

Mr. Moran: It was brought out the other day on cross examination of one of the witnesses, in reference to the company's efforts to get this work done. It is also apropos of the testimony that was

given as to the time it will take to get this in, and that sort of thing.

808 The Master: Objection overruled and exception.

(The paper was received in evidence and marked Plaintiff's Exhibit No. 34.)

Q. What efforts have you made towards financing?

A. Why, I know it has been impossible for us to sell any securities, so I have therefore limited my financing to borrowing ready cash from the banks in order to keep the company—to pay the company's operating expenses and keep us going. I have succeeded up until the first of the year in borrowing sufficient money from the banks to pay the deficit in our—made up the difference between our operating revenues and our operating expenses, to buy sufficient coal and oil and pay the labor to keep us running.

Q. What is the extent of your borrowings?

A. I have borrowed a total of $225,000 from the banks.

Mr. Jackson: What dates?

The Witness: Why, $200,000 of that was borrowed up until some time after the 1st of the year——

Mr. Jackson: Between what periods, I mean?

The Witness: Year of 1919 and——

Q. (Interrupting.) The most recent borrowing?

A. The most recent was some three—about three months ago I endeavored to borrow $150,000, and succeeded only in being able to borrow $25,000.

Q. Did you give security for this loan?

809 A. Why, we have, all the security we have, yes.

Q. What security have you given?

A. We have given about $101,000 of our first refunding mortgage bonds.

Q. On this whole loan of——

A. (Interrupting.) On this whole loan of $225,000.

Q. You spoke this forenoon about withdrawing the funds from the Empire Trust Company to make additions and extensions. Did you use this to make additions and extensions up to the present time, such as have been made since 1916?

A. Oh, yes, and the difference in the funds that we have—the shortage has been made up through a certain amount of this loans, a portion of that loan.

Q. No, I asked you about——

A. (Interrupting.) Yes.

Q. If the additions and extensions you had made since July 1st, have been made with the moneys withdrawn from the Empire Trust Company and withheld from the Empire Trust Company?

A. Yes.

Q. You have sold no securities, I think you told us?

A. No.

Q. Do you owe current obligations for material and supplies?

A. Yes, many of them.

Q. Can you give the amount?

A. Oh——

Q. Never mind.

A. No, I can't give the exact amount. I know it is many thousands of dollars.

810 Q. Have you a large stock of meters on hand?

A. W- have practically no meters.

Q. Practically none? What does that mean?

A. We have just a few meters to take care of our rotating stock, that is, the meters that are to be removed for non-registration and complaints and matters of that kind.

Q. You have no meters in stock, new meters in stock, except for new customers?

A. We have none whatsoever.

Q. And no funds to get any?

A. No.

Q. And have you supply of service pipe and that sort of thing?

A. No, we have practically no service pipe.

Q. Have you got a full quantity of oil and coal on hand from day to day?

A. No, we are just running from hand to mouth on both coal and oil.

Q. How many day's supply of coal have you on hand, now, do you know?

A. Possibly eight days' supply.

Q. And oil?

A. Oh, I don't know off hand today. About two or three days possibly, something a little more.

Q. What is that?

A. Probably two or three days, a little more. I don't know off hand, today.

Q. Are your deliveries of oil and coal due to your inability to pay your debts?

A. Deliveries of coal are due to our inability to stock up. We could receive coal, sufficient coal, if we could pay for it, but our deliveries of oil are more or less due to the shortage of oil, and

811 the small quantities that we have just received——

Q. You owe a substantial oil bill now?

A. Yes, we are paying interest on our oil bills.

Q. How much oil and coal—how much oil should you have on hand to insure safe operation?

A. About 750,000 gallons.

Q. And you probably have on hand today how much? About what part of that?

A. About 20,000 gallons, 25,000 gallons.

Q. A couple of days delay in the harbour would——

A. Put us out of business.

Q. Do you think you could get this if you had money?

A. I could get probably a greater supply than I am getting now, but I could not get anywheres near 750,000 gallons at the present time. It would enable me, however, to go out and buy spot oil, and pick up cargoes outside of my contract, to put in this stock.

Q. In reference to expenses of manufacture and distribution, we have carried it down to June 30, 1920. The figures on the exhibits for that period are the figures for the whole six months, the average for the six months?

A. Yes, sir.

Q. Your costs since that date, or in the latter part of the six months' period are higher than the average?

A. Yes, sir.

Q. To illustrate, what are you paying for oil now?

812 A. 10 cents per gallon.

Q. And the average on your statement for 1920?

A. May I look at the statement? (Witness refers to paper).

Mr. Jackson: You mean ten cents under contract, Mr. Elsman?

The Witness: Yes, sir. It was 7.9 cents per gallon.

Q. So it is now over two cents above the average for the six months?

A. Yes. That ten cents is the cost alongside.

Q. Now, your coal is now higher than it was for the six months?

A. Yes, sir.

Q. Have you had computed the increases in the unit costs due to the present prices of coal and oil?

A. Yes, sir. On coal and oil alone, that is, the substitution of the present day prices of coal and oil.

Q. This statement has been prepared to indicate the costs based upon the present unit prices of coal and oil as compared with the others?

A. Yes, sir.

Q. Is it not?

A. Yes, sir.

Q. Now, take the matter of oil?

A. Yes, sir.

Mr. Jackson: Are you putting it into evidence?

Mr. Moran: I am going to, yes.

Mr. Jackson: Hadn't you better do that before you refer to it?

813 Mr. Moran: Yes.

Q. The oil used in the first six months was 3,423,681 gallons at——

Mr. Jackson: I would like to have this in order. You are reading from some paper, aren't you? You are stating the amount?

Mr. Moran: No, it is all in evidence. It is in evidence nine times.

Mr. Jackson: Is it?

Mr. Moran: Yes.

Mr. Jackson: All right.

Q. (Continuing:) 3,423,681 gallons at an average cost of 7.91 cents per gallon?

A. Yes, sir.

Q. Or a total of $373,686.40?

A. I would like to correct that, it is $273,686.40.

Q. Now, the same quantity of oil at the present prices would cost how much?

A. At the present prices it would be ,I ——

Q In dollars, in dollars — the same quantity?

A. I mean present prices of oil. It would be $344,079.94.

Mr. Jackson: What rate?

Q Or an increase over the cost of the oil for the first six months of how many dollars?

A. $70,111.54.

Q And that raises the prices of gas how many cents a thousand cubic feet?

A. 8.71 cents.

811 Q. In other words, just on account of the increase in the price of oil, the present contract price of oil, it will cost the gas company 8.71 cents more than the price shown on the exhibit for 1920?

A. Yes, sir.

Mr. Jackson: At what rate for oil is that?

Mr. Moran: That is at contract price, ten cents.

Mr. Jackson: Well, tell us it.

Mr. Moran: Contract price.

The Witness: Well, I will tell it.

Q. Have you computed the coal in the same way?

A. Yes, sir.

Q On the statement you have handed to me?

A. Yes, sir.

Mr. Moran: To shorten the testimony of the witness, I will ask to put the statement in evidence.

Mr. Jackson: That is from the books? The schedule or statement is taken from the books?

Mr. Moran: No, it is a computation.

The Witness: It is an actual condition.

Mr. Jackson: From the books?

Mr. Moran: No, not from the books.

Mr. Jackson: Just on your contract prices?

The Witness: Yes, sir. It is the prices that we are paying today as per contract.

815 Mr. Hill: The quantities come from the books, don't they?

The Witness: We are merely substituting the same quantity that we used in the first six months.

Mr. Jackson: According to the books?

The Witness: According to the books and according to our actual records, and substituting the prices that we are paying today and will pay at least for the balance of the year.

Mr. Jackson: We only wish to make the objection and take the exception that we had to all the other schedules.

The Master: Objection overruled and exception.

(The paper was received in evidence and marked Plaintiff's Exhibit No. 35.)

Q. Just for the sake of the record, coal and oil—the coal, the average cost according to exhibits for 1920 already in evidence is 97.3 cents?

A. Yes, sir.

Q. A thousand cubic feet?

A. Yes, sir.

Q. And this increase in coal and oil raises that price to what is shown by Exhibit 35 just received in evidence?

A. $1.10—$1.1032.

Q. $1.10 plus?

A. Plus, yes, sir.

Q. As against an average rate, statutory rate of 79.5 cents?

A. Yes, sir.

Q. Or a difference of 30.81 cents?

816 A. Yes, that is right.

Q. That is what this exhibit shows?

A. That is correct.

Q. Yes. This is just for the purpose of the record?

A. Absolutely.

Q. Now, Mr. Elsman, that statement, Exhibit 35, does not take into account any increases in labor?

A. It does not take account of any increases in labor.

Q. Or any of the other materials?

A. None whatsoever.

Q. From July?

A. No, sir.

Q. Now, the prices we have got on our exhibits for 1920 are the average prices?

A. Throughout the period of the year from January 1st down to June 30, 1920.

Q. For labor and——

A. And materials.

Q. All of the materials?

A. Yes, sir.

Q. You testified here before that there has been an increase in labor?

A. Yes, sir.

Q. In fact, this week, you put in still further increases?

A. Yes, sir, and I am still considering others.

Q. As a matter of fact, the July probably—or the June labor expenses are more than the January expenses?

A. Yes, sir.

Q. You have so testified?

A. Yes, sir.

Q. So to make it clear the labor expense in 1920 is the average for six months?

A. Yes, sir.

Q. They were higher toward the end of the six months

817 than they were in the first part?

A. Yes, sir.

Q. And they are still higher now?

A. Yes, sir.

Q. Have you figured out what is the present cost with all these elements taken in?

A. For the month of July our costs ran to $1.22 at the burner plus, with the increase. That includes the increases of labor only up to the 1st of—during the month of July. Now, that does not take into consideration the increases of labor which have taken place in the month of August, which, as I testified before, in the works alone, I believe amount to one and a half cents a thousand, and it does not take into consideration the increases of labor in the distribution department, immediate increases being necessary in the meter repair shops which will be at least ten per cent, and the increases in labor in the remainder of the distribution department including street mains, nor does it take into consideration any of the increases in the salaries of the employes in the general office.

Q. These figures you have given are from your monthly statement?

A. From our monthly statement.

Q. Of course, your August statement is not out?

A. No, sir.

Q. In connection with this matter, these expenses you have given here, these costs here, do not include any interest charges?

A. No, sir.

518 Q. No interest on bonded indebtedness?

A. No, sir. No interest on funded debt whatsoever.

Q. What funded debt have you?

A. We have outstanding, $3,178,000 in bonds, $750,000 of which are first mortgage bonds of the prior company and the balance of the first refunding mortgage bonds.

Q. Now, those first mortgage bonds are the bonds of the Kings County Gas and Illuminating Company?

A. Yes, sir.

Q. And there are $750,000 of them bearing interest at five per cent?

A. Five per cent.

Q. And they mature when?

A. 1940.

Mr. Hill: I object to this on the ground that it is no evidence of value. There has been talk of a concession being made as to the value of the plant. It does not appear that all the bonds issued and sold, if they had the proper measure of value—that the proper measure of the return should be figured upon them.

The Master: I don't understand that it is introduced as an evidence of value, is it?

Mr. Jackson: May we find out what theory counsel introduced it upon?

Mr. Moran: I have never known a rate case yet that the Court did not state the securities outstanding of the company. I don't see how the Court can do it——

819 Mr. Jackson: That is, for the purpose of ascertaining a return upon them?

Mr. Moran: I don't know. They always state it, in every rate opinion that I have every read. I don't know why they state it.

Mr. Jackson: They state the value of the property and we expect to have that stipulated, don't we? If we are going into that matter——

Mr. Moran: I will stipulate this, if you are stipulating——

Mr. Jackson: I did not know whether you were ready to stipulate yet.

Mr. Moran: When the Court or the Master write his opinion, or the District Court or the United States Supreme Court comes to consider this case, they will say, "Have you any securities out at all?" "Yes, but we did not dare mention them."

Mr. Jackson: Won't they all be included in what you intended to be stipulated as a rate base?

Mr. Moran: No, we never thought for a moment of stipulating what could be so easily proved as that. I press the question, if the Master please.

The Master: If the rate base is stipulated later, the amount of the bonds outstanding will be of no particular interest.

820 Mr. Jackson: Is the counsel going to prove certain items of valuation, which would enter into the elements covered by a stipulated rate base, and not prove the whole, and place the valuation? If he goes into any part of that, it will be necessary to take all the time to go into that proposition. We will insist upon it. We will not let any evidence as to these issues of obligations go uncontested. As I understood it, the stipulated rate base was to take out the time that was necessary to go into that contest of valuations. Didn't you understand it so, Mr. Moran?

Mr. Moran: Precisely.

Mr. Jackson: Now, hadn't that better be determined as to what is going to be done on that, before you get into any part of it?

Mr. Moran: I have asked a question about the outstanding securities of the company. I think it is important, no matter what the stipulation is.

The Master: I will let it in at the present time, reserving your right to strike it out after this stipulation has been submitted?

Mr. Hill: Exception.

The Master: You see, I don't know exactly, I don't understand—are we going to have a stipulation? We are going to have a stipulation, aren't we?

821 Mr. Jackson: Really, I think it would be more fair——

The Master: I don't see where it is material, if you have a stipulation.

Mr. Jackson (continuing): to have that covered by a certain valuation instead of allowing statements made upon the record, which would tend in the counsel's argument hereafter, and give him a basis for disputing his stipulation, that is, making a showing that he has a greater valuation than his stipulation. I think if the stipulation is entered into——

The Master: I will tell you what I will do. If there is a stipulation in this case, establishing a rate base, I don't see how the bonded indebtedness is material to this inquiry. Now, of course, there isn't any stipulation so far, and I don't know whether there is going to be a stipulation, except from what I have been told; so I have got to let it in at the present time.

Mr. Jackson: We may have an objection and exception? We will have to meet it, that is all.

Mr. Moran: Why, you have all admitted this in your answers.

Mr. Jackson: Go ahead.

Mr. Moran: The Public Service Commission certainly has
822 not denied it, because they have known it for time out of mind, they have issued these bonds and they have been issued under the authority of the Commission.

The Master: The question is how is it material?

Mr. Moran: This counsel has admitted——

The Master: Whether it is material—how is it material, if we have the stipulation?

Mr. Moran: It is material from every viewpoint, if you please—the necessity of financing, the ability of the company to borrow money, the ability of the company to go on without a return for any period of time. It has got this contractual obligation, it is an outstanding fact. It comes in now to a period when you have got to issue a different kind of security, a higher rate of interest or a shorter; and it is one of the facts and conditions surrounding this company when this war condition and its consequences have overtaken the company.

The Master: Well, if you offered it in that limited sense, you don't offer it as any evidence of value.

Mr. Moran: Well, of course, it would not make any difference if I did contend it was evidence of value, because the Courts
823 have so many times said that it was not, that I could not very well live through any such thing.

The Master: I wanted to find out whether it was material.

Mr. Moran: One of those things, as I say, it is the matter——

The Master: I will let it in; but so far as I know, as I have read a few of these decisions, it is absolutely immaterial as to the question of value.

Mr. Moran: We were not on that subject at all.

The Master: The objection was pressed for that reason, wasn't it Mr. Jackson?

Mr. Hill: I made the objection upon that theory——

The Master: I mean, your objection was pressed on the question that there is no evidence of value, and if there was a stipulation, it was immaterial. I will let it in with your objection and exception. But I agree with you, if there is to be a stipulation there is no evidence of value there.

Q. Now, we get back; I think I asked you if these first mortgage bonds were the bonds of the Kings County Gas & Illuminating Company?

A. I answered they were.

Q. Secured by a mortgage made by that company back in——

A. Oh.——

824 Q. You see, we want to have a complete statement of the case for some Court——

A. (Interrupting.) In 1890——

Q. (Interrupting.) We want some evidence to support everything. Now, have you a copy of the complaint with you?

A. Yes, sir. (Witness refers to complaint.) What page?

Q. Page 11?

A. Yes.

Q. These bonds are dated October 1st.

A. The mortgage is dated October 1st, 1890.

Q. They are fifty year bonds?

A. They are fifty year bonds, maturing October 1st, 1940.

Q. And your other mortgage is a mortgage made by the present company?

A. By the present company. It was dated July 1st, 1904, and those are fifty year bonds maturing July 1st, 1954.

Q. And they bear what rate?

A. They pay interest at five per cent.

Q. And they only provide for one kind of bonds?

A. Yes, sir.

Q. And how many of those bonds have been issued?

A. $2,428,000 have been issued and sold.

Q. Have been issued and sold?

A. Yes, sir.

Q. In the hands of the public?

A. Yes, sir.

Q. And have some been authenticated in addition to that?

A. Yes, we have authenticated approximately $701,000. $600,000 of these are on deposit with the Empire Trust Company in

825 lieu of the difference between the statutory rate and the 95 cent rate charged.

Q. And the other?

A. And the other $101,000 are used as security for the note, the money which I borrowed on note, amounting to $225,000, demand note.

Q. This $700,000 of bonds that have not been sold, they have been authenticated; has their issue been authorized by the Public Service Commission?

A. It has.

Q. For what purpose?

A. For expenses to the property since 1915, I believe.

Q. And have the extensions been made?

A. They have.

Q. Made before the bonds were authenticated?

A. Oh, yes.

Q. All of them?

A. Yes, sir.

Q. Now, the bonds, all bonds you have issued since the Public

Service Commissions Law took effect, July 1st, 1907, has been issued with the authority of the Commission?

A. Yes, sir.

Q. And there are some more of these, you say?

A. Approximately $1,000,000.

Q. Now, you have not been able to sell this $700,000 of bonds, have you?

A. We have not been able to sell them at any price which would be a fair value of the property behind the bonds.

Q. What is your capital stock?

A. The capital stock is $2,000,000.

826 Mr. Jackson: Is all of this evidence subject to that objection and exception, so that I do not need to repeat it?

The Master: Oh, yes.

Q. What is your capital stock?

A. We have $2,000,000 of capital stock.

Q. All issued and outstanding?

A. All issued and outstanding? Yes, sir.

Q. And all one class?

A. All one class, common stock.

Q. Now, you have no money?

A. Yes, sir.

Q. And just to remove the imputation that maybe you — no money because you have been paying dividends on the stock——

A. Yes, sir.

Q. Will you kindly tell us if you paid any dividends. When was the last dividend you paid?

A. In March, 1916 was the last dividend the company paid amounting to one per cent.

Q. None since then?

A. None since then.

Q. You have kept up your bond interest since then?

A. Yes, sir.

Q. And that bond interest amounts to how much annually?

A. About $258,000, exclusive of the bonds—interest on the bonds which are on deposit with the Empire Trust Company, which will amount to some $30,000 in addition.

Q. This company, the Kings County Lighting Company, tradition has it and records show that it was organized about what
827 time?

A. About July 1, 1904.

Q. Under the transportation corporation law?

A. Yes, sir.

Q. And that it acquired all the stock in a prior company?

A. Of the Kings County Gas & Illuminating Company.

Q. And merged it?

A. Yes, merged it.

Q. Under the statute?

A. Yes, sir.

Q. The Kings County Gas & Illuminating Company had carried o
business in this territory prior to that time?

A. In the same location.

Q. In the same territory?

A. In the same territory, I meant to say.

Q. And began there about what time, has tradition got it?

A. About 1898.

Q. 1891?

A. 1891, yes, sir.

Q. What?

A. Somewhere in that neighborhood. I don't know.

Q. Well, 25 years from 1891 being 1916?

A. About 1891.

Q. When the Kings County Lighting Company acquired th
property through merger, the former company had this plant
had a plant on the land at 54th street and First avenue?

A. It had a plant at 54th street and First avenue, yes, sir.

Q. And it also had the—had the same land that is there now?

A. Yes, sir.

Q. And it was not filled out as far, probably?

828 A. No, it was not; the bulkhead had been extended a
the land filled in.

Q. Did the old company own the company up where the o
station is built?

A. No, I think that was acquired by the new company. I am n
in position to answer that, Mr. Moran, I don't remember.

Q. These are the only pieces of real estate that you have a
used?

A. I don't know of any others, no, I don't know. These are th
only two. Come to think of it, the land at 56th Street and Nin
Avenue was bought by the Kings County Gas & Illuminati
Company.

Q. Yes, and was owned at the time of the merger.

A. Yes sir.

Q. Now, the buildings up there and the big holder have be
built by the present company?

A. Yes sir.

Q. The smaller holder I think was there by the old company?

A. Yes sir.

Q. You are behind, I think, some—I think we have covered th
point in the payment of taxes.

A. Shown by Mr. Gonnoud.

Q. Mr. Elsman, we have had some testimony about unaccounte
for gas.

A. Yes sir.

Q. You have seen statistics of the company as to the unaccounte
for in years gone by.

A. Yes sir.

Q. You are having prepared a statement of the una
829 counted for from 1909 down to date.

A. From 1909 down to date.

Q. Just for the purpose of clearing it up. It shows to run from 11 per cent to 15 per cent, doesn't it?

A. About an average of 14 per cent to 15 per cent, yes sir.

Q. There has been no pronounced or marked increase in unaccounted for during your incumbency?

A. No; it has been a source of worry to me.

Q. Let us get that answer.

A. No.

Q. What?

A. No. There has not.

Q. There has not? Have you given particular attention to the matter?

A. Oh, I have worried about it a great deal.

Q. That does not help it any at all.

A. I have given a great deal of attention to it. I have given a great deal of study to it, in so far as my finances would limit me to do. I have gone through the meter situation pretty carefully and determined about what the unaccounted for was from the loss of gas due to slow meters.

Q. Slow meters?

A. Yes sir.

Q. What did you find?

A. We found from the period of 1910 down to this year, the first of the year I believe, that the average of our meters was between 3½ and 4 per cent.

Q. Now, that is just due to slowness, leaving out of account all questions of temperature and that sort of thing?

830 A. Oh, that is just the natural tendency of the meter to slow up to that degree.

Q. That does not take into account the difference in temperature?

A. Oh, no.

Mr. Jackson: It does take into account the difference in temperature.

The Witness: Oh, no.

Mr. Jackson: It is a slowness by any reason.

The Witness: It is just a natural tendency of the meter to run slow. It may be due to this. It may be considered changing the meters instead of the seven year period, we are changing meters now on a five year basis. The Public Service Commissions Law calls for——

Q. I think you have a statement prepared which will be offered here, showing the number of meters repaired in last year and the prior years.

A. Yes.

Q. Have you given any attention to any possible leakage of gas from the mains?

A. Yes, I have. We have done that to some extent, but not as great an extent as we would like to. We have bored for leaks, we have been over our transmission main—I speak of the transmission main, I speak of the driving line between the works and the holders.

We have completed tests to see if there was any possibility of our company being hooked up with some other company's mains.

831 We have mains with the Brooklyn Union Company and our company on the same streets, and some of the Brooklyn Borough. I thought there might be a possibility of our company, one of our company's mains being tapped into other mains, so we have gone by and have tested the whole outlying section of our district.

Q. Did you find anybody taking gas from you that way?

A. Oh, no.

Q. What about leaks now? Did you have any great big leaks?

A. Oh, no.

Q. What?

A. No, no, indeed.

Q. You don't find anything different in that respect then——

A. (Interrupting.) Than you would ordinarily find in any gas company, except our main system should be gone over systematically, entirely, for the whole district. But there are 200 miles of mains, and that involves a tremendous amount of money.

Q. Someone has said that that is a sandy soil over there, and it is particularly adaptable to gas getting away quick if the gas gets out of the main.

A. Yes sir; if it were a clay soil——

Q. Is that a fact, that it is a sandy soil?

A. Yes.

Q. And you agree with the other witnesses, that the clay soil will hold it more?

A. Oh, absolutely.

Q. Speaking about meters, I show you a statement here

832 of your meter repairs for the last four years.

A. Yes, sir.

Q. That is a statement taken from your records to show the number of meters repaired?

A. Yes sir. This is inverted, this is wrong; this should be in 1917.

Q. What?

A. That is right.

Q. Showing the amount expended, the number of meters——

A. The number of meters, the average cost per meter and the expense per thousand cubic feet sold, and the number owned January 1st.

Mr. Moran: Now, I offer this in evidence.

Mr. Jackson: The same objection and exception to be allowed.

Mr. Moran: This is something that Judge Hill asked for, anyway.

The Master: What is the objection?

Mr. Jackson: The same objection as to the other schedules made from the books.

Mr. Moran: Well, Judge Hill asked for this. If you do not want it, why, we won't take it. I thought it would be the proper place, when I was talking about meters, to just slip it in here.

Mr. Jackson: Is that the statement you asked for on your cross examination?

Mr. Hill: I think so. I will not object to it.

833 Mr. Jackson: I will not object if it is information Judge Hill asked for on cross examination. I appreciate that.

(The paper was received in evidence and marked Plaintiff's Exhibit No. 36.)

Q. Just for the purpose of the record, this shows expended in 1919 how much for meters?

A. $22,900.98.

Q. And repairing how many meters?

A. 6,340.

Q. And in the year before that you repaired?

A. 11,500.

Q. No, wait a minute.

A. Oh, we repaired 5,187 meters.

Q. And in 1917?

A. 2,424.

Q. And in the first six months of this year?

A. 2,280.

Q. You have given particular attention to this matter of unaccounted for in the last year or so?

A. Oh, yes, indeed.

Q. Had tests made in the lines you indicated about meters?

A. Yes. We tested meters, and as I say, we made our tests on the other company's mains, and we have also been inspecting our lamp service. We had about 5,000 lamps on our 200 miles of mains, and the service lamp posts belonging to the City of New York. Now, they removed about 1,500 of those lamps by the installation of electric lamps, all the lamps are to be removed. But there is

834 a controversy on between the Edison Company and the Department of Water Supply, Gas & Electricity relative to putting up poles, so they stopped putting in the balance of the 3,500 lamps.

Q. You mean they have discontinued their operation of removing the lamps?

A. Removing the lamps.

Q. And you still have about 3,500 lamps?

A. About 3,500 lamps.

Q. They have the service pipes for them still on your mains?

A. Those are on our mains, and running to the curb. They are merely tapped at the curb. I have endeavored to have the City of New York have the service removed from the main, because they have been in there a number of years, but they refused to do that.

Q. If you had that done, you think there might be some leakage in those service pipes?

A. I am thoroughly convinced there is; I am thoroughly convinced that our average of 3½ feet per hour for gas supplied to the City of New York in those street lamps is wrong. I believe that at least should be 4½ feet per hour.

Q. But the City takes it at 3½?
A. 3½.
Q. And won't do otherwise?
A. No, they won't do otherwise.
Q. Tell me something ——
A. We further have no interest ——

835 Mr. Jackson: Just a moment. May I ask right there, to save time: Why do you say it should be 4½ feet per hour?

The Witness: Because our tests we have made by means of gauges on Welsbach mantles, that we have gone in the streets, those lamps being turned off by the Welsbach Street Lighting Company we have no control, the adjustment becomes out of order and the lamps really consume more gas than we are being paid for.

Mr. Jackson: You think they are consuming 4½ feet per hour?

The Witness: That is the best of my knowledge and belief, yes.

Mr. Jackson: Each lamp?

Mr. Moran: Well, not as they are originally set?

The Witness: Oh, no.

Mr. Moran: But with the ups and downs.

The Witness: Ups and downs, the boy lighting them and turning them off.

Mr. Jackson: As a matter of fact, the actual consumption you think will be that?

Q. That is an estimate?
A. That is my estimate, and the estimate of our engineers.
836 Q. It is an estimate of other people that you concurred in too?
A. Oh, yes.
Q. That street lighting that you do is furnishing the gas.
A. Just furnishing the gas.
Q. And the Welsbach Lighting Company light the lamps and extinguish them?
A. Yes.
Q. And you have a schedule.
A. 4,000 hours per month.
Q. Your territory over there is supplied by electricity?
A. Oh, yes.
Q. What company?
A. The Brooklyn Edison Company.
Q. They have their mains there and supply considerable lighting?
A. Oh, yes, they supply considerable lighting, house lighting and a great deal of power.
Q. And the new buildings that go up, I take it are mostly equipped, so far as illumination is concerned, with electric light?
A. Oh, every house is equipped for electric light.
Q. And your gas is not used much for illumination in that territory?
A. No, it is not for illumination.
Q. Except in the older houses that have not converted them.
A. Yes, in some of the older houses.

Q. It is used, as one of the witnesses said, generally for cooking, heating and hot water?

A. Cooking and heating and obtaining hot water.

Q. You live in that territory?

A. Yes, sir.

837 Q. And are acquainted with various sections of it and people that live there?

A. Acquainted with it in detail.

Q. And you find that your complaints, for instance, from consumers are usually directed to some heating appliance rather than a lamp?

A. Oh, practically all to heating appliances.

Q. We branched off a little from the unaccounted for. It still remains unaccounted for, however, doesn't it, Mr. Elsman?

A. Yes, it is unaccounted for. It is not leakage. Some of it is leakage.

Q. Well, it is for the reasons given by the other witnesses.

A. Yes.

Q. In which you concur.

A. I concur in them except that I don't believe our other witnesses made it plain, the dif-erence in the temperature of the gas as metered in the consumers meter and the gas as metered at our works. I think I am more familiar with the conditions there than the other witnesses.

Q. Well, what conditions do you want to emphasize?

A. Well, I know for a fact that the risers of most of the houses are on the cellar walls and are exposed pipes. I bring in the experience we have from frozen meters and frozen services in the winter time. From our study, as far as I have gone, we feel that the

838 mean temperature of the gas as metered in the consumers' meters is around 50 degrees; and we have even been considering that in our unaccounted for. But we have not made sufficient number of tests, and we have not covered our entire territory over the entire period of years, to be able to find out what this temperature actually is. We want to be absolutely sure that we know.

Q. You have in the extreme cold weather cases of a number of meters being frozen?

A. Oh, yes.

Q. Is it a fact that they are on the front wall of the building?

A. Yes, they are on the front wall of the building.

Q. You have been in the cellars.

A. Yes, I have been in many, many of the cellars.

Q. And the risers you speak of, now, that is a technical term. Just tell us what that means?

A. Why that is the riser, the pipe which extends from the inlet side of the—or from the termination of the service to the inlet side of the meter, and from the outlet side of the——

Q. Meters.

A. Outlet side of the meter to the house pipe.

Q. Which carries it to the upper floors?

A. Yes sir.

Q. That is the pipe you refer to?

A. Yes sir.

839 Q. In installing your meters you install your own meters?

A. Yes, sir.

Q. And you know where you put them?

A. Yes, sir.

Q. And do you find thousands of warm cellars, as General Jackson indicated?

A. We find that the cellars that have furnaces are usually fitted with small steam heaters and the heaters are encased with insulating material.

Mr. Jackson: Which does not insulate.

The Witness: To keep the heat inside of the furnace and we find the cellars cold.

Q. That is, the mere fact that the cellar has a furnace in it does not mean that the cellar is warm?

A. It does not reach the front pipe by any means.

Q. And a hot water heating plant or a steam heating plant, if it is properly constructed, will not heat the cellar, will it?

A. No, it is supposed to heat the house.

Q. It is only those heaters that are not properly constructed that will?

A. Yes, sir. In fact, a great many of these houses we have have no furnaces whatsoever—a great many of them.

Q. A great many of the new buildings have gone up over there, have they not?

A. Yes, sir.

Q. Are they equipping those new buildings with gas for heating purposes?

840 A. Yes, they have an instantaneous water heater in the basement in every one of those houses. In the two family houses they would have two water heaters.

Q. Have you had complaints from these people who put up these houses, that the houses are not constructed with a coal stove for cooking?

A. All the complaints we have, say 90 per cent of them, have informed us that the houses have no flues, and the only method of cooking would be by means of a gas range.

Q. And some of these 2,000 complaints you have got, are so situated?

A. Yes, sir, a great many of them, practically all of them.

Q. And many of them have complained?

A. Practically all of them.

Q. Considerable has been said about the sludge or emulsion.

A. Yes, sir.

Q. That came out of the gas.

A. Yes, sir.

Q. And it was suggested that may be it would make good road

material or varnish or something of that sort. Did you try to market it?

A. Why, it is absolutely unmarketable. I will tell you what it looked like when it first came up.

Mr. Jackson: Don't elaborate in answering his question.

The Witness: I beg your pardon.

Mr. Jackson: He asked you if you tried to market it.

841 The Witness: No, we did not even consider it.

Q. Why not?

A. Why, there is not anything to market. I know there is not anything to market. When the sludge came out it was pumped out almost like black mortar; you could not move it, you had to take a bilge pump, and it looked like heavy thick sand.

Mr. Jackson: Why not for decorative brick, then?

The Witness: After we got it out and thoroughly dried it out, it just developed into powder. It would fill this room, this sludge, and after it dried out you would probably find it resolved into a powder, and it would take a very small corner here. There is nothing left at all. It is over there now in just a small heap.

Q. Did it evaporate?

A. Why, yes, water evaporates and leaves this powder.

Q. It is like lamp black?

A. It comes to lampblack. We tried some of it out in the boilers, but it did not give us any results whatsoever. We mixed it with bituminous coal and we found out there was nothing in it, it was just a residue.

Q. Some of it is being produced every day now?

A. Oh, yes.

Q. Will you submit samples of it to the other side?

A. Why, the Public Service Commissioner has samples of it. And Mr. Merryfield made an analysis of it.

Q. You gave some testimony with reference to the number

842 of consumers you had. I think you said to me that you wanted to correct the number.

A. Yes, I would like to correct that. I said we had about 39,000 consumers at the present time. We had at the end of June, 1920, 38,956 consumers. That is figured on the basis of meters. The reason I wanted to change that was that we had been removing a great many meters that had shown no consumption, and as the new meters went in, we took out the meters that showed no consumption.

Q. What increase do you give now? What figures have you now?

A. 38,956 consumers at the end of June. May I ask a question?

Q. Yes.

Mr. Jackson: You are consulting what exhibit?

The Witness: I am consulting what is called comparative statistics, that we get out every month. I will have to ask about this because it is kind of blurred here.

Mr. Jackson: Go ahead, never mind that.

Q. That is meters installed?

A. Meters installed.
Q. That is 38,958 meters installed?
A. Yes sir.
Q. At the end of June?
A. At the end of June, yes.
Q. Or the first of July?
A. Yes.
Q. I presume you have not put in any more, have you?
A. No.
843 Q. You are not taking on any more?
A. We are taking on no consumers at the present time, no.

Q. Mr. Moran. Later we will have a statement about those—for counsel for the defense, we will have a statement here about the commercial office, the men who are employed in the promotion enterprise, and while this witness is on the stand I want to ask him a few questions with reference to those employes.

Q. You keep an organization to dispose of appliances, gas consuming appliances?
A. Yes sir.
Q. And I think someone has said, if it was not you, that you seek to run that without loss or profit to the company.
A. With a small profit to the company.
Q. In the interest of building up its business?
A. Yes sir.
Q. Which is the manufacture and distribution of gas at a profit.
A. Yes sir.
Q. And you hope to get a profit out of the gas.
A. And we would like to show a small profit there to encourage the sales department.
Q. You also think it is advantageous to the company to handle appliances.
A. It is the only way to increase your business efficiency and modernize it—the modern way of doing it.
Q. Has it a bad effect if you do not keep those things on
844 hand, your company?
A. Yes, there is indiscriminate buying on the part of consumers. They buy inefficient gas burning appliances, and the result is that we have a great deal of trouble due to constant regulation of these inefficient appliances, and at other times they buy appliances which are really dangerous for them to use. We eliminated that.
Q. The accountants you are directing have extracted from your books the expense and profits in this business for 1919 and 1920?
A. They have; yes sir.
Q. And you have seen those figures?
A. Yes sir.
Q. It occurs to me that probably at the present time you are not pushing that end of the business.
A. Oh, I have stopped the sale of appliances this year entirely.
Q. When did you stop it?
A. On the first of the year.

Mr. Jackson: 1920?

The Witness: 1920.

Q. You ran on into January and the first part of February, did you not?

A. Yes sir.

Q. And then you checked up on it on account of the——

A. On account of the condition of the plant I found we could not take on any new business, and I did not see any likelihood of us getting any new additional equipment to the plant, and I knew we had to serve gas and therefore I stopped the sale of appliances.

845 Q. The result therefore that will be shown by these exhibits, the accountants have prepared, whether it is a profit or a loss in 1920, will be in the couple of months' business done?

A. Yes, small profits will be shown and small profits where we replaced a piece of apparatus that is now in service and does not increase the load.

Q. But the business was done in the first couple of months of this year?

A. Oh, yes, the first couple of months of the year, yes.

Q. But the showing in that branch of the business has continued?

A. Oh, yes.

Q. That is, you kept the same men, did you not?

A. Yes, sir.

Q. And you have charged their expenses in the same account?

A. Yes sir.

Q. And have you used them in that business?

A. Oh, no.

Q. What have you done with them?

A. I have used that organization as an emergency squad to take care of the applicants for new service. I need all the men I have got now to take care of the consumers who are constantly coming into the office and asking the company to install gas service at new locations.

Q. And these men are used now to tell them why they do not get it?

A. Oh, yes, they are regular adjuster and complaint men
846 now. The fact is one man, the sales manager now, has taken the place of the adjuster who was taken to the hospital with nervous prostration trying to appease the people who were crying for gas.

Q. You have had people complain about this quality of gas that you have been able to turn out in the last three or four months?

A. Oh, yes, we have had a great deal of trouble with the consumers.

Q. With the regular consumers on account of the quality of gas?

A. Yes sir.

Q. Also with the would-be consumers because they do not get any gas?

A. Yes, and then that led to the troubles of not giving them suffi-

cient gas. When this trouble began we had to cut our supply of gas down to practically nothing.

Q. You are not the president of this company, are you?

A. I am the vice-president.

Q. Who is the president of your company?

A. Frank M. Tait.

Q. And you have a Board of Directors?

A. Yes sir.

Q. Consisting of how many members?

A. Seven directors.

Q. Who are members of the board of directors; are you one of them?

A. William M. Flock, C. K. G. Billings, George L. Knapp, Frank M. Tait, Elton Parks, Paul Bucker and myself.

Q. That is seven. You have seven now?

A. Yes sir.

847 Q. You increased it from five to seven, I believe.

A. Five to seven, yes sir.

Q. Has the demand kept up to the present time? I think you told us before when you were on the stand that it ran on to May and June.

A. Yes sir.

Q. How is it running now?

A. The demand is about 10 per cent over the same months last year. The demand in July this year was about 10 per cent over last July.

Mr. Moran: You may question him.

Cross-examination.

By Mr. Hill:

Q. How much money have you got in the bank, what is your bank balance?

A. I have got a statement here some place. It is so little I do not have to worry about it so much any more.

Mr. Moran: Have you got anything later than this? This is June 30th.

The Witness: Yes, I have got a statement right here, $19,641.06 in July.

Mr. Moran: What time?

The Witness: That is July 31st.

Mr. Moran: Would you mind just before you take that up letting me introduce this. This morning one of counsels suggested that in lieu of the testimony of the witness as to the order forbid-

848 ding the withdrawal of funds from the Empire Trust Company that we introduce the order. I have here a copy of the order as served upon the Public Service Commission and also with the admission on it. That offer is made. I will mark that generally if it will be received.

Mr. Jackson: I will object to it as immaterial and incompetent.
The Master: Who is the order by?
Mr. Moran: By Judge Pendleton with reference to the funds—withdrawing the funds.
The Master: Objection overruled.
Mr. Jackson: Exception.

(Received in evidence and marked Plaintiff's Exhibit No. 37.)

Mr. Moran: In connection with the testimony of one of the witnesses——
Mr. Jackson: Just a moment, I will withdraw that objection.
The Master: The objection is withdrawn.
Mr. Moran: In connection with the testimony of one of the witnesses reference was made to the action of the New York City Commission in fixing standards for the gas supply in this district, and I have here the order made by the Commission on the 13th
849 day of October, 1917, in case marked on its records No. 2235, styled Order fixing heating standard for gas, which I will offer in evidence.
Mr. Jackson: I object to that as immaterial and incompetent.
Mr. Moran: It is a long order.
Mr. Jackson: That is an order taking effect at what time?
Mr. Moran: On the date of its issue, I think, October 13, 1917.
The Master: Was this order in effect during 1919?
Mr. Moran: 1917 and 1918, and I think it ran for six months after the war. I was just looking for that division.
The Master: Six months?
Mr. Moran: I think so. So I guess it is running yet; the war is not over.
The Master: Is this order in effect now?
Mr. Jackson: That I do not know. I do not know just what the order is, so I objected to it.
The Master: I do not know anything about the order, I am just trying to find out.
Mr. Jackson: I withdraw the objection. I made an objection without reading the order, but now that the order is some-
850 what explained as to what its contents are, I will withdraw the objection.
The Master: Well, what does the order provide for? I do not want it in unless it is material. I want to be sure it is material
Mr. Moran: I will read one clause of it off the record.

(Reads from Order.)

The object of the order is that the witness referred to it and I wanted it in. There is no objection to it now anyway, is there?
Mr. Jackson: There is no objection.
The Master: Do you want it in?
Mr. Moran: Why, I do not care so much about it, only it is a fact, we cannot get away from it, that the Commission took that action. We did not avail ourselves of it, but it goes to show that the heating

quality of gas is all right, provided the price is all right. We contend that the price which they gave us was not enough even to pay for the heating quality gas which we furnished. So we are in the order. Of course we took it on ourselves, but we furnished heating quality gas. It is what I always maintained, that the quality of gas and the price are relative, and when you fix the quality you must fix a price enabling the company to furnish that quality.

851 When you get a price below that quality, that won't pay for that quality, then the company can squeeze through by changing the quality and let the price stand; but we changed the quality and yet the price was not enough, and the price has never been sufficient to our company to enable us to furnish any useful quality of gas. That is the allegation of our complaint and that I think we have supported by our testimony here.

The Master: Was this in force in 1919?

Mr. Moran: I think it is in force yet.

The Master: If you want it in then, we will accept it.

Mr. Hill: That is, there has been discussion as to what that order was.

Mr. Moran: Yes.

Mr. Hill: In the testimony.

Mr. Moran: Yes.

The Master: I think it is of some materiality.

Mr. Hill: We have all talked about it, so here it is.

The Master: There is no objection to it.

(Received in evidence and marked Plaintiff's Exhibit No. 38.)

Mr. Moran: There is produced here from the files of the Commission the order made by it on the second day of July, 1920,

852 in case marked on its records, Case No. 2320, styled Order fixing maximum price of gas, effective on and after July 2, 1920, and directing the change of standards with respect to the Brooklyn Borough Gas Company, which serves gas in the territory adjoining ours. That order fixes the price——

Mr. Jackson: No, no, please.

Mr. Moran: I am not saying anything about it.

Mr. Jackson: Have you offered that in evidence?

Mr. Moran: No, I am going to say what it does now so as to save everybody reading it. It fixes the price and also permits the company to change its standards from 22-candle power to the British thermal unit standard, the number of heating units to be furnished to be not less than 525.

Mr. Jackson: Aren't you stating what it says?

Mr. Moran: Yes, of course, and now the court can read it.

Mr. Jackson: Are you going to offer it in evidence?

Mr. Moran: Yes, I will offer it in evidence.

Mr. Jackson: I am going to object to it as incompetent, and immaterial.

Mr. Moran: Again it shows, as the other order did, that quality and price go hand in hand, and here the Commission did

853 not feel themselves justified in putting the price high enough to enable the company to maintain the 22-candle power, and therefore fixed a price for 525 British thermal units, and we have got the question in this case, on our operating expenses here, if we are going to say what our operating expenses are, they are operating expenses on the British thermal unit basis. If it is the candle power basis, they are a good deal higher.

Mr. Jackson: I shall not object to your argument being taken if the paper on which you are arguing and upon which you are stating the contents of the measure is received in evidence.

The Master: Let me ask you, there is not any dispute, is there, that the Public Service Commission under the statute has authority upon a showing made before it to vary the character of gas required by the statute, that is, from 22 candle power gas to British thermal unit gas? Isn't that true? I am not familiar with the statute.

Mr. Moran: Yes, that is absolutely true, yes.

Mr. Jackson: There is an order——

The Master: No, but just a minute.

Mr. Hill: I think that is in question. There is a question about that, isn't there?

854 Mr. Moran: Not a bit of it.

The Master: Let me develop it my way. If the Commission saw fit and if this company had a hearing before it and had proved to them that they ought to change that, that it was wise to change from 22-candle power to the British thermal unit standard the Commission would have authority under the statute to grant such a change, would it not?

Mr. Moran: There is no question about it at all.

The Master: This paper, of course, is simply evidence that in another case the Commission has acted within its discretion. I do not see that it has any possible bearing upon this case. The mere fact that it has on a hearing before it and a showing before it made a certain order changing——

Mr. Jackson: As to another company.

The Master (continuing): As to another company, the standard of gas, I do not see that it is at all material in this case, Mr. Moran.

Mr. Jackson: That is the best application.

Mr. Moran: Well, we are accused of having unclean hands, being positively dirty, you know, and being defiers of the law.

The Master: Does the introduction of this paper prove anything about your unclean hands.

855 Mr. Moran: Absolutely.

The Master: Well, what?

Mr. Moran: It shows that serving a British thermal here is not a crime; it shows that it is not criminal, the testimony shows that it is not a crime, that all other commissions permitted it, and yet this commission has permitted it with a company right beside us and has allowed it to go down to 525 b. t. u. On that doctrine of unclean hands it has a very pertinent application. Also on the quality of gas we are furnishing. The Commission has allowed

there as low as 525 and our statements show we go up as high as 521. Our hands do not seem to be unclean in that respect. It is also apropos of the fact that expenses, when you are figuring the expenses of a company in making gas, have got to take into account the quality of gas that they are making and the quality of gas they are required to make. Now, if we are going to be required and if the Commission is going to insist that we make 22-candle power gas, and if we are going to be penalized by the actions of the Commission and the other public authorities, then in considering the confiscatory character of the statute the court must consider the cost of making 22 candle power gas and not the kind of gas we are making.

856 The Master: But all of that is for the court, with all the evidence you have adduced here.

Mr. Moran: Yes.

The Master: But I do not see that the evidence in a hearing in another case before the Public Service Commission has any bearing. The details of this hearing I know nothing whatever about, and this court does not. All we have is an order.

Mr. Moran: Yes.

The Master: We have had a great deal of testimony on the question of the propriety of making British thermal unit gas for 22-candle power gas, and I believe the testimony was admissible and I admitted it as informing this court on the facts in this case and the needs of this community. Now we are getting right out and into another case. I know it serves a community somewhat adjacent to it, but in another case we are simply taking the final order of the Commission and substituting it, really, for all of the proof that has been adduced before this court. It does not seem to me to be regular.

Mr. Moran: Right in that connection, and all through our testimony, the counsel for this same Commission sat here and refused to acquiesce or agree in it, but contested it by his questions

857 and by his suggestions to the other counsel that our witnesses were giving generalities and there was not much to it anyway. Now if they will put on a witness—if the Commission will put on a witness and he should take the position that the b. t. u. standard is not the right thing, that you have got to have candle power, wouldn't that order be proper to show him, adopted by the Commission for which he appears here as a witness, and introduce it in connection with his cross examination. We do not know that they are going to call any, but we have fair warning now that their counsel in this litigation is going to belittle our testimony in reference to b. t. u. gas, and I want this in to show what this connection does in that respect—it permits b. t. u. gas.

The Master: But it cannot be questioned that the Public Service Commission has from time to time permitted the substitution of the b. t. u. gas for 22-candle power gas, can they, Mr. Jackson?

Mr. Jackson: Just what action the Commission has taken from time to time, or what the results of their investigations have been, or what is contemplated in the future, personally I am not informed.

As to the action of the Commission in this case, that is one
858 thing; as to the action of the Commission in another case, such as this order that is now presented I think it is entirely immaterial. If we should take the position of putting witnesses on the stand upon this question, then I think Mr. Moran should cross examine upon the line he suggests.

The Master: I have no doubt about that.

Mr. Jackson: We will always meet that situation when it arises, but he cannot expect to prove his rebuttal by direct examination, because he cannot tell what his rebuttal is going to be until the defendants' proof is offered. So far it has no bearing upon the case, as I see it. We will expect to meet, so far as argument is concerned, any argument that is a legitimate deduction from the evidence they offer.

Mr. Moran: And we offer that order.

Mr. Jackson: The evidence that they have in the case—when the time comes to argue upon the case. Our argument would be confined to the evidence in the case.

Mr. Moran: On this I can get an item of evidence now, as I have, which will foreclose 90 per cent of your agrument that you would make otherwise. I think I am permitted to put it in. I am warned now as to what the argument of the Commission is going to be.

Mr. Jackson: You are now warned at all.

859 Mr. Moran: I am, from what you have said. You have not acquiesced in the testimony about candle power.

Mr. Jackson: I will listen with all patience to any evidence you may introduce here, and I have only been objecting to a lot I thought was immaterial and incompetent in the case. Of course, my objection has very seldom prevailed, but I have not any complaint to make about that. It was merely to save whatever legal points there may be and make any argument we are justified in making upon your showing.

The Master: Has there ever been an application made by this company to the Public Service Commission for the relief granted in this case?

Mr. Moran: No, I proved that by this witness.

The Master: There never has been?

Mr. Moran: No, we have been constantly in court hoping all the time to be able to get relief that would enable us to give the gas that was fixed by the statute. In fact we did not know that the Commission would entertain any such application until this order was made; we never heard it until the last few days counsel has suggested "why didn't you make an application." We never heard of any such thing, and we did not think for a minute it would be entertained. In fact this other order, exhibit No. 38 here,
860 would indicate that it would not be entertained because they felt bound by the statutory rate. So far as your Honor is concerned I think you have stated once before that the statutory court has practically disposed of this question so far as the initial determination is concerned, but we never can tell——

The Master: I am not convinced of this, nor am I settled in it,

but my judgment is that the United States District Court when it approaches this question is not fettered unless it sees fit to be so by the orders of the Public Service Commission.

Mr. Moran: Now you have something to talk about, Mr. Jackson.

The Master: I want to be advised of that, if I am wrong.

Mr. Moran: Well, would you not think *in* matters of regulation within the jurisdiction?

The Master: Within jurisdiction, of course, but the language of the District Court, of the statutory court, in stating the fact that this company had or had not manufactured 22-candle power gas, or had clean hands or did not have clean hands, was not the test in this case. Judge Hand varied somewhat from that, and he holds in the Consolidated Gas case that there was not such a glaring evi-
861 dence of soiled hands in that case to warrant him in throwing them out of equity. But in the statutory court case they seem to dismiss it entirely. Of course, I am bound by them and what they say.

Mr. Hill: One of the defendants does not wish to have an argument with another defendant, but the position of the Attorney-General as I understand it is that the Public Service Commission had no power to make that order anyway, that here is a special statute compelling or prescribing a candle power, and prescribing a range—a special statute, and that by implication no general law repealed such general action. Whatever power is given the Public Service Commission to fix rates does not by implication repeal or modify the statute governing the Kings County Lighting Company and other companies in the area mentioned in that statute.

Mr. Moran: But it is the Public Service Commission Law—I forget what section it is—does in so many words, as plain as the English language can express it, that the Commission has power to fix the standards of measurement of the lighting quality and the unit making power of gas, notwithstanding that another standard has been fixed by its statute. Now, I quite agree with you,
862 Judge Hill, that any time they go to change the standard, they must take into account the price, as the Commission did in the other order.

The Master: This is a very comprehensive order.

Mr. Moran: I do not want any part of that except the latter part of it.

The Master: Let me ask you this: Would you be satisfied to offer this in evidence to prove simply that in the case of the Brooklyn Borough Gas Company the Public Service Commission authorized a change on July 2, 1920, from 22-candle power gas to 525 b. t. u. gas? I am not admitting it on that, but I am asking you if you would be satisfied.

Mr. Moran: I would be satisfied with that.

The Master: Do you object to that?

Mr. Jackson: Let me explain myself about this.

The Master: Do you object to that offer for the limited purpose?

Mr. Jackson: Now that the counsel for the Attorney-General has stated his position in the matter, it may appear to the Master a

little clearer as to the position of counsel for the Public Service Commission also. The defendants have not on all matters agreed as to the extent and limitation of various powers of the statute, and if it has been the effort, the purpose, the desire of all the counsel
863 to harmonize their position here, so far as possible, and no one to contend against a contention of another if it did not seem necessary for the purposes of this action. The Attorney-General takes the position as to the interpretation of the law and the Public Service Commission may make another interpretation of the law; the law will be before the court, the court will determine upon that point. Whatever action the Public Service Commission has taken as to some other company I think is essentially immaterial and incompetent in this case, just for the reason and for no other, for the purposes of this action, that the facts in that case were peculiar to that case necessarily, as the Master has already pointed out clearly, I think.

Mr. Moran: Well, right on that point, would you mind my observation?

Mr. Jackson: Not at all. I will add on that, so it does not necessarily follow—and counsel spoke before about putting in evidence in anticipation of some position that the Public Service Commission might take, but it does not follow that he has correctly surmised in every detail the position that we might take. Our position has been taken somewhat because of the considerations that I have ex-
864 pressed.

The Master: I am not going to get into the Brooklyn Borough Gas Company case, but what I want to know is your position on the offer for the limited purpose that I indicated to Mr. Moran. Read that again.

(The reporter read as follows:

"The Master: Let me ask this: Would you be satisfied to offer this in evidence to prove simply that in the case of the Brooklyn Borough Gas Company the Public Service Commission authorized a change on July 2, 1920, from 22-candle power gas to 525 b. t. u. gas? I am not admitting it on that, but I am asking you if you would be satisfied.")

The Master: I want to know your position.

Mr. Jackson: Well, I think that upon the ground that I stated, so far as the action is concerned with another company which has to do with whatever the circumstances were and the exigencies of that company were, we have not anything before us and we would have to go into that hearing in order to determine it. It seems to me that it is immaterial in this case.

The Master: I won't let them go into that case at all.

865 Mr. Jackson: No, but it seems it would be necessary to go into that case in order to explain the why and the wherefore of any action that was taken by the Commission.

Mr. Moran: Right in that connection, from the testimony we have heard and from our own limited general knowledge of things, is it

not a fair and correct statement to say that if b. t. u. gas is as useful a commodity in the 31st Ward it is likewise a useful commodity in the 30th Ward and not a poison?

Mr. Jackson: I think you exaggerate it. I think that there is not any question as to whether it is a poison or not; the question is whether it is complying with the law. The Attorney-General has been contending and the City has been contending all through this case that the law provides for 22-candle power and that these companies who do not substantially comply with that provision of the law or statute do not come into equity with clean hands.

The Master: Supposing with that offer it is stipulated that no such order has been entered in behalf of the Kings County Lighting Company by the Public Service Commission.

Mr. Jackson: That would be the fact whether stipulated or not. They won't prove it and therefore it does not exist.

Mr. Hill: No, they have proved they made no application.

866 Mr. Jackson: Yes, they have proved that too.

Mr. Hill: The Attorney General would like to add to his objection the further statement that the order is immaterial to the issue involved, and generally incompetent and inadmissible.

The Master: You object to it under any basis?

Mr. Hill: We say they have broken the law and that can only be cured by going to jail.

Mr. Jackson: I appreciate the Master's question, and I would not like to be captious with an objection, but I really under any circumstances cannot see—and I have been thinking here while we have been talking about it, whether there was anything or how in any way, I could withdraw the objection. I cannot see how the Commission's action as to any other company has any bearing on this case. If it has relieved any other company, or if it has tended to relieve any other company from any statutory requirement makes no difference. The fact that the Commission has acted, if its action is illegal, does not make the act of the company legal. The assumption of authority does not create authority, the usurpation of authority does not create authority.

Mr. Moran: I am not offering it for that purpose.

Mr. Jackson: This candlepower requirement is a statutory requirement, or it is not. This order would not make it legal.

867 Irrespective of that, the evidence is that in view of any such action by the Commission, that the Commission has taken no such action in this case. There is no application to the Commission, that has been made for such action in this case, and to introduce the action of the Commission in any other case seems to be just as immaterial, as if they introduce the action of the Commission in Kansas towards the gas company operating in Kansas.

Mr. Moran: Now, will you allow me to make a suggestion? It has occurred in this trial, and possibly in every other trial that objections have been withdrawn, and I am hopeful. I am by nature and from the experiences we have had in this case particularly hopeful about the attitude of my opponent. I suggest that we defer

action on the matter, and they may withdraw their objection at some future time.

Mr. Jackson: If there is any way of withdrawing it with satisfaction to the whole situation, I will be very glad to do it.

Mr. Moran: We will pass it for the time being.

Mr. Hill: Am I to continue the cross-examination?

Mr. Moran: Yes.

By Mr. Hill:

868 Q. You stated, Mr. Elsman, that you had learned that between three and four per cent of your unaccounted for was the result of slow measurement of your customers' meters?

A. Yes, sir.

Q. How did you ascertain that fact?

A. We took the results of the meters, of the tests of the meters that had been removed from 1910 down to some period in the first part of this year, and put through a test in our meter shop. The meters, after they are brought in off the district, either for a change, for regular periodic changes of seven years, or complaints upon the part of the consumers, or complaints upon the part of the Public Service Commission, are brought in from the consumer's premises and tested, when they come in, before they are touched in the shop at all. So we test them immediately when they come in.

Q. So you found that those meters that were brought in were registering at three to four per cent?

A. Yes, sir.

Q. Those were the bad meters about which there had been complaints and were the oldest meters, were they not?

A. Not necessarily. They were the meters that had been removed in the period of the seven year changes, and the meters that had been removed from causes of complaint of a consumer.

869 Q. According to your schedule here, in three and half years, you have removed and repaired half of your total number of meters, have you not?

A. Is that the total then.

Q. Well, it is in round figures. Your second column of figures shows somewhere around 16 or 17 thousand?

A. Very nearly, yes, sir.

Q. And you base your rate of between three and four per cent on those meters which have served seven years and which were brought in for change, do you not?

A. Any of the meters that have been brought in off the district for any reason whatsoever.

Q. Most of those meters, or a portion of your meters, are substantially new, that you have got out in the field, are they not?

A. Oh, no, Judge, we put in about 2,000 meters a year.

Q. But here in three and a half years, you have corrected half of the total number of your meters?

A. Yes, some of those meters may only have been out for a month or two.

Q. I understand, but as a general proposition a meter stays in seven years?

A. Yes, sir.

Q. And the meters that you brought in and tested, were those that were seven years old?

A. No, some of those would be less, because we concluded to change over to a five year period after we had gone on with this test.

Q. But you brought in your oldest meters?

A. Oh, yes. Yes, indeed.

870 Q. And your three and four per cent was a test on your oldest meters?

A. In general, yes, that is correct.

Q. Would you not think that a general average of loss by your meters, measuring slow, would be more nearly one half of three and a half per cent?

A. Oh, no, because we cannot determine just the time the meter runs slow. I cannot tell you whether that meter runs three or four per cent slow by reason of its being in operation for seven years or four months.

Q. I know, but you brought in those meters which your experience led you to believe were slow, did you not?

A. Yes.

Q. So, from your eighteen or twenty years' experience you selected meters that were the worst and you only found in those meters that were the worst, a loss of between three and four per cent?

A. No, they were not the worst meters. I do not like to use that term. They were not the worst meters. They were meters that we brought in for complaints, on account of the complaint of the Public Service Commission, consumers going over there and complaining of a high bill, the meters removed for complaints of consumers who simply made complaints to our officers, meters that were not registered.

Q. Were some of them fast, did you ever find?

A. Yes, we found a very small percentage of them fast.

Q. How much of a percentage?

871 A. Oh, very, very small. Practically infinitesimal.

Q. Can you tell me how many per hundred or how many——

A. No, I cannot tell you offhand.

Q. You are the manager over there and direct the destinies of the company?

A. I attempt to, yes, sir.

Q. Do you consent, and may it be record here that you consent for the Attorney General to get the assessment from the State Tax Commission of your special franchise, having in mind the amount that is assessed on tangible property, and the amount that is assessed against intangible property?

A. I would refer that to counsel, I think, that request, if I should be allowed to confer with him.

Q. You will confer and tell me within a very short time?

A. Yes, sir.
Q. What is your salary?
A. $7,200 a year.

Mr. Moran: Was that it during the whole time?
The Witness: That is this year and 1919. From the end of 1919.
Mr. Moran: It sounds now as though it begun when you came there.
Q. Did you keep any record of the meters that run slow?
A. Oh, I have a complete record of all the tests that were made since 1910.
Q. Have you got a summary or analysis of those records?
A. I presume we have; yes, sir.

872 Q. Did your entire salary go into the Exhibit 6—I think it is. It is the one marked page 4 of Exhibit B for the year 1919, under the heading salaries and expenses of general officers.
A. No, sir.
Q. Do you know how much of your salary went in there?
A. I beg your pardon?
Q. Do you know how much of your salary went in there?
A. About 75 per cent of mine, I believe.
Q. What other salaries are there?
A. The salaries of the assistant treasurer, the salary of the assistant secretary.
Q. Who is the assistant treasurer?
A. Mr. Paul Bucker.
Q. What does he receive?
A. I think it is $4,500.
Q. What does he do?
A. He has charge of all the disbursements of the company, and has charge of the collections.
Q. Where is his office?
A. 4802 New Utrecht avenue.
Q. That is, he is in your office?
A. In our main office, yes.
Q. All of his time?
A. Yes, sir, all of his time.
Q. What other salary is there?
A. The salary of the Secretary of the Company, William M. Flook.
Q. Where is his office?
A. His office is at 80 Broadway.
Q. What is his salary?
A. $2,400 a year.
Q. What work does he perform?
A. He countersigns some of the checks, and is secretary of the company.

873 Q. That involves attending at the annual meetings?
A. Yes, sir, he attends all the meetings of the Board of Directors.

Q. How many meetings did you have in the first six months of 1920?

A. I am unable to tell you offhand.

Q. Well, haven't you any recollection?

A. About three or four.

Q. How many checks did he countersign?

A. I could not tell you.

Q. What kind of checks does he countersign?

A. He countersigns all checks; most any checks.

Q. Does he countersign all checks?

A. Oh, yes.

Q. Do you mean that you take all checks in the ordinary course of business over to Mr. Fleck's office at 80 Broadway?

A. A great many of them.

Q. What kind?

A. The salary checks, checks for disbursement of material and supplies or payment of materials and supplies, coal and oil bills—all sorts of bills.

Q. What kind of checks are they that you do not take over there?

A. Oh, small checks under $100, I believe. They are countersigned all in our office.

Q. Is it a fact that the secretary countersigns all checks above $100?

A. I beg your pardon?

Q. Is it a fact that the secretary countersigns all checks above a certain figure?

A. Well, he does when he is—oh, no, not above a certain
874 figure. It all depends upon his availability.

Q. That is, you have authority?

A. Yes, but I do not sign checks.

Q. You have not signed them?

A. No, very few.

Q. Who has similar authority?

A. Mr. Tait, the President of the Company, and Mr. Gonnoud.

Q. Where is Mr. Tait?

A. Mr. Tait is at 80 Broadway.

Q. Does he carry a salary?

A. No, sir.

Q. What other salaries are there?

A. Part of Mr. Gonnoud's.

Mr. Moran: You are speaking about what salaries now?

Mr. Hill: Any salaries.

Mr. Moran: Then he should say all. Mr. Gonnoud draws a salary.

The Witness: I said Mr. Gonnoud's salary.

Mr. Moran: You said part of it.

The Witness: Part of it goes into commercial.

Mr. Moran: That is what he is asking.

The Witness: Mr. Gonnoud's, and the purchasing agent's salary.

Q. Who is the purchasing agent?

A. Mr. MacFarland.

Q. What is his salary?
A. He receives $2,400 a year.
Q. Where is his office?
A. 4802 New Utrecht avenue.
875 Q. He is at the headquarters of the company?
A. Yes, sir.
Q. What other members of the Board of Directors besides those you have mentioned, receive salaries?
A. No other members of the Board of Directors except those I have mentioned.
Q. What are the directors' fees?
A. $10.
Q. You said you had a bank balance as of July 1st, of $19,641.06. What is the amount of accounts payable?
A. Bills that we owe?
Q. Bills payable?
A. Around $225,000.
Q. Those are bills payable. I mean accounts payable?
A. Well, accounts payable are $124,494.77.
Q. As of what date?
A. As of July 31st.
Q. How much of that is payroll?
A. I cannot tell you offhand.
Q. What is your weekly pay?
A. I could not tell that. It is practically a small amount, a very small amount. You see, July 31st, the payroll checks were all out, and it would only be a small portion, about four days of the weekly payroll in the works. It is practically all materials that counts there.
Q. Have you made tests as to the temperature of gas as it goes through the consumers' meters?
876 A. We are on that now. Yes, sir, we are on that now.
Q. You mean you are now making them?
A. Yes, sir. Just at the present time we are not, but we are in the course of that study.
Q. You have not yet taken any temperatures?
A. No, we have been held up on—we have taken some.
Q. Can you give me what you learned from those you have taken?
A. No, I cannot give it to you offhand. They are taken on a chart running 24 hours every day, divided into each hour.
Q. You have given testimony and there has been offered in evidence a compilation of figures showing the cost per thousand feet of gas in the month of July, 1920?
A. Yes, sir.
Mr. Moran: No.
The Witness: Yes.

Mr. Moran: Wait a minute. There has been no compilation of the cost of gas in July, 1920.
Mr. Hill: That is what you have on labor and coal and oil.
Mr. Moran: No.

Mr. Hill: What month was it?

Mr. Moran: It was not in any month.

Mr. Hill: What was it you said was $1.22 per thousand?

877 Mr. Moran: That was oral testimony, not a compilation. We have a compilation of the figures, of course.

Q. You have a compilation?

A. Oh, yes, I have a compilation.

Q. In that $1.22 per thousand cubic feet made, what did you have in for repairs or any of those items?

A. I will give them to you. For repairs on production—I will read them in cents per thousand?

Q. Yes.

Mr. Moran: They are not grouped there, are they, Mr. Elsman?

The Witness: No. I will have to pick them out.

Q. I do not want you to take too long a time about it.

A. I have a total production repairs of 5.21 cents.

Q. You have total repairs in production alone?

A. Yes, sir.

Q. Of five cents and what?

A. 5.21 cents.

Q. That is per thousand cubic feet made?

A. Yes, sir. Then I have the distribution.

The Master: I thought that was both production and distribution.

The Witness: That is just for the month.

Mr. Hill: This for that trial month of his. It is five cents on his production.

878 Mr. Moran: Judge, you see it is raised to five cents. These repairs go on more in the summer time than they do any other time. Go back to July, 1919, and you will find what they were in that month; they will be higher than the average of the year.

Mr. Hill: That is one of the things, you should not use one month, you should use a longer period to depend upon. It bears out my contention.

Q. But that is double your 1919 figure; it is 2.74 cents?

A. It is 2.74, I believe, yes. That is very low.

Q. What is the amount in dollars there?

A. It is $6,599.15.

Q. What is your miscellaneous works expenses item?

A. .83 cents.

Q. And that is how much in dollars?

A. $1,059.45.

Mr. Moran: Just now, tell us again how much it makes per thousand.

The Witness: .83, or 83/100 of one cent per thousand.

Q. What are your repairs on mains?

A. I have not given you any of that. The repairs on mains is 2.18 cents per thousand, total amount expended $2,277.73.

Q. Comparing it with 1919, that is two-thirds of the entire year?

A. Oh, yes, we have not been doing any repairs at all in 1918 and 1919 on our mains. We have not touched them.

879 Q. You are doing repairs now, though?

A. We have got to do it now. We have reached a point where we have to do it.

Q. Is that direct labor or contract?

A. I beg your pardon, sir?

Q. Is that direct labor or contract labor?

A. That is practically all direct labor, but some contract labor.

Q. How much did you have in for that month for repairs of services?

A. .56 of one cent, or a total amount of $585.76.

Q. And repairs to meters?

A. 2.27 cents per thousand, or $2,373.39.

880 Q. Repairs of appliances?

A. Nothing.

Q. Repairs of general structures?

A. $22.20, or .02 of one cent.

Q. Repairs of distribution?

A. Practically nothing. $1.84.

Q. Street lighting expense?

A. Nothing. Street lighting repairs, I beg your pardon. $1.84 street lighting expense.

Q. What is your commercial expense for that month?

A. 7.67 cents, or $8,011.11.

Q. Salaries and expenses, general office.

A. $1.2, or $1,255.50.

Q. General law expense.

A. $4,020, or 3.85 cents.

Mr. Moran: That is an accrual.

The Witness: That is what I was going to say. That is an accrual we have not paid that.

Q. Miscellaneous general expense.

A. 2.03 cents, or $2,117.

Q. Insurance.

A. 1.18 cents, or $1,229.46.

Q. General stationery and printing.

A. One cent, or $1,060.04.

Q. Did you charge anything in for uncollectible bills.

A. I think we do. Yes, sir.

Q. How much?

A. .69 of a cent, or $719.75.

Q. And installation work.

A. 2.25 cents, or $2,353.57.

881 Q. How do you get that; what is that for?

A. Well, that is the cost, the actual cost of changing the meters on the consumers' premises. That takes in all changes, sets and removals, work on the consumers' premises.

Q. What does repairs of meters mean?

A. That is the repairs that take place after the meter is brought into the shop.

Q. Work on consumers' premises?
A. .82 of one cent, or $854.87.
Q. What is that?
A. Well, that is the cost of going around adjusting appliances, taking care of the complaints, general investigations.
Q. Distribution superintendence.
A. .56 of one cent, or $5,801.27.
Q. Distribution supplies and expenses.
A. .58 of a cent.
Q. How much have you estimated in the aggregate for taxes in dollars, state and county, or altogether if you have got it that way?
A. 7.48 cents.
Q. That is in the aggregate?
A. Yes, sir.
Q. That is all of them?
A. Yes, sir.

Mr. Moran: Would it serve your purpose, Judge, if we had a statement for the month of July prepared, the same as the six months' statement is, with all this on?

882 Mr. Hill: I think it should be put in to show what the $1.22 was.

The Witness: I have given you the amount of taxes in cents. I would like to complete it.
Q. Yes.
A. $7,792.86.
Q. What is that derived from?
A. That is an accrual that we set up every month for taxes.
Q. If you accrue that every month you will have more than your total taxes at the end of the year.
A. Oh, no. I do not think so.
Q. Have you raised your assessment since 1919.
A. No.
Q. It is $7,000 and the aggregate taxes—well, I see, you have mentioned the length of risers. What do you mean by that term?
A. The risers, you are speaking of, Judge?
Q. Yes.

Mr. Moran: He wants to know some particular thing about it.
Mr. Hill: What it was?

A. I said there that it was the pipe that is brought from the point of the service through the entrance to the building, to the meter.
Q. To the meter?
A. To the meter; tha tis to the inlet side of the meter, then from the outlet side of the meter to the house pipe.

883 Q. It does not make any difference how long the riser is from the outlet pipe of the meter to the house pipe, does it?
A. Not as far as consumption is concerned; no sir. But as far as trouble is concerned, though——

Mr. Moran: Judge, he did not make any point of the length of it, it is the location of it. Not the length of it, the location of it, being on the front wall of the building.

The Witness: You know sometimes, Judge, the meters are such on the second and third floors in the bath room and we would have to——

Q. That keeps the bath room warm anyway, does it not?

A. I don't know.

Q. How long a period is it that you have not taken new customers?

A. Why, we have taken very few since March, 1920. Since March, 1920, is right; yes sir.

Q. You have figured in in your July, 1920, and also for the first six months of 1920 the promotion expenses of some seven or eight thousand dollars that you say you used solely as a force of appeasers, forces to appease the public who were irritated.

A. Well, they were consolers to a certain extent.

Q. Consolers and pacifiers.

A. Then the men are also doing work, those same men, doing other work. I can tell you what they are doing.

884 Q. Just a moment. When you get all these extensions of yours in you can cut off all that item of pacifiers, can't you?

A. As pacifiers, but I will put them back in their regular jobs selling appliances.

Q. Then you will have a profit on your appliances and pay them, won't you?

A. We always try to make a little profit.

Q. But you did not during this year, until July, 1920?

A. No, I agree with you.

Q. That is a loss, is it not?

A. That is a loss, yes.

Q. You gave the schedule of figures, of wages that you gave and are about to pay. The fact that immigration into this country is on the increase, in your opinion will that have any effect upon the price of labor?

Mr. Moran: I object to that as assuming something that is not established and probably not a fact, about the increase of immigration.

The Master: Go ahead and answer it; we won't go very far.

A. It has had no effect on us. The fact is I have been in very close touch with the immigration authorities. My uncle has been deputy commissioner of immigration at Ellis Island for many years. I have even tried to get help that landed at Ellis Island for my gas works and I have been unable to do so.

885 Mr. Moran: Is there a great increase in immigration?

The Witness: We have not noticed it in Brooklyn.

Mr. Moran: I have not heard about it; in fact I have heard people complaining.

Mr. Hill: I will give you the figures if you want them.

Mr. Moran: No, you know about them.

By Mr. Jackson:

Q. While we are on the subject of immigrants, when was your most recent attempt from this uncle of yours and through his influence over the incoming tide of immigrants—when was your most recent attempt to get some labor for your plant?

A. Some time last Spring or this Spring.

Q. The Spring of 1920?

A. Yes sir.

Q. What class of immigrants did you seek for?

A. The fellows who could handle a shovel.

Q. So that in view of the highest skill required in laborers, that you heard one of your experts testify was necessary, in view of the worst quality of gas oil, that is necessary.

A. Oh, no, that highest skill I do not——

Q. You do not take any stock in that.

A. Yes, I do, but I have a definite plan as to how to do that.

886 Q. Then you think you are skillful enough to handle that poor quality of oil?

A. I am skillful enough to get men who are able to handle it, yes.

Mr. Hill: I am finished so far as anything I think of.

Mr. Moran: He will be available for any questions you may think of to ask him, but he won't be here again to take the chair generally.

The Master: But he will be here every day.

Mr. Jackson: Yes, I may want to ask him some more questions.

ANDREW J. GONNOUD resumed the stand.

Direct examination.

By Mr. Moran:

Mr. Moran: I am through with Mr. Gonnoud's direct examination except for some things Judge Hill asked about or some things I volunteered. One was with reference to the unaccounted for.

Q. Have you prepared a statement of the unaccounted for of the company from 1909 down to date, 1920?

A. I have.

Mr. Moran: I offered that in evidence, in connection with that matter.

Mr. Hill: That is taken from what?

887 Mr. Moran: From the reports of the company. It is the same thing that has been reported to the Commission.

(Received in evidence and marked Plaintiff's Exhibit No. 39.)

Q. You were to get out a statement of uncollectibles.

A. Yes.

Q. Have you got that written out?

A. Yes. (Handing counsel paper).

Q. You have here a statement from 1908 to 1920 of the uncollectibles charged in expenses or in connection with expenses.

A. Yes.

Q. Showing the total in dollars.

A. Yes.

The Master: 1919?

Mr. Moran: From 1908 down to the present time.

The Master: Did you ask for that, Judge?

Mr. Hill: I asked for the amount of uncollectible bills.

Mr. Moran: I offer that in evidence.

(Received in evidence and marked Plaintiff's Exhibit No. 40).

Q. Have you got the statement of the gas oil as measured by the company on delivery, in comparison with the amount paid for it?

A. Yes.

Q. Will you produce that?

A. This is it for 1919. (Handing counsel).

888 Q. Hand me the 1920, too.

A. That is the 1920. (Handing counsel).

Mr. Moran: Instead of making two, I will offer this in evidence as one exhibit, for 1919 and 1920.

(Received in evidence and marked Plaintiff's Exhibit No. 41).

Q. The statement just received, for the purpose of the record, shows that in 1919 the company was billed for how many gallons of oil?

A. 5,587,191.

Q. And your measurements showed a receipt of how many gallons?

A. 5,551,374.

Q. And the gallons billed exceeded the gallons received by how many?

A. 35,817.

Q. Or in percentage of the quantity received how much?

A. .0064 per cent.

Q. According to *t*this statement there was a variation in practically every shipment, was there not?

A. Yes.

Q. For instance, the first one there was one gallon more you received than you were billed for, and in the next measurement it showed that you received 2,238 gallons less?

A. Yes sir.

Q. Now, I notice one here of 15,636 gallons more received than billed.

A. Yes.

Q. Do you recall anything about that one?

889 A. No, I do not.

Q. You do not know whether there was any disturbance over that or not?

A. No sir.

Q. And the shipment immediately preceding that you were short 11,427?

A. Yes.

Q. I presume that was looked into, was it not?

A. Yes, sir, I believe both were looked into. Whenever there is a large variation it is looked into.

Q. Well, who can tell us what it resulted in?

A. Mr. Elsman can tell, I imagine.

Q. Turning to 1920 it shows that you received how much oil as per bills.

A. Gallons billed 2,922,206.

Q. And gallons received as per your measurement?

A. 2,933,535.

Q. Your receipts exceeded the billed by how much?

A. 11,329.

Q. Or an increase in percentage of how much?

A. .0039.

The Master. We will suspend now until tomorrow afternoon at two o'clock.

(Further hearing thereupon adjourned to Wednesday, August 18, 1920, at two o'clock, p. m.)

[Endorsed:] Public Service Commission, First District, Aug. 18, 1920. Bureau of Statistics & Accounts.

5891. United States District Court, Southern District of New York.

Before Hon. Gordon Auchincloss, Special Master.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Transcript of Reporter's Minutes.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York.

Barclay, 8477.

890 KINGS COUNTY LIGHTING CO.

v.

NEWTON et al.

61 Broadway, New York,

August 18, 1920—2 o'clock p. m.

Met pursuant to adjournment.

Present:

The Master,
Mr. Moran,
Mr. Hill, and
Mr. Jackson.

ANDREW J. GONNOUD resumed the stand.

Cross-examination.

Continued by Mr. Hill:

Q. You prepared, Mr. Gonnoud, at my request, certain data covering 1919 and 1920, showing the number of pounds of coal which was billed to the plaintiff, and for which they paid, and the number of pounds of coal which the plaintiff actually received according to their own weights; is that the truth?

A. Yes, according to their own weights.

Q. There are quite a number of different items going into the tabulations?

A. Yes.

Q. And you have one showing the boiler coal in 1919?

A. Yes.

Q. Is it a fact that during 1919 you received, of boiler coal, 369 less tons than was billed to you and for which you paid according to the books of your company?

A. No.

Q. Isn't it 369 tons less?

A. No; that is 369 tons less according to weights taken in these three ton buggies that we weigh them, but that does not
891 mean that we received 369 tons less than we paid for, by any means.

Q. All right, you received less according to your own weights?

A. According to the weights—yes, according to our own weights.

Q. Than was billed to you and you paid for?

A. Yes.

Q. The shortgage on boiler coal was 369 tons?

A. There was no shortage.

Q. According to the weights?

A. Well, an apparent shortage, you might say; an apparent short-

age. It is a variation there, that is all you can call it—a variation between the weights. You can't term it a shortage.

Q. Was there billed to you and did you pay for 11,644 tons and 406 pounds of boiler coal?

A. Yes.

Q. According to the weights that you took of that coal, was there 369 tons less than that amount?

A. Yes.

Q. You concluded, and this amounts to 3.16 per cent on the entire amount purchased, does it now?

A. Yes.

Q. Did you have billed to you and pay for, of anthracite coal in the year 1919, 23,751.03 tons of coal?

A. Yes sir.

Q. According to the weights which you took up of that coal, did you receive 220.3 tons less than that amount?

A. According to our weights, yes.

Q. This made a shortage, according to your weights, of
892 .92 of 1 per cent; is that right?

A. Well, I can't say there is a shortage: I can state——

Q. Well, according to your weights?

A. There is a difference, there is a variation there; our weights show less.

Q. Well, it is a variation less?

A. Yes.

Q. A variation minus?

A. Yes, that would be a good way of putting it. I don't want it to appear on the record that there was any shortage here, because there isn't any such thing as a shortage.

Q. Do you weigh the boiler coal in buggies?

A. That received from the boats we weigh that way. Boiler coal received from the boats is weighed on trucks about three—they contain about three tons.

Q. The anthracite coal you weigh in those buggies in which you convey it to the gas machines?

A. No, we weigh those in the same way in the same kind of trucks—buggies as we call them.

Q. In trucks?

A. Yes.

Q. Do they hold about three tons?

Mr. Moran: Cars.

A. They are simply little cars.

Mr. Moran: Little car up on the tracks there, isn't it?

The Witness: Yes.

893 Q. You furnished me a schedule of bituminous coal. Is that included in the first schedule which I questioned you concerning, under the heading boiler coal?

A. It is not.

Q. Did you purchase and have billed to you and pay for during 1919 1,880 tons of bituminous coal?

A. Yes.

Q. According to your weights in your yards, did you receive 39.9 tons less than that?

A. Yes, according to our weights.

Q. Or according to your weights, did you receive 2.12 per cent less than the total amount which was billed to you and paid for by you?

A. Yes, according to our weights.

Q. You mean to keep your weights correct?

A. I do not get the question.

Q. Do you mean to keep your weights—your scales correct?

A. Do we mean to?

Q. Yes, is it your intention to have your scales right?

A. Yes, the scales are examined to see that they correctly weigh.

Q. I will now ask you to examine the schedule of barley coal from January 1st, 1920, to June 30th of that year. Did you have billed to you and did you pay for 9,518,096 pounds of barley coal during that period?

A. Yes.

Q. According to the weights in your works yard, did you receive 216,551 pounds less than that amount?

A. According to our weights, yes.

894 Q. Was this minus quantity 2.275 per cent of the entire amount that you should have received?

A. Yes.

Q. Did you during the same period, January 1st, 1920, to June 30th of that year, have billed to you and did you pay for 32,565,456 pounds of anthracite broken coal?

A. Yes.

Q. According to the weights in your yard, was there 66,078 pounds less than that amount received actually by you?

A. Yes, according to our weights.

Q. And was this a percentage of .002 short?

A. It was.

Mr. Moran: What does that mean,—one two-hundredths of one per cent?

Mr. Hill: I think it is less than that, isn't it? 2/1000ths would be 1/500th, wouldn't it.

The Witness: Yes, some infinitesimal fraction like that.

Mr. Hill: 2 1000ths would be 1/500th, wouldn't it?

Mr. Moran: 1/500 of one per cent?

Mr. Hill: That is what I would understand it. But some of the others are larger, you know.

Q. Of bituminous coal during the same period, did you have billed to you, 2,326,864 pounds of coal, and did you pay for that amount?

A. Yes.

Q. According to the weights in your yards, was there
895 actually received by you 6,624 pounds less?

A. Yes.

Q. Was this apparent shortage .028 of 1 per cent?

A. Yes. When you say paid for now, some of this might——

Q. (Interrupting.) Well, paid for or go into your accounts receivable?

A. Yes—accounts payable.

Q. Payable, I mean?

Mr. Moran: Why do you call it different in different years?

The Witness: I don't know; that is the way it was gotten up, in a hurry.

Mr. Moran: Here you have got bituminous?

The Witness: We have bituminous each year; the only difference is one place we call it barley and the other place we call it——

Mr. Moran: Boiler?

The Witness: Boiler coal.

A. We always have some unpaid bills. There are always bills outstanding, when you bring it down to June 30th, unpaid.

Q. You do not know, when I say paid for, whether it is actually paid for, or whether it is an accounts payable?

A. Yes. It is not an account payable, we know that.

Mr. Moran: Well, that is important. Do you want us to contest those bills?

Mr. Hill: I would not have any idea of making any suggestion as to how you run that over there. Are you consulting me now as an attorney?

896 Mr. Moran: Yes.

Mr. Hill: Well, I will send you a bill then.

Mr. Moran: No,—as to your position.

Mr. Hill: I am not inclined to advise you on behalf of the Attorney General. If you consult me personally, I will meet you outside; if you will give me a retainer, I will give you an idea.

Mr. Jackson: The size of the retainer will influence the quality of the advice too.

Q. On quantities of material used in the manufacture of gas, as appears by Exhibit 6, and Exhibit 2 and other exhibits of a similar character, the quantities are based upon the amounts of material billed to you?

A. They are based on the amount we used. Of course, the billed amount comes in there, because we take the amount we have on hand at the beginning of the year and we add to that the amount billed, and subtracting the inventory at the close of the period gives us the amount used.

Q. And you charge up that shortage in your books, and that appears in these schedules which you have furnished—that apparent shortage?

A. We accept the billed weight.

By Mr. Jackson:

Q. Well, the quantities that you base those computations upon, are taken—one item of them is taken, the amount of coal and the amount of oil is the amount that is billed to you, is it not?
897 And not the amount according to your weights at the yard?
A. Yes.

Q. It is the amount that you have testified to just now, upon these different schedules that you have furnished as the amounts billed to you?

A. The amounts billed to me, as the amounts——

Q. Don't you understand the question without repeating it, because that just duplicates the record?

A. No, I do not. I don't understand the question. Read the question over again.

(The question was read by the reporter as above recorded.)

A. Which different schedules do you refer to there,—those schedules that we had?

Mr. Jackson: You don't mind th interruption, do you?
Mr. Hill: Go right on.

Q. Judge Hill has just been asking you as to some schedules which you have furnished here, about which he was asking you questions, and he has referred to the number of tons billed during these different years?

A. Yes.

Q. And the number of tons weighed at your yard, and referred to the difference between the tons billed and the tons weighed. You understand that?

A. Yes.

Q. Now, then, what I ask is, from those estimates your expenses that you testified to formerly, and represented upon Exhibit
898 6, Exhibit 2 and the other exhibit—I don't remember the numbers of them—that were put in to show the quantities of materials, of oil and coal,—we are dealing with now during the years 1919 and 1920— were those quantities the same quantities, according to the amounts billed to you and not according to the amounts as shown by the weights in your yards?

A. According to the amounts billed to us.

Mr. Moran: Well, they are the quantities used, not the quantities——

Mr. Jackson: No; I don't propose to accept that condition, from you or the witness. He has answered that it is the amount billed.

Mr. Moran: Let me answer——

Mr. Jackson: They have made that estimate——

Mr. Moran: It is not right. He has not said any such thing.

Mr. Jackson: I know, but the witness testified to it.

Mr. Moran: We can straighten it all out. I know what you want to get. We can straighten it all out. The quantities on the exhibits

for the expenses of operation for 1919 and 1920, are the quantities used. Whenever, to determine the amount used, it is necessary to resort to inventory adjustments, the stock on hand, or that
899 ought to be on hand, is computed according to the amounts billed, and not the amounts actually received as according to our weight.

Mr. Jackson: So that, just as we said, the amounts there, whether you call it the amounts used,——

Mr. Moran: Isn't that correct?

The Witness: That is correct; just as I explained to Mr. Hill here.

Mr. Jackson: Well, we don't want the slightest question in the use of terms. The amounts used then as shown by those exhibits are identical with the amounts billed?

The Witness: No, that would not be so. We buy coal in one period and we use it in another period. That is the amount of coal purchased during a certain period.

Q. I have not expressed myself exactly, although it seems to me that you must understand and could answer according to what you see is my purpose?

A. Well, I——

Q. (Interrupting.) I appreciate the fact that during a certain period that you do not use all the coal that you have billed to you in that period; I appreciate that distinction, but what coal you do use is taken from the number of pounds, the quantities, the tons, according to the amounts billed to you of that coal; and not according to your weights?

A. Yes.

900 Q. That is it. Now, I guess we have got it clear?

A. I explained all that in the other question.

Mr. Moran: When they weigh this coal in, their appears to be a shortage sometimes.

Mr. Jackson: Why, your witness won't stand for that word "shortage."

Mr. Moran: You will let me finish it, won't you?

Mr. Jackson: Yes, but he does not like the word "shortage."

Mr. Moran: Appears to be a shortage I said. He will stand by that.

The Witness: Yes.

Mr. Moran: Now, there is a further check on quantities.

Mr. Jackson: And if you don't mind stating, go ahead and state it.

Mr. Moran: I won't say anything, if you don't let me.

Mr. Jackson: No, I am not objecting to it. You say there is a further check. You might just as well state what the check is.

Mr. Moran: The check is, this coal goes into stock. When they use coal they weigh it again as it goes into the generators. They estimate the quantity of boiler coal used according to the wagon that carries it over there.

901 The Witness: They don't estimate it, they weigh it.

Mr. Moran: They weigh it.

Mr. Jackson: But there may be another apparent shortage there.

Mr. Moran: And there may be an overage there.

Mr. Jackson: Or an apparent overage, you mean?

Mr. Moran: An apparent overage, yes. So you are not getting—

Mr. Jackson: And where is the check in there?

Mr. Moran: Now, inventory adjustments—if you are going to pursue this, you have got to go clear through the inventory adjustments.

Mr. Jackson: Well, which is the absolute check that you go by? That is all we want to find out. Is it the survey of the pile?

Mr. Moran: What is your question?

Mr. Jackson: I say, what is the absolute check? What is the dependable amount, if all these over amounts or under amounts or shortages are apparent? What is the absolute determination? Is it merely a survey of the heap that lies in the yard?

Mr. Moran: You have got to go clear through to the end. You are figuring here that you are going to the—adding to the percentage—won't you let me finish?

902 Mr. Jackson: I haven't said a word. I was just going to light my pipe.

Mr. Moran: The great big idea you and Judge Hill have is that you are going to add to our expenses, or subtract from our expenses, I don't know which, these percentages as appear here, that we do not get as much coal as we pay for or something of that sort. Now, I say that you can't—that that does not follow at all, because you have got to go clear through the inventory adjustments in this thing, clear out to the end of it, before you can get any place. This is used simply as a check on the quantities that are billed to us, to check on it. Now, from day to day as we use coal, we weigh it and measure it, and we put into our expense accounts what those weights show; but when it comes to the end of the year or the end of the period as the case may be, to check the quantities that we use—we go to our inventories and take our inventories and make a further adjustment, so you are not going to—you can't stop just on these things.

Mr. Jackson: Well, but do you mind my inquiring further, while we are on the subject,—I was going to ask further while we were on it. You say you have got to go clear through to the end. After having gone clear through to the end, at what point, whether 903 at the beginning or in the middle or in the end, do you find a quantity that is dependable? On what dependable quantity do you make up your—do you take for the truth, and what have you taken as the figure?

Mr. Hill: Who is that question addressed to?

The Master: Let us, if possible, conduct it in an orderly way and direct the questions to the witness; and if he can't explain them—As I recollect, this question of inventory adjustment that was gone into with Mr. Hopson, wasn't it? I don't know whether this witness went into it before.

Mr. Hill: We went into it with this same witness, and he was going to bring this data. This was a continuation. Mr. Hopson just showed the scheme, the bookkeeping, but the data Mr. Gonmoud was to furnish.

The Master: If Mr. Moran thinks you are going at it in an incomplete way, let him ask his questions to straighten it out; but let us get the thing——

Mr. Jackson: Yes, but I was misled in this way, your Honor: I thought I had a satisfactory answer from the witness, both from his standpoint as to the fact, and as to my understanding of it. Mr. Moran started to testify, as I thought, somewhat differently; and I suppose he had taken the place of the witness on the stand, and I was ready if that was the development to follow it along and
904 to please him in that manner. I won't question him further at this time.

Mr. Hill: Now, from some officer of the company, your Honor, I would like to go into the question of the issuance of stock.

If the proof offered by the plaintiff yesterday as to the stock and bond issues is to be considered as any slightest evidence of value, or that the stock and bonds were issued in fact against property, corporeal or uncorporeal—it appeared that there was a million or two million dollars of stock outstanding of this company, and if that is upon any theory of showing value I want to go into it with this witness or with some other witness, whether the vice president by recalling him—just the certain figures that go into the thing at the time this stock was issued.

The Master: Perhaps Mr. Moran by a statement can make it unnecessary for you to do so.

Mr. Moran: What information do you want to know about the stock and bonds?

Mr. Hill: I understand from very good authority, it appears on the books of the company as of June 30, 1904 and July 1st, 1904, that on the first mentioned of those dates there appeared to be in the capital account $2,586,777.86; but the next day, without any
905 increase of assets, the capital account was increased to amount to $4,846,772.68, or an increase of $2,250,000 of that stock was issued against that in part——

Mr. Moran: Well, that is not so.

Mr. Hill: That being one of the findings of Justice Greenbaum, I want to inquire into that fact, if the issuance——

Mr. Moran: Well, if you want to inquire about those things, I know about them from the records only. I was not around at that time, Mr. Elsman was not around at that time, Mr. Gonmoud was not around at that time. We have the books of the present company which will show what the securities were all issued for.

Mr. Hill: If issued stock and bonds was any evidence of value, I shall want to go into it.

Mr. Moran: The fact is that the Kings County Gas & Illuminating Company have been organized in 1899——

Mr. Jackson: Do you want this on the record?

Mr. Moran: Well, I trust that the reporter is taking it down.

The Master: I want it down.

Mr. Moran: I trust that the reporter is taking it down. The fact is that the Kings County Gas & Illuminating Company
906 have been organized in 1899, that it undertook the construction of a gas works, distributing system, in the then territory of the town of New Utrecht, carried on that basis until July 1, 1904. At that time it had outstanding $1,000,000 in capital stock, $750,000 of first mortgage bonds, and I think $250,000 of debenture bonds—I won't be sure about that. It had then about five thousand or six thousand consumers and many miles of mains laid in the territory. It owned the real estate at 51th street and First avenue on which the present works of this company are located, and had a plant, gas manufacturing works there. They also owned the real estate at Ninth avenue and 65th street, on which the present holder station of this company is located, and had the holder there—a 500,000 holder there, I believe.

The present plaintiff, the Kings County Lighting Company was organized in the latter part of June, 1904, with a capital stock of $2,000,000. It acquired the $1,000,000 capital stock of the Kings County Gas & Illuminating Company, issuing for such stock its $2,000,000 of capital stock and $1,112,000 of its first and refunding mortgage bonds.

Immediately upon the acquisition of that stock of the Kings County Gas & Illuminating Company, it merged the Kings
907 County Gas & Illuminating Company under statute and thereupon became the owner of all its franchises and property, and began then to carry on the business of manufacturing and distributing gas. I understand that the books of the Kings County Gas & Illuminating Company showed fixed capital at something over $2,000,000—$2,400,000. When the books of the Kings County Lighting Company were opened, the property which it acquired through that merger was entered upon its books at the cost of it, cost of that property to the Kings County Lighting Company; and in the fixation of that cost, the bonds and stock of the Kings County Lighting Company issued for the stock of the Kings County Gas & Illuminating Company were taken at their par value.

It must be remembered that at that time the Kings County Gas & Illuminating Company had a 20—had a contract for lighting the streets of the 30th Ward, which commenced in 1891 and ran to September 1, 1916. It then had 12 years to go, and did continue for 12 years. That was one of the items of property it had.

It had the land down there at First avenue and 54th street, which I don't know whether it was appraised at that time or not, but today it is worth according to our appraisals over $1,000,000.

908 I think probably the Kings County Lighting Company, in view of all that has happened since, received dollar for dollar for the stock and bonds it issued; through that it got a going plant with a street lighting contract sufficiently remunerative to carry the company while it was building up its private business, which it did build up now to some 35,000 consumers by the time the contract expired. It received that property, and today the property

could not be duplicated for fifty per cent more than the securities outstanding against it.

In further explanation of the history of the company, upon the organization of the present Public Service Commission on July 1, 1907, the company came under its jurisdiction, and all the funds, the first mortgage—the first mortgage refunding bonds that have been issued since that time, which aggregate over $1,000,000 have been issued under the authority of the Commission—I guess they aggregate over $1,500,000—have been issued under the authority of the Commission, pursuant to Section 50 of the Public Service Commissions Law, for additions and extensions made, which have been checked up and approved by the Commission.

909 Now, so far as stock and bonds, the mere out-standing stock and bonds in and of themselves, establish value. I think that that is something for the Courts—that they have Courts spoken upon, and I cannot be expected here, and I won't assume the responsibility of deciding what the law upon that subject is and irretrievably committing this company to anything on the law with respect to bonds and stock outstanding. That is something for the Courts to handle every time it comes up, and I won't attempt to bind the company in the future, or to bind it now or in the past. My personal understanding is that the mere issue and outstanding of stock and bonds does not go very far to establish a value for the purpose of a rate case.

Now, while we are on this subject, all rate cases where a statute is challenged—the constitutionality of a statute is challenged, it is on the ground that the rate does not enable the company to pay a fair return upon investment or upon the value of its property. We have here a case where the revenue under the statutory rate does not meet operating expenses and has not met operating expenses now for two and a half years. At the present time it falls fifty per cent short of meeting the operating expenses.

910 It is inconceivable to me how such a statute can be sustained, how it can be enforced when the revenue under it does not meet operating expenses, regardless of any property at all—the value of any property back of it. There does not seem to be any question of a fair return involved, because there has been no return under the statutory rate, it is not likely there will be a return in the future, in any period if it is given to any of us to see. I would not be surprised if illuminating gas, water gas, was never again in this country sold for 80 cents a thousand cubic feet. Things have changed. It is all due to the fact—I think it is an economic fact—that the dollar, the value of the dollar, the measuring power of the dollar is changed. We have got now a different sort of a dollar than we had in 1906, when those 80 cent statutes were passed. That is the whole thing. 80 cents now is not the same 80 cents it was in 1906, or in 1916. 80 cents now—that 80 cents is now 40 cents in purchasing power.

Now, then, entertaining these views—and I think they are sustained by the incontrovertible testimony here, and not only by the experience of this company, but gas companies generally through-

out the country, and also by the decisions of the Courts—I
911 have not thought it was at all necessary in this case, to have made by the Court a valuation upon our property. I have contended that certain values are the values that control, and present values are what it would cost to produce a like thing, what it would cost at the present time to produce a like plant. I find that Judge Learned Hand, as I read his opinion, has so held, that a rate base—in the present, it is as it was always, it is the present value. Construction costs have more than doubled since the time the major part of this plant was built, and upon that basis the physical property down there and real estate could not be reproduced today, I don't believe, less than $7,000,000 to $8,000,000, and that is the value we are entitled to under Judge Hand's decision.

Now, to get that down here and to go into the evidence of that would take a time that this company cannot afford to put to it. In other words, while we would be fighting that out, the company would have to suspend business and to get away from that—and thinking it is wholly unnecessary, because as I understand the law, all there is for the Court to say is whether the statute is to be enforced, and it can do that on the operating expenses alone, and certainly
912 it can do it upon a concession by the defendants that the company has got something down there. Somebody ought to be able to say that it has got property of some value down there, simply for the purpose of calling the Court to act upon the question before it, to-wit: Shall the statute be enforced or shall it not? I had hoped that the defendants would find themselves in the position to concede—in fact, the Public Service Commission have advised me and are willing to concede that the property is worth a certain amount, just for the purpose of having the Court act upon the legal question that is before it, the Constitutional question that is before it.

Mr. Jackson: We have stood in the same position with you in that respect, haven't we?

Mr. Moran: Yes, certainly. Now, if we are going to inject into it other refinements, and if we are going to insist—if the defendants are going to insist that the Court fix a rate for this company in the event it holds the statute unconstitutional, fixes another rate, why, then, of course—and the Court agrees with them, that it is going to fix a rate—then, of course, we have got to have a valuation. As I read Judge Hand's decision in the Consolidated case, he disputes the right of the court to fix a rate. It is not a judicial
913 question, it is a legislative question, a legislative matter. He does not fix a rate.

Mr. Jackson: What did Judge Hand do?

Mr. Moran: He did in that case, however, mark a limit beyond which the company might not go.

Mr. Jackson: Well, you will be——

Mr. Moran: Just a moment. Marked a limit beyond which the company might not go, and he did that as a Chancellor. He says, the process I am about to issue lies in the discretion of this Court, it can withhold it or can grant it. I grant it, but I grant it to the

defendants only on the condition that it won't go beyond a certain point while it has the protection of this decree.

And as I read that, he put that high enough—he did not attempt to get at the value, but he put it high enough so that no injustice would be done to anyone, but he required that the difference be impounded to await the fixation of a rate by the Legislature, or by the Commission in case that should be delegated to the Commission.

Subsequently, I understand Judge Hand has modified that decree to permit them to substitute an adequate property, bonds or something else in lieu of the cash which he said in his original
914 decree—but that is immaterial, this company cannot, is in no position whatsoever to impound anything. We are here in the August days, as I said before, simply to get a decree so that we can go on doing business. We are not in a position to impound anything, we do not intend to in case this statute is suspended—we do not intend to defy the public, we do not intend to charge any exorbitant rate; and in deference to the company, I want to say every reduction in the price of gas in that territory since the organization of the old Kings County Gas & Illuminating Company back in 1899, has been a voluntary reduction. We were permitted to charge $2 or $3; we cut it down, kept it down. There was one time the statute was $1.25. We worked from that down. The statute was then $1.00, we came down to 95 cents. The present rate they are charging was a voluntary rate, and the company is not going to take any advantage of any liberty it might have here, and go out and charge, because I don't believe now, with all deference to Judge Hand—I don't believe that a company can do it. There are other restraints. A public service corporation in the absence of any statute——

Mr. Jackson: Do you mean to say a company can do it?

915 Mr. Moran: A public service corporation in the absence of any statute, can charge only the reasonable price for its gas, under the rules of the common law.

Mr. Jackson: Who is going to determine?

Mr. Moran: Any Court can determine it at all, a court of law or a court of equity at any time.

Mr. Jackson: Isn't that a retrial, necessary to determine it?

Mr. Moran: Any consumer may refuse to pay and the company has got to collect.

Mr. Jackson: It would not require a retrial, a valuation and expenses and everything to determine that at any time?

Mr. Moran: It might; and that is why we are here, because that would require a trial between each individual, and I had rather intimated yesterday, I tried to inquire in court here, before the Master, what was the position of the defendants, whether they had a defense or not; and I did not get anything from them. Judge Hill kindly told me afterwards, and it was something I suspected before, that he——

Mr. Jackson: Do you want this on the record?

Mr. Moran: Well, the Master is hearing it.

Mr. Jackson: Perhaps Judge Hill ought to state his own position on the record, as to whether he wants to go there.

916 Mr. Moran: I can state what is in my soul and what is troubling me. Judge Hill said that he was going to urge, going to say that there was some—or going to take the position that there should be some limitation, reasonable limitation on the amount the company might charge in case the statute was suspended.

Mr. Jackson: Well, I will state——

Mr. Moran: If I am wrong about that, Judge Hill will correct me.

Mr. Hill: I will state that is so.

Mr. Jackson: I will state my position upon the record, as we are discussing it as a sort of recess formality. I think it is inconceivable although conceding the technical proposition that a rate fixation is a legislative function and not a judicial function—I think it is inconceivable that a Court of Equity would, while trying to give relief to one party, leave the door open for a possible greater injury to the other party. The situation is—I have not followed it out; I shall though. A very simply illustration appears to me that I think is absolutely conclusive and that is this: That if a transport company should go into a court of equity claiming that one or more passengers on board a ship in midocean had

917 no right to be on the ship, and should contemplate a decree declaring that they had no right on board the ship, and having no right on board the ship, then the owner of the steamboat or the master should show his intention, or claim his intention of exercising his right under those circumstances of throwing the passengers overboard; I think that to provide against any such possible contingency or misuse of its intention merely to protect and declare the right of the owner of the boat, if the master would impose a condition and say, "I declare that these passengers or this passenger has no right on the boat; but I will decree that you—if necessary to have such a decree for the passenger's protection—that you carry him to some particular port."

Now, then, when any court declares that a rate that is fixed by the Legislature to protect the people against exorbitant charges—and that is the only reason for a rate being declared by the Legislature, and it is because of exorbitant charges in the past when these companies have been unrestrained—and any court says I am going to suspend the protection that the Legislature—that the people have thrown about themselves through the Legislature, because that rate does not give a fair return; then, during the time that the people may have to protect themselves again by another act of the

918 Legislature, instead of leaving the people unprotected and at the mercy of the company, and at the mere disposal of them through what their arbitrary determination may be as to what is or is not a reasonable rate, their sole construction upon that question—it is inconceivable to my mind that a court of equity should not condition the granting of equitable relief, which is meant to protect one party against the enforcement of the law—that it would

not also protect the other parties to the litigation, the public and the consumers, against any possible misuse of the exercise of its equitable power by an exorbitant rate meanwhile.

Now, that is the inherent power of a court of equity, and does not touch upon the question at all as to the rate fixing power in the Legislature and not in the Judiciary.

Mr. Moran: All right, General. Let us say something.

The Master: Let me ask: Do I understand that the Public Service Commissions is prepared to enter into this stipulation with Mr. Moran?

Mr. Jackson: About what?

The Master: Regarding the value of the property?

Mr. Jackson: We have conferred with Mr. Moran upon
919 the valuation. The Attorney General also has entered into that conference, and I think that as between Mr. Moran and the Attorney General and the Public Service Commission, so far as I know up to date, the amount has not been definitely fixed yet.

Mr. Hill: There is a difference of a quarter of a million dollars.

The Master: Well, wouldn't it be a rather good idea to get that thing settled?

Mr. Hill: Absolutely. I would like to know that.

The Master: I mean questions of evidence—the reason I want it settled at all is on questions of evidence. Now, it seems to be that when Judge Knox spoke to me about this case, he told me that the case would be materially shortened in all probability by the entering into of a stipulation.

Mr. Jackson: By about three months.

The Master: And now we are almost through the case, but questions of evidence come up from time to time which have some bearing on the fact on whether there is going to be a stipulation or not.

Mr. Hill: I told Mr. Moran——

The Master: Now, I don't want to get towards the every end of the case, and find that there is not a stipulation, or else if there is not going to be a stipulation, I just want to know it.

920 Mr. Hill: I told Mr. Moran what our experts—all of the authority I had. I told him the extreme authority that I had; and I will say to the Court it is not a trading figure, I told him a figure, $50,000 lower than my ultimatum.

Mr. Jackson: Do you want that on the record?

Mr. Hill: I would just as soon have it taken down as not. And last night he said—I told him the only figure which I have authority to act on personally, to stipulate it——

Mr. Moran: Now, may I have a word?

The Master: Yes.

Mr. Moran: I stated my views about the questions up to the Court, and the valuation as fairly constant. I prepared a stipulation and submitted it to the parties, which I thought at the time protected them in every way, named what I consider a nominal value to the property, not considering that the value was of any consequence. The parties did not sign it. The State submitted the question to somebody else, and of course, that happened which all human

beings could expect to happen—they wanted better terms, otherwise there would be no use of submitting it to anybody. So they wanted a lower valuation than the nominal value that we named.

921 Now, at that time I did not think for a moment that the Court would, when it suspended the statute, go to work and fix a rate, even a limited rate.

The Master: You mean as Judge Hand has done?

Mr. Moran: As Judge Hand has subsequently done. You see, that was after. Now, that has given me great concern. If the Court in this case holds that the statute is to be suspended, and will fix a rate why, then, it is very important that the plaintiff have a full value of is property.

How, I don't know that the District Court would consider that this company is in the same—can be treated the same as the Consolidated Gas Company. I don't know the financial condition of the Consolidated Gas Company, but I do know that the decree, working out as it will, means that that company has got to manufacture and sell gas for 80 cents, at least until the Legislature acts, which won't be before February next, and further than that, I know that if the defendants appeal in that case, that they have got to manufacture and distribute gas for 80 cents until the United States Supreme Court decides the case, which may be a year hence.

Now, that would not be justice to this plaintiff. I don't know what the Court will do, I don't know what my learned op-

922 ponents will urge the Court to do, except as they specify here today. Now, there is a way out of it. They can take this, what I call nominal value, and use it as the basis for the questions involving the condemnation of the present statute, but not for the purpose of the Court exercising its equitable prerogative and fixing a limitation upon the rate. We could come to some agreement that if the Court should want to take that attitude and want to do that sort of thing, that then the rate so fixed should not include more than a certain number of cents per thousand for return on property, leaving the Court to pass upon how much the rate must provide to cover operating expenses. Now, to make myself clear——

The Master: Let me ask you a question so that I can make myself clear.

Mr. Moran: Surely.

The Master: Your petition since Judge Hand's opinion, is first that you are not willing to try this case simply on the question of the expense in making gas; if the Court finds that the expense is in excess of the statutory rate and suspends the statute only on conditions, you are not willing to try your case by simply putting in your expenses of operation and not establishing your full value?

923 Mr. Moran: That is true.

The Master: Now, I don't know of gas cases having been tried without some sort of a rate base being established. It may be that they are tried that way somewhat. But it is conceivable, of course, that the company could show expenses, that were in excess of the statutory rate, and thereby it might—the court of equity

might suspend the statute, but it might suspend it under certain conditions, which, no evidence being before it as to the value of the property, would result in no return being allowed for the capital investment.

Mr. Jackson: Or an insufficient return?

The Master: Or an insufficient return.

Mr. Moran: That is right, or an insufficient return. Suppose we stipulated a nominal value?

Mr. Jackson: An equitable return is sufficient.

Mr. Moran: Yes.

The Master: Now, it is not your purpose to try your case simply by putting in your expenses?

Mr. Moran: It never was my purpose to try the case by simply putting in expenses.

The Master: Well I rather got the belief, in the last day or so that it might be possible that that was what you were going to do.

Mr. Jackson: Just upon that theory——

924 Mr. Moran: Personally, I think it is perfectly safe to do it, but I would not assume that responsibility for my client.

The Master: No.

Mr. Moran: And it is not necessary at all because the defendants are willing to concede a substantial amount of investment there.

The Master: A substantial amount?

Mr. Moran: Yes, sir, a substantial amount. They are willing to concede that.

The Master: Now, the question is that you can't get together on the exact amount, and further, that even if you do get together on that $250,000 more or less, on account of Judge Hand's decision, you are doubtful whether you want to do that? Is that your position?

Mr. Moran: I want the Court to be apprised of the situation, both the Master and the District Court apprised of just what we are confronted with here. It is not insurmountable by any means, your Honor.

The Master: You see, my point is this——

Mr. Moran: I do; your Honor stated it very clearly.

The Master: I will state where it gets difficult to me.

925 Mr. Moran: Yes.

The Master: That you put in evidence regarding your capital stock and regarding your bonded indebtedness, and while I fully appreciate that such evidence has never, I don't think, controlled the Court in establishing a rate base, if there is no other evidence but that, and if that evidence is unchallenged——

Mr. Jackson: Stipulated in this case.

Mr. Moran: No, no; he is speaking about——

The Master: No; if it is unchallenged, it would seem to me as if it were persuasive evidence to the Court as to what the rate base should be, and therefore when Judge Hill says he wishes to go into the question of stock and bonds, it raises a question of evidence that I have got to rule on right now.

Mr. Moran: Well, we are not going to rest it on that, anyway;

we are going further than that. The only thing that is troubling me is that, suppose the defendants concede for the purpose of the Court taking such action as necessary in condemnation of the statute——

The Master: Yes.

Mr. Moran: They concede that for that question we have a valuation of a certain amount. Now, that won't enable the Court to fix a limit upon our charges in case it wants to do that sort of
926 thing in the exercise of its discretion, because I will never admit that what they will concede is the full value of our property—the figure that they will concede, I won't admit that that is the full value; so we won't have any full value.

Mr. Jackson: No.

Mr. Moran: Now, just a moment, General. The Court, in fixing any limitation upon rate would be generous, liberal, acknowledging as it does and as it must acknowledge, it is not a rate fixing tribunal, it can't enter into the niceties of the situation, and it must—if it fixes a limit, it must go high enough so that no harm will be done to the company, and to prevent, as General Jackson very well said, only to prevent the charging of a plainly exorbitant rate to the customer.

The Master: Well, in acting in that way the Court has to have some evidence before it.

Mr. Moran: Oh, I say so. The Court has to have some evidence of that before it, or else the defendants have got to make some—the parties have got to make some agreement about that feature of it.

Now, we could do it very nicely here, the defendants can concede that we have a value of property there worth at least a certain amount of money; that is, for the purpose of finding out
927 whether this statute is to be suspended or not. Now, for the Court attaching a condition to its decree, that the plaintiff shall not charge more than a certain rate, they ought to be more generous with respect to valuation than they are on the question of condemnation of the statute. For instance, in this case as I look at it, this company has got to have 20 cents a thousand cubic feet in 1920 to enable it to get capital and pay returns. I think it has got to have 20 cents. Now, I think it would be perfectly satisfactory to the plaintiff that if the Court is to exercise that function and the defendants will stipulate that if the Court does exercise such a function, it shall allow in fixing any rate, 20 cents for return on property over and above whatever it may allow to meet the expenses of operation.

If you read Judge Hand's opinion, he says: "I go so high that I can't conceive that the Legislature would go higher." Doesn't he? He says: "They may go up to this amount, but I don't believe they would go higher."

Mr. Hill: You would have done well to work this thought up.

Mr. Moran: I have been.

Mr. Hill: Some time last week—because we can't act on your suggestion in a day or in two days.

928 Mr. Jackson: That phase has not been discussed before.

Mr. Hill: Why, I have got to put it up to the chief gas

maker of the Attorney General, and he just at present is on his vacation.

Mr. Moran: Let me say, Judge, that I have been thinking about it every since Judge Hand handed down his decision. I went over his decision the next morning and read it very carefully. The papers had it quite mixed up. I thought it was quite bad. I have been working on it ever since, and I did not know until last night that you had any such thing on your mind that you were going to work on this case.

Mr. Hill: Surely, anyone naturally might have thought, when Judge Hand's opinion——

Mr. Moran: I feared that you might, yes.

Mr. Hill: That if the Court should declare it confiscatory, that we would say that we were such protection to the consumer as Judge Hand has given in his decision.

Mr. Jackson: Even before Judge Hand's decision.

Mr. Moran: Judge, just a moment on that. If our condition was the same as the Consolidated, I would think probably you would take the same identical position, but our position is so different. The fund is impounded with the Consolidated Company,
929 and it can't be here. If it is, why, we are gone, that is all; there is no use of it.

The Master: If the Court modifies the injunction so as to provide bonds to be——

Mr. Moran: Oh, yes, we could not get the bonds; we haven't got any property. The Consolidated, I don't know what they had; I am not speaking for them. I don't know their financial condition. We could not do it. Our position is different. The Judge says I should have thought it over. I have thought it over, and it is a thing that has concerned us all the way through.

Mr. Jackson: All those considerations will come up before the Court as to what disposition should be made, it seems to me.

Mr. Moran: Yes, they come up before the Court.

Mr. Jackson: I can see what you have in mind; just that phase of the situation, you know, has not been discussed, in considering a stipulated base.

Mr. Moran: No.

Mr. Jackson: Although, I think the consideration of it, under that view, from that viewpoint, does not necessarily interfere with a stipulation. The only point is that it would have to be considered again, and neither one of the counsel here, Judge Hill or myself, are
930 quite supreme upon that end of it. We shall have, of course, to have a little conference among all the attorneys concerned, the Attorney General and the counsel for the Commission, Mr. Farley.

Mr. Moran: I am not expecting any decision on it today, but as it comes up here, it came up very naturally on Judge Hill's position on value. Very naturally, I would expect evidence at the earliest time——

Mr. Jackson: In order to avoid the extra work of valuation, I

would be hopeful of coming to some agreement with counsel upon that score.

Mr. Moran: I think it can be worked out. I was going to show the Court the stipulation that we had prepared. I thought that I had protected everything, but Judge Hand stepped in and said, "Here is a new wrinkle," and my stipulation was wholly—was not even——

Mr. Jackson: It was not quite a new wrinkle.

Mr. Moran: I don't know of it ever having been done in any other case, General. I don't — of it having been done in any other case.

Mr. Hill: In the Albany case.

Mr. Moran: I never saw that decision. That was afterward, anyway. I don't know what was done there. Now, on the matter that is here, Mr. Master, I would consider this alternative. If we can't come to some understanding with the counsel before
931 the Master, as to what amount they would concede, the Court should put in its rate as return on capital—if we can't come to that, and we have to go on with that question open—of course, we do not know now whether the Court will take any such action in this case as it did in the Consolidated case, whether it will fix any limitation at all. It may here say this is so palpably confiscatory that the Court is justified in exercising its equitable perogative and suspending the statute without any condition at all—it may do it.

Now, if you go to the Court on the report of the Master on a concession by the defendants that we have a value of a certain amount, and I reserving my point that that shall not be used for the purpose of fixing the rate, and we get in before the Court and the Court should say we want to fix a rate, why, then, I should ask the Court to send it back to the Master to determine the valuation of the property, and we could take our evidence then.

Now, the Court might—I am quite sure the Court would either do that or would work out something that would be equitable to all parties without sending it back.

The Master: Well, not so much on the question of the
932 fixing of the rate—I don't suppose that it is so usual for a Court in an injunction to fix the rate, fix a rate; or it may grant an injunction provided you do not go above a rate——

Mr. Moran: Yes.

Mr. Jackson: That is the way.

The Master: But on this other question that you raise, this question of impounding any sums——

Mr. Hill: I think, your Honor, so far as the Attorney General is concerned, it is not my theory that we wish to see—we are convinced that they need that money—that we wish to see the plaintiff unduly embarrassed, or that we will take a position that will unduly embarrass the plaintiff on the question of impounding.

The Master: The question of impounding, though, it seems is possibly even more difficult from my standpoint. It is very customary for the Court in suspending a case of this sort until it can be decided by the highest court to impound, to direct impounding, isn't it?

Mr. Moran: No; it is absolutely—never was done before except in Judge Hand's case, never.

The Master: Well, how about in the old Consolidated?

Mr. Moran: Well, wait a moment now.

The Master: How about in the old Consolidated case?

933 Mr. Moran: Well, wait a moment, now. Those were interlocutory injunctions, those were just simply interlocutory orders pending the final outcome; but on the final decision of the case—all the cases that I have read, and I have read the majority of them, I think—just merely suspend the statute without waiting for action on review at all.

Of course, in the old Consolidated Gas Company case there was a preliminary injunction entered into at the outset. A substantial amount was impounded under that before the final decree. The final decree was in favor of the plaintiff suspending the statute. The defendants appealed. My recollection is that that impounded money was still retained, impounded, pending the outcome in the United States Court; but that was because it had been impounded up to that time, it was not because it was the result—if they waited and got a final decree in the first place, there would have been nothing there.

Now, take the Denver Water Company case, they decided there the statute was unconstitutional, and they accepted that decision; there was no question of waiting for the United States Supreme Court, or anything of that sort. The Brooklyn Borough Company, tried here in the State Court, suspended the statute absolutely, did not

934 require any impounding to await any review on appeal or anything of that sort.

The Master: What do you understand Judge Hand, in modifying his injunction in the Consolidated case, permitted the Consolidated to do, to substitute bonds?

Mr. Moran: To substitute Liberty bonds.

The Master: Liberty bonds or bonds of the company?

Mr. Moran: No; Liberty bonds at their market value, in place of the cash that was to be impounded; for they could give, some one told me, a surety bond of some surety company.

935 The Master: But previously in this case were bonds of the company deposited?

Mr. Moran: Yes. We have not any more of those.

The Master: There is not any evidence about that in this record, except that——

Mr. Moran: They were deposited on the State Court's action.

The Master: Is it your present ability or an inability to deposit bonds of your own company?

Mr. Jackson: All that would be, I suppose, included in the subject of inquiry in that event.

Mr. Moran: Well, I do not see where we could get them. We testified to how many we have issued and outstanding and how many we had authenticated which were pledged with the Empire Trust Company.

The Master: Does that amount close the mortgage?

Mr. Moran: No, it does not close the mortgage; but you cannot

issue bonds under a mortgage without you put in property of the equivalent value, and if we put in property and issue bonds, we will have to issue bonds in order to put in the property, and we cannot issue bonds under that mortgage.

Mr. Jackson: There is a difference here.

Mr. Moran: And there would not be any protection, you know, if issued without property back of them. I do not see what
936 they would be impounded for. Why would we impound them in this action—to await what action?

Mr. Jackson: There is a difference in the situation between the Court on the question of a temporary injunction and at the time of the final decree.

Mr. Hill: Judge Hand made his decree really temporary.

Mr. Jackson: It is within the discretion of the Court at all times, under the circumstances.

Mr. Hill: Judge Hand kept it alive and open.

Mr. Jackson: He made certain provisions about the expedition of an appeal, and so on.

Mr. Hill: Oh, and also he said this is subject to being reopened, and put the burden on the people.

Mr. Moran: That is when a change of events comes around.

Mr. Hill: Yes, sir.

The Master: That was a final decree of injunction, was it not?

Mr. Moran: Yes, a final decree—as final as they can make it.

Mr. Jackson: Well, he exercised his discretion to make provision at that time, although of course I think without any doubt there was a difference on the question before the Court as to a temporary injunction upon the final decree.

937 The Master: I just raised this question because I wanted to satisfy myself of what theory the case was going to be tried on and presented to the District Court, and I think our discussion has been very helpful and has cleared the situation considerably, in my mind at any rate, and I leave it to you gentlemen to work it out.

Mr. Jackson: We are all going to try and assist the master in every way we can, by solving the difficulties as we go along, and by agreement wherever it is possible.

The Master: It may be a waste of time to hold these hearings until something is evolved from your conferences, because when Judge Hill starts in talking about stock I have got to let him go ahead.

Mr. Jackson: That is the trouble with Mr. Moran going into that subject at all. I was fearful that it was putting a burden on the defence of putting in some testimony to straighten out the record—more than we had intended to, that is all.

Mr. Moran: I wish I had the stipulation here. Have you seen it—that we prepared?

Mr. Jackson: I saw one that the attorney general had not agreed to yet.

Mr. Moran: To everything but the amount. He had agreed to

everything but the amount. If that was clarified here, there
938 would be no ambiguity at all. The Court would be obliged to act, regardless of the event, upon the amount stated in that stipulation.

Mr. Jackson: So far as the valuation is concerned.

Mr. Moran: So far as the valuation is concerned. Isn't that so?

Mr. Jackson: You think the stipulation under Judge Hand's disposal of the impounding and so on, and conditioned upon a rate, is too strictly binding upon you?

Mr. Moran: It does not provide for that eventuality.

Mr. Jackson: That is true.

Mr. Moran: In several ways it does not cover that. As I said before, we could agree upon an amount that would go into this tentative rate for return upon capital leaving the Court to decide all questions about that period. We agree upon that. That would solve the whole thing. If we cannot come to that, then we can use that stipulation, my position being made clear on the record, and if the Court then at the hearing of the Master's report wants to fix a rate as a condition of granting its release, and wants the full value of the property for that purpose, then we shall want the Court to send it back to the Master to get the value at that time, on evidence,
939 Mr. Hill: I should think it would be the position of the Attorney General that we should want such proof before the Court that, without any more evidence, the Court could, if it was so advised, grant an injunction that you believed you were entitled to, conditioned as to how high a rate you might charge, if it is determined you were entitled to charge any higher rate. I doubt very much from my slight knowledge of the position of the Attorney General in these cases, that he will make any stipulation that does not contain facts and put before the Court facts from which a decision as was made in the Consolidated case can be made without further delay.

Mr. Jackson: If there were any such hearing, you would not expect the Attorney General or the Public Service Commission to take any different stand, so far as their contentions are concerned, that the valuation is res adjudicata under Judge Greenbaum's decision.

Mr. Moran: You can make any contention you want about that.

Mr. Jackson: There would not be any stipulation as to that.

Mr. Moran: Oh, no.

The Master: I should be very reluctant to have this hearing in its present phase, at any rate, go into questions of value without going back to Judge Knox for further instructions.

940 Mr. Moran: That may solve it, if we can take it to Judge Knox in the interim before you make your report and find out about this thing.

Mr. Jackson: That question can be further considered and a stipulation made that would cover the valuation. Under the circumstances we might arrive at some stipulation.

The Master: I should want before taking this case into a valuation case, to make at any rate an attempt to dispose of it before the District Judge.

Mr. Moran: Yes, I think that——

The Master: Now, I do not mean in any way to coerce either side to make it one kind of a case than another, but I think the Master has always got the right to ask instructions from the District Court.

Mr. Jackson: Of course, Judge Knox did have the understanding before him on the statement of all counsel, that the rate base was to be stipulated.

Mr. Moran: But he had the position of the company very clearly stated to him.

Mr. Jackson: Oh, yes.

Mr. Moran: That we understood it was simply to condemn the statute.

Mr. Jackson: Oh, yes.

941 Mr. Moran: And since that time Judge Hand has made this decision.

Mr. Jackson: I do not dispute your position at all. It should be considered.

Mr. Hill: We believe it is our duty in the event the Court should find that the 80-cent rate is confiscatory, to protect the public.

The Master: Undoubtedly.

Mr. Hill: Therefore if we went up before the Court saying Now we assume that possibly you will wish to fix a rate, and if you should decide you do want to fix a rate, then send it back to a new Master—it would weaken our position. For that reason we cannot——

The Master: My position simply is that, as I understood, Judge Knox on the representation made to him by counsel for the plaintiff, that the case was an emergency case, and in order to meet the emergency it was hoped that a stipulation respecting value would be entered into—with that in view Judge Knox hoped that a determination by the District Court on the case would be had in a very short time. Now, if by reason of Judge Hand's opinion, counsel for the plaintiff are concerned as to the protection of this company's rights, I should wish to present this case in some form or other for further instructions to the District Court, before making

942 it a valuation case.

Mr. Hill: That would be very satisfactory to the Attorney General?

Mr. Moran: That is perfectly satisfactory to the plaintiff. You would not want to make it—you want to do that before making any sort of report at all?

The Master: Well, that depends on whether you gentlemen can work anything out that is satisfactory to you, without applying to the District Court.

Mr. Moran: Well, I am afraid we cannot, from the Attorney General's view.

Mr. Jackson: Do you want all this discussion upon the record?

The Master: It is quite helpful to me.

Mr. Jackson: Oh, I see.

The Master: I would not ordinarily ask for it.

Mr. Moran: I think, though, in view of the fact that it is a good deal extemporaneous and that sort of thing, we ought to have a chance to edit it a bit. I might see something tomorrow morning that does not read so well.

The Master: Yes. Because I have asked Mr. Jackson's position in the case; it is a matter that concerns me.

943 Mr. Moran: In the first two or three days after the decision of Judge Hand, I was not able to form any opinion about it, and then we were in the trial of the case. I was busy every day and was giving my attention to that, and it was not until I spoke to Judge Hill last night that I considered that it was my duty to bring it to the attention of the Master at the earliest possible time, or at least to counsel's. But it came up here naturally in the discussion today.

Mr. Jackson: Of course, there is a question as to how much time this will take at the present time. Mr. Farley is away on vacation, and the Attorney General may not be immediately available. I do not know about him.

Mr. Moran: We do not need anything like that. Let us go before the Court and let the Court decide it.

Mr. Jackson: Do you mean as to the point in the case where we go into the question of valuation—whether we enter into a stipulation now as you state?

Mr. Moran: Now, this need not go on the record.

The Master: No. I have got all I wanted on the record now.

(Discussion then ensued off the record.)

The Master: I just want to clear up one thing in my mind, although it may be in the record already.

By the Master:

944 Q. The statement of the taxes on Plaintiff's Exhibit 6—am I right in saying that those taxes are the taxes which have been assessed against what you claim is the company's property used in the public service?

A. Yes.

Q. And all other property has been eliminated?

A. Yes, it shows the elimination there.

The Master: Is that item disputed by the defendants?

Mr. Hill: Yes, as to the special franchise I have asked them if they will consent that we may apply—saying that they consent—for the assessment as to corporeal or tangible, and as to intangible property, for their special franchise. They say it cannot be gotten, and I ask if they consent for the Attorney General to get it.

The Master: So far as real estate, land and improvements are concerned, that is not contested?

Mr. Hill: I think not. They say they have divided it on the same basis.

Mr. Moran: What is the contest with reference to the special franchise?

Mr. Hill: You stated that it could not be obtained from the State Tax Department.

Mr. Moran: I know, but what is the trouble?

Mr. Hill: Here is our position—that your officials have been negligent in not seeking to review the assessment. I believe and am informed that two-thirds of the assessment for special
945 franchise is for intangibles—for the value of the franchise; and if your corporation is operating that franchise not at a profit, but at a loss, then it has no value except the tangible property that is in the street, and there should not be any assessment for intangibles.

Mr. Moran: The assessment made in the years in question, the total assessment, which is $1,500,000, is not above, but slightly above, at any rate, the value of the structures in the streets—the distributing system. The plaintiff always seeks to have as low a valuation as it can obtain from the Tax Department, as all other taxpayers do, but it does not feel, in fact it will not, nor its present counsel will never advise it, to apply for the reduction of a special franchise which in gross is not substantially greater than the value of the tangibles in the street, or the amount that the plaintiff claims they are worth.

Now, Judge Hill says that he is informed, or words to that effect, that the State Tax Commission assesses the intangibles at two-thirds of this amount here, $1,500,000, and one-third for the tangibles. I know, for I have lived with the Franchise Law since its enactment, that the State Tax Commission does not assess separately; in fact, the statute requires them to assess in one gross amount.
946 The special franchise is defined in the statute to be the right, authority and permission to maintain structures in the streets, together with the value of the tangibles in the street. In numerous litigations with which I have been connected we have sought to get from the Commission the amount they ascribe to tangibles, and the amount they ascribe to intangibles, but without any success. Any of the figures they may have now are not the result of any official action. They are nothing but the mental reflections of somebody connected with the matter, and have no probative force or value on that.

We have had our property inventoried and appraised, and at the present time, and in 1918, 1919 and 1920, the intangibles could not be reproduced for much more than a million and a half dollars, the total value of this assessment. We will never consent that the informal statements in the Tax Department may be used to show the value of the intangibles, and the value of the tangibles, because they are nothing but computations or figures that some clerk has dug up, and they do not represent official action, and they could not represent official action because the State Board has not asked them to make any finding on it separately.

947 Mr. Hill: I will state for counsel that the records of the Tax Department do contain the items of property of a tangible nature, which they have assessed against your company, and the records do contain an assessment for value against intangibles,

and that I am informed that that assessment will be delivered in the event the attorney general asks for it, with your consent or the consent of your company.

Mr. Moran: If it is a public document, you do not need any consent.

Mr. Hill: I am telling you the only way that I can get it.

Mr. Moran: I cannot consent to something that comes in here by the action of other than public authorities, when from what I know of it, it is not official action. The Judge raised another question here—of course there is no evidence on it at all yet. If this line is pursued it becomes necessary to have a valuation of the structures in the streets, because he says we are negligent. We are negligent, may be, if the assessment is grossly excessive; whether it is grossly excessive or not, depends first on the tangibles in the street. We have got to get that.

Mr. Jackson: Your answer to that then would be that the
948 Judge's argument was not based upon the evidence.

Mr. Moran: Well, I do not believe that he will claim it was himself.

Mr. Hill: All the claim I make is that I have seen the segregation and I was told that I could not use it without your consent.

Mr. Moran: Why would they let you see it without our consent? And you have used it, you have stated it on the record now. I do not mean that you did it unprofessionally or anything like that at all, but it is a matter of fact, it has come out.

The Master: But there is no evidence as to that.

Mr. Moran: No, we do not consider it as evidence.

Mr. Hill: I did not state it as a matter of evidence.

Mr. Moran: Oh, no, I understand, Judge.

By Mr. Hill:

Q. Has the fund made up of the one cent per thousand cubic feet been set up, apart, as a separate fund?

A. No, it is just an accrual.

Q. Is that all included in the $19,000 bank balance as of July, mentioned by Mr. Elsman?

A. No, there is another one included there. We do not set it up as a separate fund.

Q. Where is the money derived from that one cent per thousand cubic feet?

949 A. It is a liability and not money. It is in the form of a liability rather than in the form of actual cash.

Q. And that is, you did not set it up as a sinking fund, and put it away anywhere?

A. No.

Q. Then that is solely a matter of bookkeeping?

A. Well, I would not say it is solely a matter of bookkeeping. Of course it was a bookkeeping function to do that, but it is not solely a matter of bookkeeping.

Q. Did you put the $12,000 in 1918 away by itself, and mark those funds?

A. In actual cash?

Q. Yes.

A. No, not in actual cash.

Q. Then what is it?

A. It is a liability which we set up on our books, against which we charged the cost of the property we are taking out, so instead of actually taking the loss in cash, and passing it through cash all the way through, we simply make a short cut and charge it against this reserve.

Q. Was the $12,000 ever segregated from the general funds of the company?

A. No.

Q. For 1919?

A. No, not the general cash of the company.

Q. Then the only place that that appears, really, is a matter of an account on your books, is it not?

A. It is an account on our books, yes.

950 Q. Then that is the only tangible thing that has ever been done with it, to put it on your books?

A. No, we have put it up on our books, and we have charged against it actual withdrawals.

Q. Is that solely, then, a matter of bookkeeping, so far as the setting up of the affirmative amount against which you charge, when you do withdraw certain items of fixtures or plants?

A. The operation of setting it up, yes, is solely a matter of bookkeeping.

Q. But there is never any money set apart in some separate fund from which you have paid any part for new material and new machines, when you purchased them?

A. Not actual cash.

By Mr. Jackson:

Q. Nor other security?

A. Not actual cash.

Q. Nor other property or security?

A. Oh, yes, because when we set it up—it involves so much there. We do actually pay out cash, but we pay out cash on the new capital that replaces the old capital. The cash becomes part of the new capital and the old capital, instead of affecting the cash, is simply charged against this reserve, thereby reducing a liability when we retire the capital.

Q. Your reserve is only on your books—the theoretical reserve, is it not?

A. It is on our books just the same——

Q. A theoretical reserve, isn't it? Why not some time get some place. You know what we are talking about and you know exactly what we mean. Why don't you answer the question?

951 Mr. Moran: Just a moment.

A. I want to know from him——

Mr. Moran: Hold on a minute. I think that is an entirely unfair observation.

Mr. Jackson: No, I think it is perfectly fair.

Mr. Moran: You make it because you do not understand.

Mr. Jackson: The situation is perfectly clear and counsel is trying to get an answer from the witness that is perfectly straightforward, and it does not seem possible to get it, and it just lumbers up the record, and the situation is perfectly clear. That is a theoretical account, and there is nothing there to stand for it, except that you have placed that item on the books.

Mr. Moran: It is not any such thing; it is an actuality, now. It is an actual cash transaction. You are entirely wrong.

Mr. Jackson: Now, then, let the witness explain from his own standpoint, in his own words, just what that consists of.

Mr. Moran: He is not offered here as a competent witness on that subject.

Q. Then what do you know about it—about that item?

A. I simply set it up by direction of my superior officers. They have directed me to set aside 1 cent per thousand cubic feet
952 as a reserve.

Q. And you know that that item is on the books, and that is all?

A. Yes, I know it is on the books.

Q. Then why are you attempting to testify any more about it, when counsel tells you that is all you know about it, that you are not competent and you are not an expert on any other question—are not produced on any other question?

A. I know what entries I make. I know the general function of it. I was asked whether it was a bookkeeping proposition and only a bookkeeping proposition.

Q. And all you know is that it is on the books?

A. Yes.

Q. Then all you know is that it is a bookkeeping proposition?

A. No, it is more than a bookkeeping proposition, too, but I have set it up there because I have been directed to do so.

Mr. Moran: We can clear it up for you.

Mr. Jackson: By what witness?

Mr. Moran: By any number of them. We can clear it up by this witness.

Mr. Jackson: We would like to have it cleared up by some witness who knows about it.

By Mr. Hill:

Q. Do you know whether or not there has been set apart in any separate fund, in money or property, the one cent per thousand cubic feet for withdrawal of plant?

Mr. Moran: Now let me say something, will you?

953 Mr. Jackson: Why not let this witness say whether he knows or not.

Mr. Moran: Well, say what you know about it.

Mr. Hill: No, I have asked whether or not he knows.

Mr. Moran: It is perfectly obvious it has not been done—perfectly obvious, to everybody in the court room.

Mr. Jackson: It is not obvious to the witness. We have not been able to get him to say so, and that clearly appears. That is all there is to it.

Mr. Moran: No, Mr. Jackson, you are wrong.

Mr. Jackson: We are willing to be convinced.

Mr. Moran: Well, I am willing to ask the witness some questions. I originated it, so I could very probably testify about it.

Mr. Jackson: Then it is purely theoretical.

Mr. Moran: Oh, no, it is actual. It represents cash, and ought to represent cash. The witness is in your hands.

Mr. Hill: All right, let him answer my question.

The Witness: Will you read that question, the last question?

Q. Do you know whether or not there has been set apart in any separate fund, in money or property, the one cent per thousand cubic feet for withdrawal of plant?

Mr. Moran: You mean now for 1919?

954 Mr. Hill: Or for any other year. Well, I will limit it to 1919.

A. Yes, sir.

Q. Has there been set apart any money or property against this account?

A. There has been set apart no actual cash. There has been credited to this account the one cent per thousand, and charged against this account an amount of capital withdrawn during the year 1919.

Q. You have credited to this account the one cent per thousand cubic feet for several years last past, have you not?

A. Yes.

Q. So that that account now shows a credit balance?

A. Yes.

Q. Has that credit balance been set up, apart, in a separate fund in cash or in property, or is it included in the $19,000 bank balance mentioned by Mr. Elsman, if you know?

A. It has not been set up in cash or property, nor is it included in the $19,000 cash.

Q. Where is it?

A. It is in the liability, on the liability side of the balance sheet.

Q. That is all on that point. Did you get up the table showing the number of men working on the two days in the several years that we mentioned, prior to this trial?

A. I attempted to get that up, but it was such an impossible task and so hard to get it, and so meaningless, that I did not finish
955 it—did not finish the work.

Mr. Hill: That is all I have to ask him.

Redirect examination.

By Mr. Moran

Q. Mr. Gonnoud, in reference to the account Plant withdrawn from service, I think you have stated that you includes in your expenses amounts equivalent to one cent for each cubic *feet* of gas made in the year?

A. Sold

Q. Sold—you credited to this account?

A. Yes.

Q. In 1919, you did not have any cash to represent this one cent, did you?

A. No.

Q. Why not?

A. Because no cash was set aside for it.

Q. Never mind whether it was set aside for it or not. Did you have any cash to begin with?

A. No, we did not have the cash.

Q. Why?

A. We just had funds enough—we did not have funds enough to meet our other obligations.

Q. Your other operating expenses?

A. Yes.

Q. In other words, before you paid your coal, or after you paid your coal and oil bills and labor, you did not have anything actually from your revenues to measure up to this one cent; is that right?

A. That is exactly right.

Q. That is exactly right?

A. Yes.

Q. Had you had cash enough from your revenue, what would have been done with this one cent?

A. It could have been set aside.

956 Q. It could have been?

A. Yes.

Q. But it would not have been, would it?

A. No.

Q. It would never the less have figured in as a part of your operating expenses, would it not?

A. Yes, it would.

Q. And it would be charged in there and credited where?

A. To the reserve account.

Q. Now, the cash would come in, you would have it in your cash drawer, would you not? Actual cash comes in from your revenues, does it not?

A. Oh, yes.

Q. And if the operating expenses exceed your revenues, this cash will be in your cash drawer?

A. In the cash drawer, certainly.

Q. And it will be credited to the reserve?

A. Yes.

Q. When will it be used?
A. When the plant is withdrawn.
Q. Not that particular dollar, but will actual money be used for anything?
A. Yes.
Q. For that purpose?
A. For replacing the property.
Q. For buying an equivalent piece of property, will it not?
A. Yes, replacing the property.
Q. Then this is actual money taken out of operating expenses, passing through these accounts, and actually invested in buying a piece of property, equivalent to the property withdrawn?
A. Yes, that is what I wanted to explain.
Q. You have not had that cash because your revenues have not been sufficient to meet your expenses? Is that right?
A. Yes, that is right.
957 Q. You have not had it in 1920 either, did you?
A. No.
Q. In 1918 you just about had it, did you not?
A. Yes, in 1918 we had it.
Q. In 1917 you had it?
A. Yes.
Q. You actually got the cash, did you not?
A. We got the cash, yes.
Q. It was in your cash drawer?
A. Certainly.
Q. If it has not been used for any other purpose, it is there to buy another piece of property, is it not?
A. Yes.
Q. You do not tag your dollars, do you?
A. No.
Q. And by rights you ought to have eighty odd thousand dollars in this account?
A. Yes.
Q. And you have eighty odd thousand dollars in this account, have you not?
A. I do not know the exact amount.
Q. About that?
A. About that.
Q. But you do not keep that money?
A. No.
Q. Your attention has been called and you submitted some statements here in reference to amounts of coal billed and quantities shown by your weights.
A. Yes.
Q. You have charge of passing or auditing the account?
A. Yes, sir.
Q. Of authorizing its payment?
A. Yes.
Q. How is it you authorized its payment when the weights shown by your weighers differ from the amounts on the bill?

958 A. I have taken it up with the dealers several times, the coal and oil people, and have been informed by the coal people that it is their practice and the practice of every one in the coal business, to accept the railroad weights, and furthermore I have been informed that the Interstate Commerce Commission have passed a ruling on the matter of railroad weights, the weights going from one line to another line, the originating carrier weighing the coal and each connecting carrier must accept the weights of the original——

Mr. Jackson. We will object to this as incompetent and immaterial.

A. Continuing: Of the originating line. Shall I go on?

The Master. I will let him state this.

Mr. Jackson. Exception.

A. (continued). The coal is weighed by the originating carrier, the weights are accepted then by each connecting line, and then the coal companies who sell us the coal accept those weights and bill us on those weights, regardless of whether our weights may show larger or smaller.

Mr. Jackson. I object to that and ask to have it stricken out as incompetent and immaterial, not the best evidence of any such ruling, if the ruling was competent.

The Master. He is testifying to a practice.

The Witness: Yes.

Mr. Jackson. He is testifying to what he has been informed as to a ruling. That is not the best way of proving it—not the
959 best way of proving the practice.

Q. Why do you continue to weigh it?

Mr. Jackson. May I just note the exception first?

Mr. Moran. Certainly.

The Master. I will take the evidence.

Mr. Jackson. Exception.

Q. Why do you continue to weigh it?

A. We weigh it to keep it in touch with the situation, and to see that we are not grossly—that there is no extreme variance there. Wherever there is an extreme variance, we call it to the coal company's attention, so that they might check up their figures.

Q. It is weighed in your place in small quantities?

A. Yes, it is weighed in trucks, or cars, of about three ton capacity, and of course there is a variance of weight there on account of the fact that we weigh it in small quantities and it is weighed in large quantities at the mine.

Q. And it is handled in the open air and dust lost?

A. It is handled in the open air with a certain amount of losses, due to that fact.

Mr. Jackson: I object to that last statement and ask to have it stricken out as incompetent and immaterial.

The Master: Do you mean "due to the effect"?

Mr. Jackson: Yes.

The Master: Strike it out.

960 Mr. Moran: Well, it is handled in the open air—that stands, does it not?

Mr. Jackson: If it is so.

Q. You know it is so, do you not?

A. Yes, it is handled in the open air.

Q. Bucketed up out of a barge?

A. Out of a barge.

Q. And carried up?

A. Carried up to the tracks.

Q. And carried in from there?

A. There is a trestle there. It is lifted up to this trestle and then carried into the coal pile. We start to unload a boat load of coal, and it would be hard for us to contest the weight anyway, because we dump the coal in on other coal, and after we have weighed a cargo of coal, if we find a difference it would be impossible to separate that amount of coal and have the coal people come over and reweigh that coal.

The Master: I think we will suspend until tomorrow morning, if that is satisfactory.

Mr. Moran: I have a schedule here I might put in by this witness. You will want to look it over. It will just take a minute.

The Master: All right, go ahead.

Q. You have prepared a statement here showing the available assets and actual liabilities of the company as of July 30th?

A. Yes, as of July 31st, 1920.

Q. Have you that?

A. Yes (handing counsel).

961 Mr. Moran: I will offer that in evidence.

Mr. Hill: I will probably want to ask him about some of those.

Mr. Moran: You will want to ask him about those too.

Mr. Hill: Yes.

(Marked Plaintiff's Exhibit No. 42.)

The Master: What are we going to do about this course of procedure we have been discussing this afternoon? Will you and Mr. Moran get up something, or do you want me to get up something to submit to the Judge? At any rate perhaps I better get up the form of submission, if you will give me a copy of the stipulation with your reservations, that you are prepared to sign.

Mr. Hill: I am ready to sign the stipulation which Mr. Moran has previously prepared and submitted to the Attorney General.

Mr. Moran That will be all right. You are prepared to sign that. That will be your contribution to the submission—you are prepared to sign that.

Mr. Hill Yes, if the figure is—shall I tell him?

Mr. Jackson That is not a position such as the Master contemplates. We would like to have an agreement of counsel to-t.

Mr. Hill That is what I can do now without consulting. I have not any authority beyond that.

962 Mr. Jackson You can do nothing without a direction of the Court, unless there is a stipulation that counsel are ready to sign.

Mr. Hill I am ready to sign that stipulation.

The Master Will you let me know tomorrow morning whether you are prepared to sign any stipulation with reservations?

Mr. Moran I am prepared to sign a stipulation with reservations.

Mr. Jackson Don't you see, Mr. Moran, that does not quite answer the Master's question.

Mr. Moran I think it is a direct answer to it.

The Master Put it this way then. Can you agree on a stipulation to sign?

Mr. Jackson By tomorrow morning, you mean?

The Master Or let me know whether you are going to agree or not.

Mr. Jackson There cannot possibly be a stipulation agreed upon until, really, there is the actual stipulation presented and agreed upon by counsel. We have had these conferences and we have had full stipulations and there was an agreement on that. Here is a new condition arising. I do not see how anybody can assure you it will be done until it is done. We cannot say we will agree when we know very well it is a question.

963 Mr. Moran It will come to this. We will have to go back to the District Court and get instructions to go on with the valuation of property. It may come down to that.

The Master I think that tomorrow we ought to have some clearly defined views on it.

Mr. Jackson Do you want to adjourn for a time? I do not see how we can agree any closer without some opportunity to get together.

The Master We will adjourn until tomorrow morning at ten o'clock, and then take up the situation and see what course of procedure we better follow.

Mr. Jackson I think it is tomorrow morning at 10 o'clock, that by reason of the absence of Mr. Newman upon his vacation, who has attended to the New York & Queens County case, that the duty is going to devolve upon me to step down there and, at any rate try and get a postponement.

Mr. Hill The Queens County case is up for argument tomorrow morning.

Mr. Jackson I have in mind that you would not go on tomorrow morning. I should not imagine that would take long.

The Master: Can you get an adjournment on the statement
964 that this hearing is set for ten o'clock, or can we make this hearing at 11 o'clock?

Mr. Jackson: That ought to give plenty of time, because we are not ready to go on with that, and I intended to ask for an adjournment anyway.

The Master: Then at eleven o'clock tomorrow morning.

(Adjourned to Thursday, August 19th, 1920, at 11 o'clock a. m.)

964¼ [Endorsed:] Public Service Commission, First District. Aug. 19, 1920. Bureau of Statistics and Accounts.

964½ United States District Court, Southern District of New York.

Before Hon. Gordon Auchincloss, Special Master.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Transcript of Reporter's Minutes.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York.

Barclay, 8477.

965 KINGS COUNTY LIGHTING CO.

v.

NEWTON et al.

61 Broadway, New York,
August 19, 1920—10.00 a. m.

Present:

The Master.
Mr. Moran.
Mr. Hill.
Mr. Jackson.

Met pursuant to adjournment.

The Master: I have telephoned Judge Knox and told him of the progress we have made, and the difficulty that had occurred to me in connection with the failure up to the present time to present a stipu-

lation signed by the parties to this action; and I told him very briefly over the phone that I had stated to counsel, I thought it would be wise to apply to him for further instructions, and asked him whether he would give us an opportunity to confer with him today, since he is going away on Saturday morning, and he said he would only be too glad to. I said that procedure seemed to me with the approval of counsel, and he said he would only be too glad to, and to let him know what time we wanted to do it.

Mr. Hill: I have proposed this: In the event the Court shall determine by its decree that the statutory rate is confiscatory,
9956 and in the event in such decree a maximum rate shall be fixed at which the plaintiff may sell gas, as a condition of granting an injunction, and either party is dissatisfied with the maximum rate so fixed, such party may apply at the foot of the decree to have the matter sent back to the Master for the taking of further and additional proof upon the valuation of the plant and property used in the public service, and such evidence and the report of the Master thereon may be used by the Court in making a decree, modifying the decree as to the maximum rate to be charged thereafter.

The Master: That is all right to me.

Mr. Hill: Of course, I have got to submit it.

Mr. Moran: That would be a matter that we would have to get Judge Knox's advice upon, that and the whole thing, as to whether that would be a satisfactory way for the Master to send it up. He has taken account of the expenses and determined the constitutionality or non-constitutionality of the statute, on the rate base—and send it up with that stipulation.

The Master: If we take up anything with Judge Knox, I think it is a distinct advantage to take it up with him orally.

Mr. Moran: I do too.

The Master: And consult with him in his chambers be-
9957 fore he goes away. It takes a lot of time to prepare papers, and they do not generally tell the whole story.

Mr. Jackson: If we have that definite suggestion there, we might ask if that would be satisfactory.

The Master: I do not see that you have to consult your clients on that subject.

Mr. Jackson: It would not seem to me so, either.

The Master: Because the Judge can direct that, that it be done in that way or any way he wants. He said to me when I told him that, contrary to our anticipation, a stipulation had not been signed—he said, "Well, I do not see how you are going to go ahead in any other way than to take your value," and I suggested to him that it might be possible to avoid that. It seems to me peculiarly a case in which we ought to go to the District Court and ought to go as quickly as possible.

Mr. Moran: Do you have to make an appointment with him?

The Master: Yes, I can call him up.

Mr. Moran: Suppose we make an appointment with him at half past two.

Mr. Jackson: Two o'clock or half past two would be satisfactory to me.

The Master: We can go now.

968 Mr. Jackson: How would it be if we had copies of that stricken off of that proposal?

The Master: We can have it read to him.

Mr. Jackson: All right. I am ready. How about that, Judge Hill, that stipulation, the agreement upon the figures that we are authorized to agree upon—what do you say?

Mr. Hill: I have no question in my own mind that that is what he would decide anyway, that either party would have that right. I dislike to assume things——

Mr. Jackson: Doesn't that take care of your worry about the matter?

Mr. Hill: I do not like to assume a position without at least telephoning somebody in Albany. I would at least wish to do that, but I think I can get that without any trouble. I should not propose that unless I was reasonably certain they would approve of it.

The Master: Would it not save you from embarrassment if I go up and ask instructions from the Court?

Mr. Moran: The Court can give us the assurance now that in case we do come in, and they do fix the rate, that shall be the stipulation, if it is unsatisfactory the party shall come back.

Mr. Hill: I shall have no feeling about that. I shall not consult anybody on that, if the Court says that. If the Court says

969 you agree to that stipulation, I have not any embarrassment at all.

Mr. Moran: He says if I fix a rate I will give either party the right to go back and have a valuation fixed.

The Master: The Judge is doing the assigning.

Mr. Jackson: That takes care of you and takes care of us, too.

The Master: I will telephone to the Judge now. (After telephoning.) Judge Knox had to go out at a quarter past twelve, and that would make it rather quick, so that he set it for three o'clock—three o'clock at his chambers. Now, we can proceed, I suppose, and keep away from dangerous points until three o'clock at least.

ANDREW J. GONNOUD resumed the stand.

Cross-examination (continued).

By Mr. Hill:

Q. You have furnished, and there has been marked in evidence as Exhibit 42 a schedule headed "Available Assets, Actual Liabilities." You have it before you?

A. I have.

Q. The cash in bank, $19,641.06, is your available and usable cash for the conduct of your business?

A. Yes.

Q. What is the $12,500 which is designated special deposit?

A. That is money we held in the special deposit to meet our bond interest when it comes due.

970 Q. It is a sinking fund which you set up against the interest on your bonds?

A. Not a sinking fund. It is a part of the cash that we set aside to meet the bond interest.

Q. Over what length of time have you been engaged in accumulating that sum of $12,500?

A. If I explain the nature of the accrual, probably it will show up better.

Q. All right.

A. We attempt each month to set aside the complete proportion of the bond interest, so that when the interest date comes around to pay the interest on the bonds we have the money available, we have it set aside in this fund, and as soon as the interest date comes around we make out a check against that fund and pay it. This $12,500 here is not enough to meet the accrued bond interest to date. The accrued bond interest to date is shown on here as $27,279.17. We have not enough money to meet that. This $12,500 is interest on money we have set aside to meet the bond interest on the first mortgage. We have been accruing the full amount up until July 1st, when the interest date—when the interest became payable on the first refunding mortgage, and we had at that time to use all the money available in that account to take care of interest on the first refunding mortgage. And we have been accruing after that, and we have put in $12,500 so as to take care of the interest that is coming due in September on the first mortgage.

971 Q. There is a deficit in accrued interest anyway up to this time, on bonds, you say, of $7,000 and some odd dollars?

A. Will you repeat the question?

Q. (The question was read by the Reporter.)

A. No, there is no deficit on bonds. We do not have to accrue that bond interest, we do it merely as a convenience, so that we will have the money set aside. It is not a deficit until the interest date comes around.

Q. All right. Now, I will ask you, beginning on July 31st their had accrued due interest as of that date, or had it not become due $27,279.17?

A. It is accrued but not due.

Q. There had accrued interest on July 31st, 1920, amounting to $27,279.17 on your bond issues?

A. Yes.

Q. And you have as a reserve or special fund against that amount as of July 31st, 1920, $12,500?

A. Yes.

Mr. Moran: Had actually deposited that money in the hands of the bank which was the trustee under the trust mortgages?

The Witness: Yes.

Q. And that sum of money was deposited with the trustee named in the trust mortgages?

A. Yes.
Q. Which secured the bonds?
A. Yes.

Mr. Moran: Which secured the first and refunding mortgage bonds, but not the first mortgage bonds.

972 Q. Which secured the first and refunding mortgage bonds?
A. Yes.

The Master: Was that required by the mortgage or is it simply voluntary?
Mr. Moran: No, that is voluntary.

By Mr. Moran:

Q. The $27,279.17 represents the accrued interest for one month on the first and refunding mortgage bonds and for five months on the first mortgage bonds?
A. It does.
Q. That is just what it represents, is it not?
A. Yes, sir.
Q. Because you have paid your interest on the first refunding bonds, July 1st?
A. Yes.
Q. And the last payment you made on the first mortgage bonds was last March, was it not?
A. April.
Q. It is April?
A. April.
Q. Then it represents——
A. Four months.
Mr. Moran: It represents four months on the first mortgage bonds.

By Mr. Hill:

Q. What was the total amount, if you can tell me of your receipts during the year 1919 from gas sold, because I want to get your percentage of accounts receivable there, and the rate it bears?

973 A. We cannot show the receipts. It does not show the receipts. We can show the amount of revenue, if that is what you wish.

Q. All, that will not be materially different—and the merchandise, too?
A. It is, $1,020,951.71 plus 15 cents per thousand on 1,226,312,600 cubic feet.
Q. Give it to me in dollars and cents?

Mr. Moran: He will have to figure that out.
Mr. Hill: That is what percentage of your total business, from the receivables which you carry on your books? That is what I am trying to get at. I will either ask you for the total of your sales of gas or your percentage, either one.

Mr. Morgan: The total is 85 per cent and the sales $1,204,898, approximately; that is 95 cents to private consumers and 75 cents to the city.

Q. You have accounts receivable as shown by the schedule, Exhibit 42, of slightly in advance of $160,000, have you not?

A. Yes, as of July 31st.

Q. This shows that you are carrying on your books as receivables about 13 per cent of your total business of the year, does it not?

A. Approximately that, based on the 1919 figures.

Q. What percent is it based on the 1920 figures?

A. Well, our increase in sales is about 30 per cent.

Q. All right, it will be above ten per cent, will it not?

A. It will be approximately ten per cent, yes.

974 Q. All right. That means that every account on your books on the average stands 30 days before it is collected, does it not?

A. Yes.

Q. 36 days, to be exact?

A. Yes, sir.

Q. Don't you know that gas companies ordinarily collect within ten days of the termination of the month during which the gas was furnished?

A. No.

Q. Wouldn't that in your opinion be possible?

A. No, sir.

Q. That is, you can cut off the gas if they do not pay, can you not?

A. Yes, we can cut off the gas if they do not pay, but it takes that length of time to bill and get the bills out, and get the collectors out to deliver the bills.

Q. When do you get out the bills for the month of July, 1920?

A. We do it right along.

Q. Yes, but when are they all out?

A. It is done continuously.

Q. Well, they are all out by the last day of the month?

A. By the last day of July. Yes, they are all ready to be rendered. That is, they are not all delivered by that sometimes.

Q. The percentage that these figures show, all those bills on the average will run until the 6th day of September, won't they, before they are collected.

975 The Master: May I ask what the purpose of all this is?

Mr. Hill: Because you are losing interest on $160,000 for a considerable period there, by the laxity of your collection department.

A. They may run to September 6th, but we are taking a period now of the summer time when it is very hard to make collections.

Q. Your receivables ordinarily run below that $160,000 which I have mentioned, which your present schedule shows?

A. It usually runs around that. It is sometimes lower and sometimes slightly higher.

Q. Your accounts payable is very largely for material?
A. Yes.
Q. Your bills payable is your bank debt?
A. It is demand notes we have at the bank.
Q That you put in at the bank?
A Yes, sir.
Q Explain the item, "Taxes accrued, $291,008.17"?
A. The taxes accrued are the taxes accrued and not paid. Practically all of this $291,006.17 is due and unpaid; we are paying, at least, we are accruing, seven per cent interest on that amount that is due and unpaid.

Mr. Moran: That is what you have to pay on when you pay the tax.

The Witness: We will have to pay this, yes.

976 Mr. Moran: That $291,000 does not include accured interest?

The Witness: No, that is the next item, $25,052.34.

Q. These are taxes due and owing for State and City taxes?
A. Yes.

Mr. Moran: No, they are all City taxes.
Mr. Hill: All City taxes?
Mr. Moran: Yes.
The Witness: They are practically all City taxes.
Mr. Moran: Well, they are all City taxes, are they not?
The Witness: Yes, they are.
Mr. Moran: Don't say practically all, they are all.

Q. You have a very small item, wages accrued. Why isn't that included in your first item of accounts payable for labor and material?
A. Well, we keep that as a separate account where the wages are accrued and not paid.
Q The wages accrued item is because July 31st, was not at the end of the week?
A Yes.
Q. Going back up to your assets, there is a heading, Miscellaneous, $10,019.38?
A. Yes.
Q. What is that?
A That represents accounts receivable, miscellaneous, which would represent the receivables of appliances, and so forth.

Q. What did you do, sell that stuff on the installment plan?

977 A. A few of the appliances are sold on time payments.

Mr. Hill: That is all.

Recross-examination.

By Mr. Jackson:

Q. These current actual liabilities, not all of them are immediately necessary to be paid or even during the current year?

A. Yes, they all are.

Q. Immediately necessary to be paid?

A. Well, with the minor exception of the very small item of taxes accrued, that will not be payable until the 1st of November. That would be the fraction of the taxes accrued since May 1st.

Q. Your accounts payable for labor and materials, those you would expect to pay?

A. Oh, yes.

Q. And those are accounts or indebtedness incurred since what date?

A. All since the first of the year.

Q. And there is no indebtedness of that account incurred before the first of the year?

A. Not to my knowledge.

Q. And bills payable?

A. I might qualify that, because there was one small item of less than $100 of last year that I am not positive at the moment that has been paid.

Q. Bills payable?

A. Yes.

Q. Is all that item aggregating $225,000—does that represent indebtedness the first of this year?

A. No, some of those demand notes, $145,000 of them, were taken out prior to the first of the year.

Q. How long ago was there any item, an indebtedness,
978 incurred regarding it—the greatest length of time?

A. The first note was taken out, I believe in August, 1919, of this $225,000.

Q. So that indebtedness was incurred since August, 1919?

A. Yes, sir.

Q. And those were various notes?

A. Yes, sir.

Q. Made at various times?

A. Yes, sir.

Q. Since that date?

A. Yes.

Q. Have any payments been made on account of the principal?

A. No, sir.

Q. No payments have been made on account of the principal of any of those notes?

A. No.

Q. And there is no reason for the immediate payment of those notes in 1920 any more than there was in 1919, is there?

A. Yes there is. They are demand notes and they could be——

Q. They are demand notes ever since they were made in August, 1919, isn't that so?

A. Yes, but of course they could be demanded, a demand to pay at any time.

Q. They have not been demanded yet, have they?

A. They have not, as yet.

Q. Taxes accrued, two hundred and ninety one thousand odd dollars. Those were accrued since what time?

A. They go back to 1916.

979 Q. And there is no reason for immediate payment in this year of those taxes, is there?

Mr. Moran: I object to the question. I submit that this question——

Q. Has any greater urgency or occasion arisen for the payment of those taxes today than there was in the past?

Mr. Moran: Yes, every day the property is in more jeopardy; they will be selling it out on us before we know it.

Q. Do you adopt the answer of your counsel?
A. I adopt it as my answer.
Q. Is that the only reason that you know of?
A. No, the further reason that we have to accrue interest on it. We are accruing a seven per cent interest that will have to be paid on it.
Q. Have you stated all the reasons?
A. Yes, all that I can think of at the present time.
Q. All that have been brought to your attention?

Mr. Moran: I object to the question.
Mr. Jackson: No, no.
Mr. Moran: I can object to it.

A. All I can think of——

Mr. Moran: Just a moment now. I object to the question, the inquiry addressed to this witness is not proper, because the law provides for the property taxes and their penalties for non-
980 payment, and I submit it is entirely irrelevant and immaterial.

Q. Do you expect to charge all the year's taxes, for the years past, in part of this year's—liabilities of this year, when it is perfectly apparent there is no necessity of paying them all this year? I want to find out whether there is any special reason for the payment this year any more than there was last year. Isn't that a practical question?

The Master: Well, the fact remains that the taxes, the amount of the taxes, is not in dispute, is it? The amount of the taxes that are due, and the interest—the interest is not in dispute?
Mr. Jackson: I think not.
The Master: Well, whether or not they ought to pay them one year or another, ordinarily they ought to pay them when they are due, so as to avoid the payment of interest.
Mr. Jackson: But they have not been paid in years past, and we are now basing this action on the years of 1919 and 1920. As to what obligations were disregarded in the years past and that are being brought into this year's, it is quite material as to how *these* accrued indebtedness should amount up against these——

The Master: How are these separated at all? Are these taxes for 1917, 1916, 1915 or when?

981 Mr. Jackson: Yes. He says these taxes cover 1916. As to what amount and what year, I think it has not appeared.

The Master: I think it would be a good idea to separate that item, indicating the taxes which are represented by 1916, 1917, 1918 and 1919 as have accrued on those taxes.

Mr. Moran: The expense statement for 1919 and 1920 show the taxes for those years.

Mr. Hill: Don't you have 1917 and 1918?

Mr. Moran: Just wait a minute. They show the taxes for 1919 and 1920.

The Master: That is what I assumed.

Mr. Moran: Yes, they are there.

The Master: I assume that if you deduct the amount stated in Plaintiff's Exhibit 6 and 13, representing taxes due in the period of the year 1919 and first six months of 1920, from the amount of taxes accrued with interest in this statement of assets and liabilities, you will find those taxes which had accrued previous to 1919. If you are taking exception to the use of the word "current," in this statement, Exhibit 12, I think we understand the nature of that liability. It is a liability of the company. Now, we know what the taxes are for 1919 and 1920, from these statements. The rest

982 of the taxes accrued before that time, and whether they ought to have paid them in that year, I do not know about, and I do not believe we are interested in that, are we?

Mr. Jackson: All the accrued liabilities of the past again appear, of course, upon the books as a present liability; that is true.

The Master: Yes. But they are of no interest to me.

Mr. Jackson: But the present necessity of liquidating that liability is another question.

The Master: Yes, but they are of no interest to me in trying to determine whether during the years 1919 and 1920, the statute requiring a charge of 80 cents per thousand cubic feet of gas was confiscatory or not.

Mr. Jackson: If the plaintiff has failed to pay its taxes in years past, at a time when it was able to pay them, and according to the ordinary course of imposing and paying the taxes, the taxes should have been paid, and those obligations are allowed to accumulate and then brought forward as a liability in a year of special stress, in order to show the impossibility or the desperate financial condition of the plaintiff at that time, and as bearing upon the question as to whether the rate is confiscatory at that time, and in consider-

983 ation of a period only covering in point of consideration, just the present year and a half of the period of stress, then I think it is quite important as to what the company has done with these unpaid obligations of the past, and when it advances those obligations as a part of this bad financial condition in the present.

Now, here is a liability that is stated as against its current liability assets, which totals on this sheet $202,000 and odd. Then as against its current available assets, which are restricted to the cash on hand

and in bank, as special deposit and accounts immediately receivable, it sets against tha current actual liabilities which are accrued liabilities from other years in great part, and as to the years even of 1919 and 1920, they are not immediate liabilities, and they are not such liabilities as in other years, the plaintiff in its ordinary course of business has made a liability and charged off as a liability in its bookkeeping of that year.

We are entitled to take the years 1919 and 1920, and have the same deductions and the same system of bookkeeping and the same charging and credits, when we consider those years, as the company has been customarily doing in its bookkeeping and its busi-
984 ness transactions in prior years. Not where it has let taxes go in prior years, and not paid them, and said they did not have to be paid, and probably did pay the dividends—whether that has occurred or not, I have not quite before me, but that might be the case. Then for the purpose of declaring a rate confiscatory adds together all its liabilities whether necessary for payment or not, and whether possible of deferment or not, it is the ordinary course of business in time of stress to postpone such liabilities into other years as can be postponed. And it has been the custom of the plaintiff to postpone such liabilities to more favorable times. With such urgent requirements of expenditure as plaintiff has here, we say that should meet those by deferring such liabilities as they can defer and not charge them up as against the rate of these years 1919 and 1920. I think that is a fair and reasonable contention, and that is all my questions were directed to.

The Master: What is the question?

(The Reporter read the question as follows:)

"Q. Do you expect to urge all the taxes for years past in part of this year's, liabilities of this year, when it is perfectly apparent there is no necessity of paying them all this year?"

985 The Master: I will let him answer. I do not think any of us are fooled by it. The figures are before us, we understand what they are. I will allow him some latitude.

Mr. Jackson: Well, I will be brief.

A. We do not charge in any one year any current liability. The liabilities are charged as they go along.

Q. I am talking about this charge right here, Mr. Gonnoud?

The Master: Let me ask Mr. Gonnoud, you do not call this a current liability, do you?

The Witness: Yes, we do call it a current liability, because it is a liability that is current. It is a liability right now, right at the present time. It is current business, it is not a liability that is beyond. If we had paid this here in prior years when they were due, our assets on the other side, our current assets on the other side, would be entirely wiped out.

Q. You are talking as a bookkeeper?

Mr. Moran: I object to that.

Mr. Jackson: And this is what the books show. Yes. He is talking about that as a bookkeeper, aren't you?

A. This is the theory of the proposition.

986 Q. Yes, it is a perfectly well known theory; there is not the slightest question about that.

A. It is the practical side of it. You see, we owe the bill. This statement here is not to show the expenses one year, or another year.

Q. You owe a debt you have never paid—don't you, right now, today?

Mr. Moran: Unless it has been outlawed.

Mr. Jackson: Yes, that is true, unless it is outlawed, because that is only a defence.

The Master: You put these in today as a current liability.

The Witness: Yes, as a current liability.

Mr. Moran: These taxes run back to what year?

A. We have some of the last half of 1916.

Mr. Moran: And all of 1917?

The Witness: No, one-half of 1917, all of 1918, all of 1919 and 1920.

Mr. Moran: Seven months of 1920.

The Witness: Yes, seven months of 1920.

Q. Now, can you recall the amount of those taxes that represent the year 1916, in this item of $25,000?

Mr. Moran: We can get it for you.

Mr. Jackson: You will get it, then, will you?

Mr. Moran: Yes.

Mr. Jackson: Just the amounts for each year. All right.

987 Mr. Moran: We have the figures here. I tried to show it the first day of the trial; you all objected to it, and the Court sustained your objection, so we left the papers at home.

Mr. Jackson: We have an item then of bills payable.

Mr. Moran: It was not in my opinion so material and I acquiesce in the Court's decision.

The Master: Sometimes we seem to go back into 1916, 1917 and 1918, and other times we do not.

Q. The accrued interest on unpaid taxes aggregating $25,000 odd, is the accrued interest upon those unpaid taxes for the various years that you have mentioned?

A. Yes.

Q. The accrued interest upon the notes payable of $1,162.50 is accrued interest since what date?

A. We paid the interest on this every quarter, and so this is the interest that has accrued since the last payment, which was made during this year.

Q. Are those demand notes merged into one note or are they still several notes?

A. There are still several notes. There are several notes.

Q. Has the interest been paid up to the current quarter upon all the notes?

A. Yes.

Q. And this accrued interest on notes payable is the amount that will be charged at the next time of quarterly payment?

A. Not the entire amount, just the amount up to July 31st.

988 Q. The quarter had not expired upon any of these notes upon July 31st?

A. Evidently not.

Q. And so there will be by the time the quarter expires some addition to that?

A. Yes.

Mr. Moran: There probably is now. Probably some of this has been paid. It is possible, you know, during the month of August.

Q. Does the quarterly period on each one of these notes expire at the same time—all at the same time, I mean?

A. I do not believe so. I would not say offhand.

Q. Do you know when the next quarterly payment for any interest becomes due?

A. No, I do not know offhand.

Q. The accrued bond interest of $27,000 odd, that is accrued from what period?

Mr. Moran: He has already testified generally to that.

Mr. Jackson: Has he?

Mr. Moran: Yes.

Mr. Jackson: When is it?

Mr. Moran: From July 1st on the first and refunding mortgage bonds.

Mr. Jackson: July 1st of 1919?

Mr. Moran: From July 1st, 1920, on the first and refunding mortgage bonds, and from April 1st on the $750,000 of first mortgage bonds.

The Witness: April 1st, 1920.

989 Q. And that is the aggregate of those two amounts that have been mentioned of accrued interest?

A. Yes.

Q. And that is the part of the accrued interest that has accrued—that is the interest that has accrued in one instance from July 1st, 1920, and in the other instance, April?

A. Yes, 1920.

Q. It is not the total bond interest that will be due at the time of the payment?

A. No, it is not.

Q. Then in considering those current liabilities in the light of what it may be necessary to pay presently, or at some time during the current year, according to your custom of business, you could deduct from that column the item of taxes accrued, $291,000 odd?

Mr. Moran: I object to that as an improper question.

Mr. Jackson: Well, I suppose it can be computed without asking this witness specifically.

The Master: I think he has testified anyway that from his opinion it could not be deducted.

Mr. Jackson: Yes.

The Master: Whether you can or not does not rest finally with this witness.

Mr. Jackson: Yes, he means that he could not adjust it and still not have it a present liability, according to the books, and
990 we agree it should be carried as a present liability.

Mr. Hill: I want to clean up by this witness or by a concession or statement, or by questioning some witness produced by the plaintiff, after the charge of 95 cents per thousand cubic feet, the time when it was begun pursuant to the Court order, the time when it was done without any Court order.

Mr. Moran: That involves a legal question. I will answer it.

Mr. Hill: State it then.

Mr. Moran: From July 1st, 1916, until the entry of the decree in the State Court action on the 29th of March, 1920, there was an order in that action permitting the company to charge 95 cents, and it did charge 95 cents in accordance with that order.

On the entry of that decree of course that order was entered, but immediately upon the entry of that decree, the plaintiff appealed in that action to the Appellate Division, and I think the same day or the day after it applied to the Appellate Division for a stay of proceedings and obtained an ex parte order enjoining the defendants from enforcing the statute. There was nothing in that order limiting it to 95 cents or otherwise, but that order did enjoin defendants from enforcing the statute. That motion came
991 on to be heard on the third Friday in April.

Mr. Hill: 1920?

Mr. Moran: 1920, and was denied on the fourth Friday in April. That is that motion for a stay. It continued to charge 95 cents to the present time. The collections at 95 cents were authorized by the order on July 1st, 1916, to March 29th, 1920. The company made its deposits down to the entry of the order of August, 1918, which has been received in evidence here, when it withdrew the funds which were on deposit and has ceased to make any further deposits. It deposited in lieu its bonds, which is provided by that order, which has been received in evidence. Now, my view of it is that nothing after March 29th, 1920, is subject to the terms of that order.

Mr. Hill: But probably we ought to have in evidence the order of July 1st, 1916; that is, your temporary injunction and your ex parte order restraining the time of your stay on appeal, and the order which was made on the fourth Tuesday in April, 1920, denying your application for a further injunction. It has a bearing upon their compliance with the terms of the Statute.

The Master: Do you want that in addition to the statement?

You have no reason to doubt his statement or think it is
992 not correct?

Mr. Hill: I have no reason to say that at all, but I was wondering if the District Court would say we should have had these orders rather than a concession. I am content with that concession, though.

Mr. Moran: No, I do not object to that. The first order, the original interlocutory injunction order, I think probably is necessary to complete the order that is already in, because the order already in takes it up where that left it off. If it is satisfactory it may be considered in evidence, as far as I am concerned, and referred to by any party. I will furnish you with a copy.

Mr. Hill: And the order of the Appellate Division?

Mr. Moran: Well, that was just an order to show cause containing a restraining provision in the meantime. The motion on the order to show cause was denied without opinion, and all concurred, $10 costs.

Mr. Hill: All right, I think that will cover it. That is all with this witness.

The Master: As I understand it, Mr. Moran, since 1916, since that order, they have charged 95 cents?

Mr. Moran: Yes.

The Master: And they still charge 95 cents?

Mr. Moran: Yes, and they charged it prior to that time they charged it since July 1st, 1914, continuously all the way
993 through. The statute went into effect, that we complain of, on the first of July, 1916. Now, there has been an order made by the District Court or by the statutory court in this case, on conditions the company could not accept, has not accepted, has not served the order, and has not taken any advantage under it at all. As you can see from this statement that is produced here of July 31st, it did not have any 15 cents to deposit with any trust company.

The Master: I do not know that it is necessary to put it in the evidence, but why not have that opinion, at any rate, before the Court, of the statutory court, and the fact that you have not proceeded under it?

Mr. Moran: Well, I stated that at the very first hearing, that we have not proceeded under it. I have a very interesting situation there, your Honor. The defendants have appealed from an order that I never served on them and never took advantage of. I do not know whether to appear in it or not. Of course, I am not asking for the Judge's advice, because he always wants a fee. I am just telling you my predicament.

Mr. Hill: I have not any opinion on it.

The Master: Is there anything more from this witness?

Mr. Moran: You asked about the opinion of the statutory
994 court.

The Master: That has been referred to and is in the minutes, you say?

Mr. Moran: Well, the opinion. I was referring to our non-acceptance of the order. The opinion I handed to you.

The Master: Yes, I have the opinion.

Mr. Moran: Of course, we do not have to introduce that.

The Master: No, you do not have to introduce that in evidence; you can simply refer to it at any time.

Mr. Moran: It is just like the opinion of any other court, you can refer to it for the law.

The Master: And the fact that you have not proceeded after the opinion in any way whatever. There is not any dispute about that, is there, Judge?

Mr. Hill: No.

Mr. Moran: No, there is no dispute about it. In fact, if we could get the Court to do something, I would do it, but the Court convened under the statute made the decision and went away. I told the individual members of the Court that we could not operate but I could not get them in session to come in and formally and humbly say we could not accept what they gave us. But they know it.

995 Although probably Judge Ward does not, because he was out of town at the time I tried to see him. Judge Mayer was told and Judge Knox was told about it, and the defendants were told about it. My counsel went away, too, so I have had to take my own initiative on it.

The Master: Is there any other evidence from this witness?

Mr. Hill: Not on my part.

Mr. Moran: The defendant's counsel asked for an analysis or made inquiries concerning the transactions in the sale of appliances and the expenses connected with that activity and revenue received from it. Now, we have here an analysis of the sale of our appliances in 1919 and 1920. I have handed copies to the counsel.

Mr. Jackson: Have I got one?

Mr. Hill: I assume you have; they handed me one this morning.

Mr. Moran: I have one here (handing counsel). Do you want to ask any questions about that, Judge?

Mr. Hill: No, they show for themselves. It analyzes work on consumers' premises and promotion expenses.

The Master: Has this gone into evidence yet?

Mr. Moran: No, it has not.

By Mr. Moran:

996 Q. These statements I have here entitled "Sale of Appliances in 1919 and 1920", have been prepared from the books and are correct?

A. Yes, they are prepared from the books and are correct.

Mr. Moran: I will offer them in evidence as one exhibit 1919 and 1920.

(Marked Plaintiff's Exhibit No. 43.)

Mr. Moran: On this Exhibit 43——

Mr. Jackson: Which exhibit are you referring to, the one you have just offered?

Mr. Moran: Yes, they are both marked as one exhibit, Exhibit 43.

Mr. Jackson: Are you questioning about that now?

Mr. Moran: Yes.

Mr. Jackson: Before it was received in evidence I had in mind a question or two if you want me to ask them now.

Mr. Moran: I was just going to ask a question in explanation of it.

Mr. Jackson: Go ahead.

Q. This shows the revenue from the sale of appliances and the cost of appliances and the gross profit on appliances?

A. Yes, sir.

Q. And then you have below stated or set out the expenses connected with all that business?

A. Yes, the selling and the setting of the appliances.

997 Q. And it shows a profit in the first year, in 19— of how much?

A. $3,730.71.

Q. And the other one; the statement so far as it covers 1920, is on the same basis?

A. On the same basis.

Q. I think you have said that your sale of appliances there occurred mostly in the first two months?

A. In the first two months.

Q. And you practically suspended on account of the inability to supply new customers?

A. Yes, sir.

Q. But you put in there the entire promotion expense for the six months?

A. Yes.

Q. Although the promotion organization was used in other branches of the business?

A. That is true.

By Mr. Jackson:

Q. In making up these figures as to the expenses, what records did you consult?

A. The books of the company.

Q. Any others?

A. The general ledgers, and the sub-ledgers.

Q. Do these items as you have set them forth here appear on those books as you have set them forth?

A. Yes.

Q. Do the items appear separated and in these exact figures as you have set them forth?

A. In the case of revenue from sale of appliances and the cost of appliances, they are shown one on one side of the revenue account and one on the other side of the revenue account.

Q. As the figures are set forth here—the same figures?

998 A. Yes. And on the selling expenses, they are all set forth separately in the books, as shown on here.

Q. For instance, does the item of installing ranges, cookers and

laundry stoves, $1,965.81—does that appear in those figures on any book?

Mr. Moran: That is for 1919.

A. Yes.
Q. What?
A. Yes.
Q. What book does that appear upon?
A. On the sub-ledger.
Q. Do you remember the page?
A. Not offhand, no. I do not recall the page.
Q. Do you know from what figure that item, if it does appear on a sub-ledger, was made up?
A. It was made up from the records that lead up to that.
Q. What records?
A. Why, the labor and material records.
Q. Have you kept records separating from the other business expenses of the company the time of the laborers or of the workmen, the employees of the company, that were devoted to this work in connection with the sale of gas appliances?
A. As outlined here, yes.
Q. I perceive that this is an outline. Now, I have been trying to get at what you base this outline upon.
A. It is stated here.
9689 Q. Is this an approximation, your judgment at the present time?
A. No.
Q. Or is made up from allocations of labor and expense, made at the time that the labor and expense was performed and incurred?
A. Yes.

Mr. Moran: Which?
The Witness: It is taken right from the books.
Mr. Moran: Well, which is it now?
The Witness: It is not an estimation at all. It is taken right from the books in these amounts.

Q. In what way does it appear on the books; that is what I want to get at.

Mr. Moran: As the workmen do the work their time is kept at that time, and is charged to this.

A. Yes, as the labor is done we charge it into these separate accounts. We carry an account for each——
Q. Where is your first charge for that labor made, upon what piece of paper or record showing the allocation of the labor or expense, to sales of appliances instead of the gas making or gas producing part of the business?
A. It first appears on the time slip of the man.
Q. And those time slips of the men do allocate that labor as I have asked you?
A. Yes, it does.

Q. And there is no item here that you have outlined or stated in the aggregate that has not been taken from separate time
1000 slips in that manner—made in that manner; is that so?

A. No item of labor.

Q. Is there any item of expense whatever?

A. Material and supplies would be taken from material and supplies slips.

Q. Would those material and supply slips separately state at the time they were made, that the materials and supplies used were used in the sale of gas appliances?

A. Certainly.

Q. I have not the exact words before me, but when I asked you on this question before, or on the subject before, to get out a statement of that kind, didn't you say that you had not kept a separate account of all the labor and expense that was occasioned in the business of the sale of gas appliances, and that you would have to estimate that according to your best judgment at this time, and that you had no other means of ascertaining it?

A. Well, what I stated at that time, if I recall correctly, was the fact that there might be—other than these items here, there might be possibly attributable to this particular expense here, a portion of the time of men who were engaged in the other businesses, who were engaged in the gas business. Will you repeat that please?

Q. We understand you; you mean the gas business is distinguished from the sales appliances. That is what we are trying to distinguish.

1001 A. (Continuing:) Who are engaged in the gas business, where it would be impossible to segregate their time.

Q. And in this statement you have not attempted to segregate the time of any such men?

A. No.

Q. So it does not include anything of that kind?

A. No.

Q. And this statement of course, then, does not include any proportion whatever of any overhead charges in the business?

A. It includes—yes, it includes a portion of what might be called overhead charges such as rent and telephone and so forth, which are already included in promotion expenses. For instance, in the case of rent, when the rent bill comes in——

Q. Rent for what?

A. Well, take rent for branch office, when that rent bill comes in, we take fifty per cent of that and charge it to this particular business, assuming that 50 per cent of that would be chargeable to this account.

Q. Well, that is charged at the time to this account?

A. Yes.

Q. And that has been your custom from the books, to charge it in that way, is it?

A. Yes.

Q. That comes under the heading of promotion expense?

A. Yes, it does.

Q. That is the only item of overhead charge in that, or under that heading—rent?

A. No, I said rent and telephone, and janitor service. I do not know all the items off hand.

1062 Q. There are a great many items of every day labor that you cannot separate from the gas making and gas distributing business, are there not?

A. No.

Q. There are not a great many items?

A. No, not a great many items that we cannot separate.

Q. Did you not state there were a great many items, or to that effect, and you gave as your reason that you did not know what a man was going out for when a complaint was made; you could not tell what the complaint was about, and therefore you could not allocate his labor?

A. That is only in the case of special complaint work. That is only the one item, all poor gas or no gas complaint work.

Q. You are excepting to my question then in asking if there were not a great many items. There are some items?

A. There are a few items, yes.

Mr. Jackson: That is all for the present.

Redirect examination.

By Mr. Moran:

Q. That is what you refer to when you said there might be some time of men in the gas business attributable to this that you could not allocate?

A. Yes, that is what I referred to.

Q. And that is trivial?

A. Yes, very trivial.

Mr. Jackson: I object to that statement "very trivial", and ask to have it stricken out.

The Master: I will let it stand. Is there anything more from this witness now? What do you want to do? It is seven minutes
1063 to one. Do you want to proceed for half an hour now, or do you want to adjourn and meet at the Judge's chambers?

Mr. Moran: How would it do to get through with Mr. Hopson for half an hour and then take lunch. Mr. Hopson is right here.

The Master: Will that be all right?

Mr. Jackson: That will be satisfactory.

HOWARD C. HOPSON, resumed, further testified:

Cross-examination.

By Mr. Hill:

Q. I notice, Mr. Hopson, on page 325 of your evidence you said in speaking of Exhibits 6 and 13, as follows: "The red figures were

so large that the sole aim in getting it up was to get it up in the form in which it would most clearly show what the facts were." Is that so?

A. Yes, sir.

Q. By that did you mean that it was possible for you to get up schedules and sets of figures which would obscure the facts?

A. No, sir.

Q. Then what did you mean by that statement?

A. I meant that in connection with these rate proceedings, there are always items about which there is disputes, which might be contended for as properly deductible in determining what remains, and on the other hand others contend that they might not
1004 be, and they might have been included in these statements as items to be contended for by the company if there had been any doubt about what the figures showed.

Q. Is that your whole answer?

A. Yes, sir.

Q. Then you mean that in some statements you put in figures which were questionable?

A. No, sir, but which the court and other people differ about.

Q. Did you put those in this statement?

A. There were none of those sought in this statement.

Q. If you had put any of them in, would you say so?

A. Yes, sir; if I was asked about them.

Q. That is, there might be expenses of these gas companies which people would well differ upon, as to whether they should be included as an expense in making gas?

A. Yes, sir.

Q. In certain cases. Is that right?

A. Yes, sir, that is right.

Q. And you were accustomed at times in preparing schedules containing those items, to prepare the schedule in such form that it does not show what the facts are?

A. No, I did not say that.

Q. Well, you said that in these you did show what the facts were, so I assume there must be others in which you did not show the facts?

A. No, all I mean is that this statement was prepared solely from the standpoint of showing the bare operating expenses as
1005 set up by the Public Service Commission. It does not include interest on consumers' deposits, it does not include normal income tax on the bonds that the company has to pay, it does not include the reserve for contingency, $16,000, that the company sets up and charges to surplus, it does not include the interest on the taxes, which in my opinion are clearly an element of expense which this company has been subjected to by reason of the statute.

Mr. Moran: It does not include any expense incurred on account of this litigation?

The Witness: Not a cent.

Mr. Moran: Or any other rate litigation?

The Witness: None.

Q. I find on page 330 of your testimony, when you were qualifying as a financial expert, the following statement: "I have had the sole and complete jurisdiction over millions and millions of securities that the up-State New York authorized, including issues running up to forty and fifty million dollars for the New York Central Railroad." What was the sole and complete jurisdiction which you exercised over the issuance of those millions and millions of dollars of securities?

A. In most cases the up-State Public Service Commission does not hold hearings in connection with capitalization proceedings.

1006 They refer the application to the company, which is usually ex parte, to the division of capitalization, which investigates and reports and recommends, and the Commission almost uniformly followed the recommendation of that division, and during the period which I referred to, I was the head of the division.

Q. They refer what questions to you?

A. They referred questions as to whether the allegations contained in the petition were correct, and as to whether in the opinion of the division the application should be granted.

Q. Did you have the power to swear witnesses?

A. No, they did not handle those cases by swearing witnesses.

Q. No, I am asking you. Did you have the power to swear witnesses? You said No.

A. No, sir.

Q. What was the means by which you arrived at your conclusions as to whether or not millions and millions of dollars of securities should be issued?

A. By examining the books of the corporations to ascertain whether they had expended the money in accordance with the requirements of the statute.

Q. What else did you do to ascertain on that subject?

A. We referred the results of our investigation to engineering departments of the Commission which worked under my supervision, and received reports from them, and when their report was received, to make up what was called a final report which was presented to the Commission.

1007 Q. What did the engineers do?

A. The engineers supplemented the accounting report by ascertaining whether the property had actually been put in that was shown on the books as having been purchased, and they also passed upon the reasonableness of the expenditures in cases.

Mr. Moran: And the necessity of making contemplated improvements—were there securities for that purpose?

The Witness: Yes, they also reported on that.

Q. Were your reports and recommendations in the form of written recommendations?

A. Yes, sir.

Q. Your whole business, then, was to examine the books; you

were an expert accountant to the Commission to examine the books, and then you told the engineering corps what improvements the books indicated had been made, and you then reported to the Commission itself the facts you found in the books, and the facts the engineers told you, on those two branches of that inquiry, did you not?

A. That and more.

Q. What else?

A. In the larger cases, where the volume of the expenditures was very great—for instance, a company like the Erie Railroad or the New York Central—we went over the items of expenditure and passed those about which we thought there would be no question and reserved the balance to be inquired into further. In some cases we conducted——

1008 Q. Wait a minute. Inquired into further by whom?

A. By me or my division. In some cases when they were inquired into further the method of the inquiry was to summon the less important companies' employees who had immediately to do with the matter, and cross-examine them and examine their detailed working papers to ascertain the method which they followed. In other cases we secured the assistance of the Commission's engineers who sat with us while such inquires were made. Sometimes where the statement of the engineers on the particular companies were mixed, or their recollection was poor, the Commissions' engineers went out and looked at the property, and I or my assistants went with them, and sometimes they did not.

Q. All you did was to audit the books, was it not?

A. Well, I have just told what we did up to that point.

Q. And if there were items in dispute, you talked with the people who made it?

A. Yes, sir.

Q. Don't you think you have fully stated them?

A. Well, I have not finished yet.

Q. Wait a minute. Don't you think you have from that fully and quite completely stated any powers you did have when you said, "I had sole and complete jurisdiction over millions and millions of securities"? You do not think you understated your power any?

A. Well, I may have put something there that as you read it now sounds as though it went further than it should, but as

1009 I said it, and at the time you were questioning whether I knew anything about the issue of securities——

Q. I did not ask you at all.

A. Well, you had been asking previously. But I would like to go on now and state what I did about these matters.

Q. Just a minute. You never did turn off the Commission themselves, did you?

A. No, nothing like that.

Q. Except the resignation?

A. If you would like to ask what I did, I would like to go on and finish.

Q. All right, go ahead.

The Master: This inquiry is directed to how much experience this witness has had?

Mr. Hill: Yes.

The Master: In discussing costs of making gas, is it not?

Mr. Hill: No, he qualified as a man that could tell what rate of interest should be charged, and bearing upon that——

The Master: I do not remember that.

Mr. Hill: Oh, yes, he started at eight and he grew more enthusiastic, and he finally put it up to eleven per cent. It is in the early pages of his testimony.

The Master: I do not remember that.

Mr. Hill: He started from eight per cent and worked it up
1010 to eleven, as he added more millions to the bonds he had completely and entirely jurisdiction of.

The Master: Well, I did not remember that; I thought it was directed to the question as to whether he was competent to discuss the expense account of this company.

Mr. Hill: It was solely on the question I have now in mind, that he qualified and put the rate of interest—I assume by this time from the rapidity with which he advances——

The Master: I think you had better proceed by question and answer, then. Let the Judge bring this out by question and answer; I do not think it is necessary to have long statements.

Mr. Hill: All right.

Q. You were simply an accountant there, were you not?

A. No, sir.

Q. You were working under the title of private secretary to the Chairman of the Commission?

A. Not after I began to do what you have just been talking about.

Mr. Moran: Get his title, Judge.

Q. What was your title?

A. Chief of the Division of Capitalization.

Q. Go on and tell us about anything else you did except to audit the books and inquire about the items?

1011 A. I frequently went to the offices of the companies to discuss with their officers the form of the financial plan which they proposed and to secure details with reference to the sort of an indenture which they expected to put out, and matters of that sort. After the accounting phases of the inquiry had been concluded, the Commission expected me to bring to their attention any matters connected with the application which indicated unwise financing, applications not in accordance with the statute, and also to express an opinion as to whether or not the price at which the securities were to be sold was fair and reasonable, and as high as could be expected from a company of that sort, as the Commission in its orders always fixes the price.

Q. That is so, but I want anything that you did?

A. After the final report with the recommendation had been made it was customary for me to draft the order which the Commission

entered. All of the capitalization orders were drafted in my division, and in connection with that it was frequently necessary to confer with counsel and financial men connected with the companies and in the larger and more important cases particularly in the earlier periods of this division it was drawn in conference and consultation with the members of the Commission. During the last three years that I was there, it was quite customary to send the minor report to the company, and if they accepted it without
1012 question, to prepare the order and send it to the Commission, and in very few cases was it necessary to go down and make any oral explanation, as the report and the order which accompanied it spoke for themselves.

Q. You mean to say that you determined the form of the bonds or debentures which would be issued?

A. In connection with the issue of securities, in connection with which there was an indenture, it fell to the lot of my division to have to read them over. The statute requires that the Commission shall approve mortgages by railroad companies, and the Commission early adopted the practice of approving similar indentures for gas and electric companies, and to discuss the provisions which went into them with counsel for the company, and all that sort of thing.

Q. Oh, I do not question that the Commission did it.

A. No, I did it.

Q. Did you have sole and complete jurisdiction?

A. No, I am talking about what I did.

Q. Of this mortgage?

A. No, if the company said they wanted it one way and I said I thought it ought to be another.

Q. Yes?

A. Of course, I said, then, well, if we cannot agree, let us go down and talk to the Chairman about it, and then he would decide the question.

Q. On page 328 at the top of it, did you mention a rate of 8½ per cent from securities of this kind?

A. Yes, sir.

1013 Q. Further down in the middle of the page, did you say it is not eight to eight and a half, it is more like nine?

A. Yes, sir.

Q. Further on in your examination, at a page which I seem to have mislaid, did you raise it to eleven?

A. Not for this company.

Q. What company was that for?

A. That was the Nassau and Suffolk Lighting Company.

Q. Why did you raise theirs to eleven?

A. Because of their financial situation.

Q. What is it?

A. They are not earning their bond interest, and their business is not as fully developed as the most efficient operation of the distributing system which it now has would require in order that it might be in a stable position.

Q. They are not earning their bond interest after paying what items?

A. After paying their operating expenses.

Q. And taxes?

A. And taxes.

Q. Is this company?

A. No, this company is not.

Q. Not according to the figures that you have prepared?

A. The Nassau & Suffolk Company is a much smaller company than this, however.

Mr. Moran: Well, when you said eleven per cent for the Nassau, you did not express an opinion about that; you said they
1014 were about to apply for securities on those terms.

The Witness: Yes, and they had their hearing yesterday, and the Commissioner who heard it, so one of my assistants who is an expert says——

Q. I have not asked about that and I do not think it is a proper thing——

The Witness (continuing): that it would be granted.

Mr. Hill: Just a moment. I object to it as not responsive.

The Master: Objection sustained. I think you had better confine yourself to the question of interest of this company as closely as you can, and of the general prevailing rate of interest for companies of a similar kind, without going into great detail about these particular companies.

Q. Are you acquainted with the unaccounted for of the Bronx Gas and Electric Company, as shown by its reports to the Public Service Commission?

A. I have not referred to the reports of the Bronx Company. That is a company——

Q. Have you.

A. No, I am not familiar with it.

Mr. Hill: Are you going to put in through him—that is I have asked you to stipulate it and you send me a lot of up-State matters taken from some Brown's Magazine.

1015 Mr. Moran: Judge, do not be so facetious.

Mr. Hill: No, I am not facetious; you have something that was taken from Brown's Manual. I do not want to accept some outside compilation that is not a public record.

Mr. Moran: You have here a statement of the unaccounted for——

Mr. Hill: In Long Island.

Mr. Moran: As reported, of certain companies, for the years 1917, 1918 and 1919, taken from the reports of those companies to the Public Service Commission.

Mr. Hill: That is right.

Mr. Moran: You want that to be received in evidence?

Mr. Hill: Received in evidence.

Mr. Moran: We have a statement here taken from the Public Service Commission reports for the year 1917, for certain companies in the Second District.

Mr. Hill: All right.

Mr. Moran: 1917, being the latest published reports. Is that right?

The Witness: That is right.

Mr. Moran: And we want to have that put in.

Mr. Hill: That is perfectly satisfactory.

The Witness: And we are making up some for 1918 and
1916 1919 from the reports on file with the Commission. They are not ready yet.

Mr. Moran: You do not want the other statement we have from Brown's Directory?

Mr. Hill: No.

Mr. Moran: Brown's Directory, you know, is a standard edition. It has Norwich in it.

Mr. Hill: I do not know it. That is one reason why it should not be in.

Mr. Moran: There is a percentage of unaccounted for there. Now, about these, of course these are reports made only by these companies, and I do not think they are competent evidence. I do not think the fact that the company reports it conclusively establishes the fact that that is the percentage of unaccounted for and, besides that, there are various ways of reflecting that figure. They may have made certain adjustments before they made the report, and, according to the testimony of the witnesses, it varies with different gas companies, the amount of unaccounted for, and these figures only corroborrate that — or do corroborrate that statement, anyway.

Mr. Hill: All right.

Mr. Moran: If you entertain that view of the thing, the understanding being that is the idea underlying them I have no
1917 objection to their being received in evidence. But I want the further admission from the defendants that in the case of the Newton Gas Company, Woodhaven Gaslight Company, Richmond Hill and Queens County Gaslight Company, Jamaica Gaslight Company, which report eight per cent, each one of them in each of the three years,—just exactly eight per cent of every item—that that is simply an arbitrary figure and does not represent any actual unaccounted for.

Mr. Hill: The representative of the attorney General so concedes.

Mr. Moran: Those companies being subsidiaries of the Brooklyn Union Gas Company, and that figure is simply adopted to get at their accountings between the Companies of the gas being manufactured and supplied by the parent company to these subsidiary companies, and that is the figure they used for the purpose.

Mr. Jackson: You will also concede that as to those companies, the soil in which the companies serve its consumers is practically the same as that through which the Kings County Lighting Com-

pany operates. You will not? I mean so far as its sandy quality is concerned.

Mr. Moran: No, so far as I know there is not much difference in the soil. I understand the whole of Long Island is what the geologists term a terminal moraine, isn't it, and that it is all
1018 sandy? I do not know as there is any difference as you go out through the island. How is that?

The Witness: It is hard pan in the center, it is sandy all the way through. There is no stone and no clay to speak of.

Mr. Moran: I will ask that Judge Hill's exhibit here be marked separately, which is entitled, Comparative statement of percentages of gas unaccounted for of certain companies in New York City, 1917-1919.

(Marked Defendant's Exhibit D-L.)

Mr. Moran: And the statement prepared by Mr. Hopson from the up-State reports for 1917, for certain designated companies; I ask that that be marked as a plaintiff's exhibit.

(Marked Plaintiff's Exhibit No. 44.)

Mr. Moran: This statement produced here by the plaintiff is only for the year 1917, and we are in hopes of getting some figures for later years which we would like to add to it.

Mr. Hill: I do not know anything about it. I am going to ask the witness.

Mr. Moran: I want to ask the witness something.

By Mr. Moran:

Q. Mr. Hopson in this work you did while you were with
1019 the up-State Commission, you took the application and went through it and carried it along up to the point where it was submitted to the Commission for action?

Mr. Hill: I object to that as a conclusion.

Q. Well, is that so?

Mr. Hill: And that the witness has stated the facts. It is a repetition and incompetent and immaterial.

The Master: I will let the question stand. He is simply trying to summarize the statement.

A. Yes.

Q. In connection with that work, did you examine the financial structure of the company affected?

A. Yes, sir.

Q. That is its securities outstanding, its bonds, its mortgages and so forth?

A. Yes, sir.

Q. And if it was merged, the form of the consolidation or merger with other companies—you went through that?

A. Yes, sir.

Q. If it held the securities of other companies, you examined the subsidiary companies?

A. Yes, sir.

Q. You examined the whole corporate organization and financial structure?

A. That is correct.

Q. Did you at the same time in connection with issuing the securities examine the income and expense accounts of the applicant?

A. Yes, sir.

Q. To ascertain any particular fact?

A. We always went through the income account and in-
1020 cluded it as a part of the report for the information of the Commission.

Q. And what was the information desirable for?

A. To show whether the company would be able to pay the interest on the bonds, and also to bring out certain facts that had a bearing on whether it was more desirable to issue stock or bonds, or some particular form of stock or bonds.

Q. In the course of your work did you ever make recommendation to the Commission or to the Company that the plan submitted be altered and changed, or something else be taken out instead?

A. Very frequently.

Q. And your advice followed?

A. Yes, sir, in a great many cases.

Q. When you said you exercised complete jurisdiction, did you mean to say you were the authority under which the securities were issued?

A. No, sir.

Q. On your direct examination which has been referred to in the cross examination, mention was made of certain instances of interest rates companies found it necessary to pay in order to get capital.

A. Yes, sir.

Q. Have you examined into the facts in that regard and prepared a list of the particular companies and the rates?

A. I had one of my men examine the Commission orders.

Q. And have you brought here a statement of it?

A. I have; yes, sir.

1021 Q. Is that the statement (handing witness)?

A. It is; yes, sir.

Mr. Moran: That is in line with the suggestion made by the Master that you get those instances, particular instances where these rates were paid.

The Witness: It is, as I understand it.

Mr. Moran: I would offer that in evidence.

Mr. Hill: Let me see. He says one of his men went up to the Public Service and obtained this information. The Attorney General has no objection in the event that the Public Service Attorney will check it up and see on going through those two or three hands that there has not been an error made.

Mr. Moran: It is subject to verification if there is any error in it.

Mr. Jackson: Well, I will do that.

Mr. Hill: It is in convenient form.

Mr. Jackson: I will have that done, if it is desirable.

Mr. Hill: Otherwise it is so much hearsay.

Mr. Moran: Work of this kind is done as all similar work is done—one man cannot do everything, you know, he has got to have an organization and get it done the best he can.

1022 The Witness: There are two items on this that are not taken from the Public Service Commission's orders, the number of times interest charges were earned. As to the Utica Company, it is taken from the bond circular of Harris, Forbes, who sold the bonds. As to the Buffalo General Electric Company, it is taken from the bond circular of Lee, Higginson & Company, who marketed the bonds; as to the Tonawanda Power Company, it was computed under my direction from the income account of the Tonawanda Power Company. The Empire Gas and Coke Company I have not been able to yet get the computation made, but it is being made and I hope to supply it.

Q. It is not stated on there?

A. It is not stated there.

Mr. Moran: Let us have the paper marked as an exhibit.

Mr. Jackson: Hold on a minute. I do not see as there is anything for me to check with the Public Service Commission reports.

Mr. Moran: Oh, yes, everything else.

Mr. Jackson: I thought he was going through there and eliminating such things as he did not get his figures for from the Public Service Commission.

1023 The Witness: The other item true rate of interest, is a computation which is derived from the selling price, the nominal rate of interest, and the period which the securities have to run, and was taken by me personally from a standard bond table such as is used by the Commission and bond houses and financial people generally.

Q. Any mathematician or near mathematician can figure that out?

A. Well, mathematician. I would leave out the near mathematician, because it is one of the most complicated compound interest computations that there is.

Q. Well, they consult standard tables, do they not?

A. They all consult standard tables.

Mr. Moran: Let us have this marked in evidence, if you please.

Mr. Jackson: Then we won't say it has anything that is taken from the Public Service Commission record?

Mr. Moran: Oh, yes.

Mr. Jackson: Is there anything there then that you expect me to check?

The Witness: Both those items can be checked with the Public Service Commission records.

(The paper was received in evidence and marked Plaintiff's Exhibit No. 45.)

Mr. Hill: You have taken your actual interest from the lowest price at which the Commission says they can be sold at?

The Witness: Yes, sir. The number of times interest earned was put in in response to the Master's suggestion that we put in
1024 something about the number of times interest earned, and it seemed to me that the representations of well known bond houses like Harris Forbes and Lee, Higginson & Co., show the basis on which they bought it, and what the public buy it for, or buy it on.

Q. It would not make any difference whether that was a fact or not, that was the assumption on which the buyer bought it?

A. Yes, sir.

Q. And that is the price it will bring when they do earn that multiple of the interest?

A. I have the bond circulars if they ought to be attached to that statement, if you would like it.

The Master: It is something that you can check: I mean the information he described there, you can check it any way you want.

Mr. Moran: Do we want in any part of this; do we want it on the record—that the rate of interest, for instance, on an issue of $3,000,000 of bonds by the Utica Gas and Electric Company was 9.3 plus; of $2,000,000 by the Buffalo General Electric Company was 8.75; by the Empire Gas——

The Witness: That was some time ago, compared with the present.

Mr. Moran: Empire Gas and Coke Company was 9.5, and by the Tonawanda Power Company, was 8.9—all issued in 1920.

1025 Mr. Hill: I want to ask him a question or two when you get through with this, if I may.

The Witness: I would like to add one company there.

Mr. Moran: He wants to add something else. What is it you want to say about another company?

The Witness: I have here the bond circular of the Adirondack Power and Light Corporation. These bonds were issued in connection with a consolidation, and they went out nominally at par, and the company which secured them sold them within the last two weeks at a price to yield 9 per cent to the bankers. I know that as a matter of personal knowledge, having had to do with it. That company operates——

Mr. Hill: I object to that evidence. There is no evidence here that it is a similar condition, or what the security is.

The Witness: Well, I was going to state that, because I know it.

Mr. Hill: Just a moment. There is nothing to show that it is a correct measure by which you can fix a standard which would govern the plaintiff in this case.

The Master: It is all evidence, and shows the market rate of money. There is no contention made that the condition of these companies is the same, or even approximately the same;
1026 we are just trying to find out what the current rate of money is.

Q. Have you finished, Mr. Hopson, on that? Did you have something else to say about it?

A. I have spent a great deal of time examining into the affairs of that company since 1917, and worked on it almost constantly, and assisted in preparing that bond circular there, and to the best of my knowledge and belief it is correct. It describes where the company operates, in the Mohawk and Hudson River Valleys, and so forth, and it is a first mortgage.

Q. On what?

A. With reference to all of those companies. Of course, as is shown there, they earn over twice interest, so their financial condition is far better than that of the Kings County Lighting Company, which is not earning any interest at the present time.

The Master: I think we had better suspend now.

Mr. Hill: I shall want to ask him something about this at some time.

The Master: I think we will have to come back again.

Mr. Hill: It is only a question or two.

The Master: Well, I have a couple of questions myself. I suggest that we meet at Judge Hand's chambers.

Mr. Hill: Judge Hand's?

The Master: I mean Judge Knox's chambers, on the 12th
1027 floor of the Woolworth Building, about 5 minutes to three.

The Witness: Do you expect your Honor to resume the cross-examination this afternoon?

The Master: I should think it was rather doubtful. How do you feel about that, Mr. Moran?

Mr. Moran: I thought it was only a little and we could get through with it.

The Witness: If you get through soon I will be in my office, or where I can get here in ten minutes, and I would be very glad to go on.

(Recess.)

1028 KINGS COUNTY LIGHTING CO.

v.

NEWTON et al.

Judge's Chambers,

Woolworth Building,

August 19, 1920—3 o'clock p. m.

Before Hon. John C. Knox, District Judge.

Present:

Mr. Auchincloss (Master),
Mr. Moran,
Mr. Hill, and
Mr. Jackson.

The Master: Your Honor, this is an application for instructions by the Special Master. When this case was first presented to your Honor I understand that the understanding was there would probably be a stipulation of the rate base. That stipulation has not been signed nor presented to me up to the present time. The reasons why it has not been will be explained by counsel, but, as I understand it, the stipulation as drawn was prepared before Judge Hand's decision in the Consolidated Gas case. In that decision an injunction was given on conditions, and one of the conditions was that the company during the life of the injunction would not charge more than
1029 a certain rate for gas. The stipulation as proposed by counsel in this case, contemplated a stipulation as to the physical value of the property; that is, they contemplated stipulating that the property was worth at least so much. Counsel for the plaintiff claims that sum is very much under their actual investment; counsel for the defendants claim that it is at least as much as their investment or even more.

Yesterday at the hearing, or two days ago at the hearing, counsel for the plaintiff asked certain questions with reference to the stock and bond accounts of the company, and yesterday cross-examination was directed to the evidence adduced by the plaintiff respecting those bond and stock accounts. I at that time asked the attorneys whether they were going to submit a stipulation, because if they were going to submit a stipulation, I was not prepared to permit them to continue, at any length at any rate, a discussion of the capital investment of the company. They then stated they were not at that time prepared to submit a stipulation, and Mr. Moran, representing the plaintiff, stated that his difficulty in agreeing to a stipulation at this time, was that he did not wish on behalf of his client to take any chances, that if he proved his case with reference to the expenses of this company, the Court in granting an injunction suspending the statute should limit the amount that the company might
1030 charge for gas during the life of the injunction. I then stated that I was not prepared to continue the hearings and to hold an exhaustive inquiry into the value of the physical property of the plaintiff, without asking you for instructions.

We are almost finished with the taking of testimony respecting the expenses of this company. If we are to go into the question of the value of the capital investment of the company, the hearings will no doubt drag out for a considerable time. Before continuing the hearings and investigating the physical value of this property, I wish to obtain instructions from you after you have heard the present status of the hearings, and after you have heard counsel for both sides explain their positions with reference to the stipulation.

Mr. Moran: If the Court please, it was considered when we applied for the appointment of a Master, that we could probably have a short trial by eliminating the questions with respect to the value of the plant and facilities. It seemed that that question could be eliminated, because the plaintiff would accept a concession from the defendant that the property was worth a certain amount that they were willing to concede. Plaintiff was perfectly satisfied, as counsel was,

that the amount that would be conceded by the defendant,
1031 would be sufficient to call for the condemnation of the statute by the Court; that is, the expenses of operations, with a return upon the investments or the value that they would feel at liberty to concede, would surely call for the condemnation of the Statute by the Court, if the operating expenses themselves would not call for that condemnation.

We considered at that time that the only question that the Court would be called upon to decide, and the only matter it would be called upon to deal with, was whether the Statute was valid, and whether its enforcement should not be suspended. We did not conceive that it was for the Court to fix a rate; if the Court were to fix a rate, of course we would want a fair valuation of our property, and we would want the full value of our property, from which the Court could ascertain the amount of return we would be entitled to, under any rate. I felt at that time that the Court would not undertake, and I have no decisions where the Court did undertake, to fix a rate; but at the time we started into the trial, and while the defendants were satisfying themselves about the stipulation, which I had submitted to them, Judge Hand made his decision in the Consolidated Gas case. In that case, as I read his opinion, he did not fix the rate, but as a condition of granting the injunction
1032 which he did grant, he put a limit upon the amount that the company might charge,—I think $1.20. He did that, as he stated in his supplemental opinion, and as he stated in the main opinion, because it was within the exercise of his discretion, that he could withhold or grant the injunction, and inasmuch as the company would not be subject to any regulation under statute or otherwise, he put on the limitation of $1.20, and he put that on, as I read his opinion, as high enough so that when the legislature comes to fix the rate or delegates to the Commission the power to fix that rate, any rate they fix will be well under that in his opinion, so he was liberal and generous about it.

Of course that struck me, it set me to thinking about our case, and while the two cases are entirely different, that is the condition of the company, our company, must be entirely different from that of the Consolidated Gas Company, otherwise I do not see how any such provision could be applied to it. In the Consolidated Gas case it is required that all the excess between the 80 cents and whatever rate they charge, shall be impounded, subject to a fixation of a rate by the legislature or the Commission; and he allows them to substitute in lieu of the cash difference, a security, Liberty bonds or something like that.

1033 Of course, in our case no such thing is possible otherwise our second condition will be worse than our first. In other words, we will be worse off after a decree than when we started out; because we are trying it in these August days, just to get relief so we can keep the plant going.

But, never the less, while I do not see how any such rule could be applied in our case, as a matter of precaution I must guard against having a situation existing upon which the Court might fix, if it did fix a rate, a wholly inadequate rate.

I gathered from one of the counsel, the counsel for the State, that they will contend that any decree here, if a decree goes in favor of the plaintiff, or any injunction issued, shall be upon a limited rate. Of course if a limit is fixed, then it is necessary to find out how much in that rate is necessary to make an adequate return on the investment.

Coming again, we have to have an actual investment in the plant and property to find out what it was, and I would not feel satisfied with the value which they would concede in this case for that purpose; in other words, the value that I can get them to concede. I can accept only for the purpose of inquiry into the question and decision by the Court of the question whether the Statute
1034 should be enforced at this time or not, whether it is constitutional; but as the value we are entitled to, the rate they will concede is wholly inadequate, in my opinion, and way below what we could establish with proof.

The situation is just as critical if not more so than it was when we applied to the Master, and as I understand the object of coming here is to see if we cannot make a short cut to this one way or the other. It has been suggested that we make our stipulation—that is, that the defendants conceding a certain valuation, and we accepting that for the purposes of calling for a decision on the constitutionality of the statute—and then if the Court should condemn the statute and hold it unconstitutional, and should grant an injunction, and should as a condition of granting that injunction fix a limit on the rate, that either party if he felt aggrieved by the rate might and would be entitled to an order sending the matter back to the Master to take the testimony and ascertain the real value of the plant and facilities, and upon the coming in of his report, the Court would make such modifying decree as that report and the evidence supporting it would warrant, raising or lowering in that event the limit of
the rate that the Court has fixed. In the meantime, however,
1035 the rate to be in force. It is dangerous to mention figures, for I might put some bad ideas into somebody's head.

Mr. Hill: For all purposes of the case, the amount that we stipulate is to be regarded as the value until application is made to open on the foot of the decree, which the Court will make, and some other value fixed by the Court. That is what you stated was to be understood, that the sum we named would be the valuation for the purpose of determining the constitutionality. It is for all purposes in the case. But if the Court as a condition for granting an injunction fixes a rate above which the plaintiff cannot sell gas, and if either party is aggrieved, then we may apply to your Honor on the foot of the decree to have it again sent to the Master.

Mr. Moran: Well, I would want more than a right to apply; I would want it that he would be entitled to an order sending it back to the Master.

Mr. Hill: All right.

Mr. Moran: To decide the issue as to the value of the property.

The Court: I do not see any impropriety in some sort of an arrangement of that kind, as everybody seemed to concede when this

matter was before the Master, that it was necessary that the matter be determined with considerable speed; and I have no objec-
1036 tion to that, and to allowing the actuality to be determined as to the value of your plant and equipment, upon which you are entitled to receive a fair return, if the Court should seek to limit the rate on any injunction that may be issued, if it finds the statute transgressed, on constitutional grounds.

Mr. Moran: The statement of the Court covers the case admirably and is acceptable to the plaintiff.

Mr. Hill: It is to the Attorney General.

Mr. Jackson: That is the only valuation before the Court would be a stipulated one, until the question arises, if it shall arise, as to some condition of a rate temporarily or under such conditions as the Court may deem best. Then, a rate having been fixed by the Court, if either party feels aggrieved by that rate, in that event he may apply to the Court to have the matter resubmitted to a Master upon that question, the idea being that——

The Court: So that the Court may have before it the actual value of all the property upon which the plaintiff is entitled to a fair return in the fixation of a rate which it shall impose pending an appeal to the Supreme Court.

Mr. Jackson: You see, I think that is not quite a statement
1037 of the position, because that would presuppose a trial of that question before it goes to the Court.

The Court: Well, you have got to try the question——

Mr. Jackson: Now here is the situation. We are trying to avoid the trial of the valuation of the property at the present time before the question is submitted to the Court upon the constitutionality of this rate, as it is about to be submitted upon the operating expenses and a stipulated value of the property. Now, if we can stipulate that valuation of the property for that purpose—and it includes, as Judge Hill says, in our opinion, and the stipulation was so intended, all the purposes of this litigation unless and until some other valuation is fixed for some other purpose; the idea being this—that the stipulation in any event was going to confine this valuation to the strict purpose of this litigation, and we had in mind stipulating also that in order to bind it to that effect, there should be some expression in the decree of the Court, to the effect that this valuation is only the amount for the purposes of this litigation. Because neither side want to be bound in the future and call it res adjudicata as to this valuation.

The Court: I understand that, that the question was to
1038 come up, and your assumption was that the question would come up before the Court on this valuation, and be determined by the Court as to whether or not this Act of the Legislature is constitutional.

Mr. Jackson: Yes.

The Court: And that then the corporation would probably have the right to increase its rate. That is, there would be no governmental agency which could have limited its rate, and it could have put into effect such sum as it thought it was entitled to receive. That

has been complicated, as I understand, in the mind of Mr. Moran, by the decision which Judge Hand gave in the Consolidated Gas Company case. His purpose, as I get it, is that if the Court fixes a rate which in his judgment does not allow them a fair return upon the actual value of the property, then they may apply at the foot of this decree for leave, and be entitled to the right, to go before the Special Master and prove the entire value of the property, and that the Court may then again consider the matter as to whether or not any rate imposed is an excessive rate or too low a rate.

Mr. Hill: In the meantime, however, the Statute to be suspended.

Mr. Jackson: No.

The Court: Yes.

1039 Mr. Jackson: Subject to the condition of the rate determined by the Court.

The Court: Yes.

Mr. Moran: Yes.

The Court: I guess that covers it, does it not?

Mr. Jackson: That is a clear understanding.

The Court: All right, I do not see any impropriety in that.

Mr. Hill: And in determining the maximum rate, if the Court determines it proper, too, to fix a maximum rate, in fixing it in the first instance he takes as his rate base the amount we stipulate.

Mr. Moran: Oh, I cannot bind the Court.

The Court: The Court will pass upon that.

Mr. Moran: That is a question for the Court.

The Court: Yes.

Mr. Moran: That is a question for the Court, as to what it will do.

The Master: Your Honor, do I understand that I am instructed to continue the hearings, assuming that a stipulation is presented to me establishing a rate base for the purposes of this hearing, and make my report——

The Court: You can make your report upon the basis of that stipulation.

1040 The Master: And if a stipulation is not presented, that I must go ahead in the ordinary course?

The Court: That is what it is necessary for you to do; because otherwise you have no foundation upon which to build at all.

Mr. Moran: It is clearly understood that this matter of having the cause sent back to the Master, will be a matter of right, that he will be entitled to an order sending it back in case the temporary rate is considered inadequate?

The Court: I think I stated that a while ago.

Mr. Jackson: Anybody shall have the right.

Mr. Moran: And to be entitled to an order, of course, sending it back to the Master?

The Court: Yes, to take full proof as to what the value is.

Mr. Jackson: We are trying to have the time and trouble in taking that saved, and if it cannot be saved, I suppose the rights of all parties ought to be preserved to have that hearing in case they feel they ought to have it.

1041 The Master. Gentlemen, you have heard the instructions given me by Judge Knox. Pursuant to those instructions I am ready to receive from you any stipulation you may be prepared to enter into pursuant to the instructions received by me from the District Judge.

Mr. Moran. If the defendants' counsel will notify me what amount they will concede as the present fair value of plaintiff's plant and facilities used in the public service I am prepared to act.

Mr. Hill. The Attorney-General, with permission to withdraw the concession I am about to make in the event it is not accepted by the attorney for the plaintiff, is willing to concede for the purposes of this trial only—

The Master. And pursuant, I understand, to the language of Judge Knox?

Mr. Hill. And pursuant to the language of Judge Knox, that the valuation of plaintiff's plant and facilities used in the public service at all times since January 1, 1919, was and is the sum of $83,300,000. This concession is made solely for the reason that we desire to expedite the trial and for the purpose of the present trial only. It is not to be binding upon any of the parties, particularly upon the Attorney-General, except for the purposes of this trial.

1042 The Master. And it is made subject to all of the conditions and provisions of Judge Knox' instructions to me?

Mr. Hill. I include the last suggestion of the Master in my reply.

Mr. Jackson. I will make the same concession as stated by Judge Hill for the defendant represented by me, with the condition that all the parties to this case request the court in answering the decree herein to insert therein any necessary or suitable provision protecting the parties from the further or other use or binding effect of this stipulation as to the value of the plant and facilities in any other action or proceeding.

Mr. Moran. The plaintiff claims the present fair value of its plant and facilities used in the public service is in excess of the sum of $83,000,000, as alleged in its complaint, but in view of the necessities of the situation and the fact that a full valuation is perhaps not necessary or needed for a decision upon the legal questions involved, it accepts the concessions as to value in lieu of calling witnesses to establish the value, provided that it will be agreed here and now if and when it may hereafter in this or any other cause,

1043 action or proceeding before this court or any other tribunal, board, commission or body, be necessary to determine the validity of Chapter 604 of the Laws of 1916, or any other statute, rule or regulation establishing or purporting to establish the rate or price of gas furnished or sold in the territory served by the plaintiff, the parties to this action and their successors shall be free to establish the value of the plant and property used in the public service in all respects as though this concession and acceptance had not been made.

Mr. Hill. So far as I have power to make that agreement, I make it.

Mr. Jackson: I make that agreement, claiming in behalf of the defendant I represent the same condition.

Mr. Moran: You do not want to be bound by your concession hereafter of value?

Mr. Jackson: Not any more than you do.

Mr. Moran: That is the idea. Then don't you absolutely agree to it?

Mr. Jackson: I say I claim the same condition on behalf of my defendant. I had already agreed to it before I stated that. Read what I said.

Mr. Moran: But you do not claim we have not full power in making this concession to also agree that it shall not be used at any other time and place?

1044 Mr. Jackson: I think that when we stipulated this figure for the purposes of this litigation we really did not need any fringe upon the proposition.

Mr. Moran: I quite agree with Mr. Jackson.

Mr. Jackson: And if you want to make that idea more specific, why, I want the same specification to be binding upon you as you want binding upon us. I understood that this figure was to be the figure for this litigation and not to be quoted elsewhere by either party. Is that the idea?

Mr. Moran: That is the idea, and I quite agree with Mr. Jackson. It was only for the purpose of greater specification and certainty that I mention this feature of it.

Mr. Jackson: I understood that when we were going to stipulate a rate base for the purposes of this litigation, we meant what we said, and that it was to serve the purposes of this litigation all the way through to the changes that may be made as were indicated before Judge Knox a short while ago, and that it was not to be taken as the valuation of this property in any other action or proceeding by either party. Is that what you understood, Judge?

Mr. Hill: Yes, that is my understanding, that it is the 1045 rate base for all purposes of this litigation until changed, if ever changed.

Mr. Jackson: In this proceeding.

Mr. Hill: And then to be changed in this proceeding.

The Master: Pursuant to Judge Knox' instructions.

Mr. Hill: Pursuant to Judge Knox' instructions, and pursuant to the suggestion and conversation and agreements had before Judge Knox.

Mr. Moran: We won't have any misunderstanding about it. You understand if a decree is entered in favor of the plaintiff in this action, suspending the enforcement of this statute, and no action is taken by the legislature, and in five years from now conditions are changed so that the defendants feel that they should not then be restrained from enforcing the statute, the decree here will provide that they can come back and have the decree vacated on showing such new conditions. Now, I do not want this figure here that we have mentioned today used as the value at that time of this plant and property, even as it exists today. So when you say this litigation

you are including a litigation in this action which may come on five years from now, at the foot of this decree.

Mr. Hill: But there is a way provided, according to the talk we had with Judge Knox, where proof and evidence may be
1045c adduced to show actual value, and until that time comes and that procedure is followed this is the rate base and the value of your property for the purposes of this litigation.

Mr. Jackson: That is why I suggested that the parties unite in asking the court, so that it would not be necessary for anybody to ascertain as to this situation—to go into the record, that it would be inserted in the decree, so that it would appear there just the purposes of this stipulation, the extent of it.

The Master: The Master understands that this stipulation and agreed valuation of $3,300,000 is for the purpose of facilitating and hastening the report of the Special Master to the District Court, and that upon such report having been filed and the opinion of the District Judge on said report having been handed down, such protective provisions as may be deemed necessary on the part of either party at that time may be demanded from the District Court, and further that Judge Knox has given the right to either party, if upon the handing down of his opinion or the District Court's opinion on the Master's report, if either party is dissatisfied in any way whatsoever, to have the case sent to a Special Master for the purpose of determining the true value of the property, and that this value is what the Master regards as an arbitrary value fixed for the purposes aforesaid.

Mr. Moran: That is enough.

Whereupon, a recess was taken, the hearing to reconvene at 61 Broadway.

1045d [Endorsed:] Public Service Commission, First District, August 28, 1920. Bureau of Statistics & Accounts.

94296

Vol. II.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 295.

CHARLES D. NEWTON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND ALFRED M. BARRETT, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT, APPELLANTS,

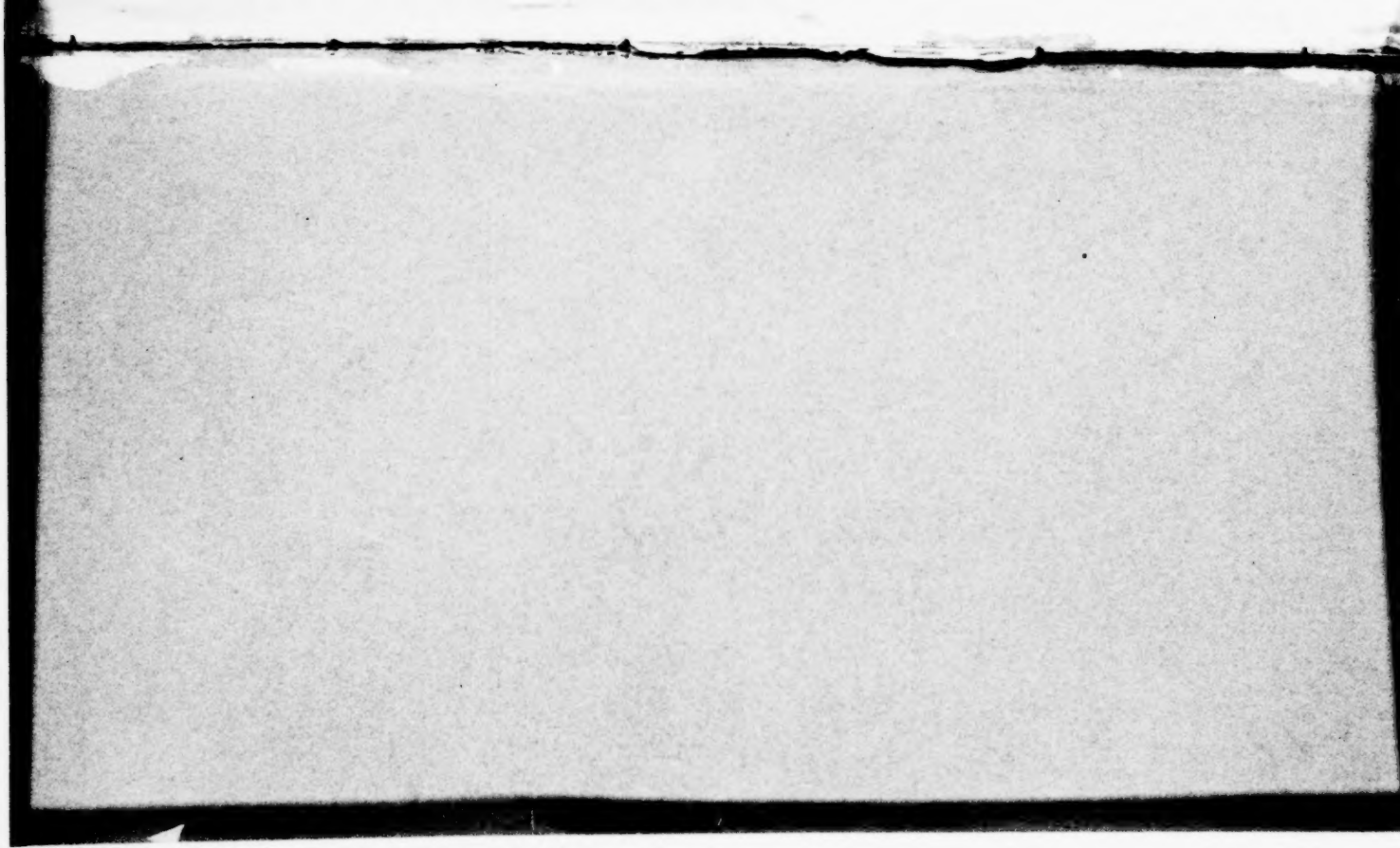
vs.

THE KINGS COUNTY LIGHTING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 11, 1921.

(28,224)



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23—Coal contract with Williams & Peters, April, 1919, to April, 1920	1863	1043
24—Letter covering supply of coal, dated March 12, 1920, Lehigh Valley Coal Sales Company	1865	1044

	Original.	Print.
Plaintiffs' Exhibit 25—Letter covering supply of coal, dated March 24, 1920, Lehigh Valley Coal Sales Company	1866	1045
26—Letter covering supply of coal, dated March 27, 1920, Lehigh Valley Coal Sales Company	1867	1044
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32—Public Service Commission order, dated June 11, 1920, their case No. 2741	1875	1048
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34—Letter, dated July 29, 1920, United Gas Improvement Company	1881	1052
35—Statement of present-day prices of coal and oil	1884	1054
36—Statement of meters repaired 1917, 1918, 1919, 6 months 1920	1885	1055
37—Order of Justice Pendleton releasing impounded funds	1886	1057
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39—Statement of "unaccounted for" Kings County Lighting Company 1909-1920	1912	1077
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46—Public Service Commission's order in Brooklyn borough	1919	1084
47—Comparative statement of operating expenses years 1917, 1918, 1919, 1920, altogether	1921	1086

		Original.	Print.
Plaintiffs' Exhibit 48	Comparative statement of operating expenses years 1917, 1918, 1919, 1920, altogether	1922	1086
49	(This number omitted)	1926	1086
50	Original franchise	1927	1086
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D2	Oil contract	1931	1088
D3	Oil contract	1936	1091
D4	Oil contract (D2, D3, and D4 ordered received, limited to clause on page 1501, but not formerly marked in evidence.)	1941	1094
D5	Page 4, Vols. 1 and 2, "Gas Service News"	1945	1096
D6	Statement of "unaccounted for" different companies	1953	1096
D7	District stockholders Kings County Lighting Company (D7 ordered stricken out on page 1746.)	1957	1097
D8	Form No. 8502A, requisition blank	1958	1097
D9	Material order blank	1959	1097
D10	Supplies issue slip	1963	1097
D11	Coal weighers' sheet blank	1965	1097
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D14	Payroll blank	1970	1097
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D19	Oil contracts, September 1, 1916, Gulf Refining Company and Boston Consolidated	1976	1098
D20	Daily make and sent out years 1918, 1919, to June 30, 1920	1983	1101
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D23	Balance sheet 1917, 1918, 1919, 1920; operating revenues, expenses, and taxes 1917-1920; taxes charged to income 1917-1920	1987	1104
D24	Significant data	1993	1103
D25	Letter to Standard Oil Company, dated December 7, 1918	2007	1104

	Original.	Print.
Defendant's Exhibit D26—Letter to Dudley (Prudential Oil Co.), dated November 21, 1918....	2007	1104
D27—Letter to E. A. Lyon, district sales manager Gulf Refining Company, dated December 7, 1918.....	2007	1104
D28—Reply to letter D27, dated December 14, 1918.....	2007	1104
D29—Letter from Gulf Refining Company, dated November 25, 1918.....	2007	1104
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D32—Letter from Texas Company, dated December 12, 1918.....	2008	1104
D33—Reply letter to D32, dated December 14, 1918.....	2008	1104
D34—Letters (44 in number) oil correspondence	2008	1104
D35—"Unaccounted for" of other companies	2008	1104
Judgment roll in action of Kings County Lighting Company *vs.* Egbert E. Woodbury *et al.* in supreme court New York County. This exhibit was introduced by defendant and received in evidence, but not marked with an exhibit number..	2009	1105

VOLUME II.

1045½ United States District Court, Southern District of New York.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Before Hon. Gordon Auchincloss, Special Master.

Transcript of Reporter's Minutes.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York.

Barclay, 8477.

1046 61 Broadway, New York,
August 19, 1920—4.00 p. m.

(Met after recess.)

HOWARD C. HOPSON resumed the stand.

Cross-examination (continued).

By Mr. Hill:

Q. On Exhibit 45 you have, under the heading "True Rate of Interest," set out that as to the issue by the Utica Gas & Electric Company, the rate was 9.3 per cent. I will ask you if you arrived at that figure, 9.3 per cent, by an assumption that all of the bonds were sold at the lowest rate at which they could be sold under the order of the Public Service Commission?

A. Yes, sir.

Q. And with that assumption, and the assumption of the nominal rate of interest, and the maturity, you computed the figure 9.3 per cent?

A. Yes, sir.

Q. So that the true rate of interest of those bonds would be as proportionately lower as they were sold for any sum above the

lowest amount which the Commission permitted them to be sold for by its order?

A. That is true.

Q. And the same thing is true as to the rate which you have computed as to the Buffalo General Electric Company, is it?

A. Yes, sir.

Q. And as to the Empire Gas & Coke Company?

A. Yes, sir.

Q. And as to the Tonawanda Power Company?

1047 A. In the case of the Tonawanda Power Company, I know of my own knowledge that they were sold at that price. In the case of the Utica Gas & Electric Company, I only know by the statement of my assistant who was working on the matter, which is to some extent hearsay, of course.

Mr. Hill: I object to that and move to strike it out.

Mr. Moran: He has not stated what it was.

Mr. Hill: No.

Mr. Moran: In these prices, sale prices, that you have taken here, or assumed, you mean the prices that the company got for them from the banker?

The Witness: Yes, sir.

Mr. Moran: You do not mean the prices that they might have been sold by the banker to the public?

The Witness: No, sir. This is the cost to the company of the money.

Q. But in each case you have assumed that they were sold at the lowest figure permitted by the Public Service Commission, in making the computation of the true rate of interest?

A. Yes, sir.

Q. And you say as to the Tonawanda, you understand they were sold—you know they were sold——

A. I know they were, yes, sir. In the case of the Utica and the Buffalo General Electric Company, I know the Commission

1048 held a hearing on this matter before they permitted this price to be fixed, at which hearing the terms of sale with the bankers were disclosed to the Commission, and appear on the official records of the Commission in the sworn testimony.

Mr. Hill: I object to that and move to strike it out, as the official record is the best evidence.

The Master: I will strike it out. I do not think it is competent.

Q. I notice that all of these companies which you have put on this tabulation are upstate companies?

A. Yes, sir.

Q. Have you included any gas companies or public service corporations of a like kind in or about the Metropolitan District here?

A. Not in this tabulation. Mr. Howard of the Commission was to work up something in the First District Commission, which he was to submit to us, as I understand it.

Mr. Hill: I do not know of any further cross examination that I have.

Redirect examination.

By Mr. Moran:

Q. Mr. Hopson, you examined the company's books with reference to that account, "Plant Withdrawn from Service"?

A. Yes, sir.

Q. Just tell the Court what that means, avoiding as many accountancy terms as you can.

Mr. Jackson: What was that account?

1049 Mr. Moran: Plant withdrawn from service, that Judge Hill asked about yesterday.

A. The Public Service Commission requires all property which has an expectancy of life and service of more than one year to be charged to an account which is called, in the uniform system of accounts, fixed capital; and as time goes on, some of that property has to be replaced or retired, and other apparatus chargeable to the same general account substituted for it. The Kings County Lighting Company made an examination of their books over a period of years, to determine the actual amount of property that had been replaced over a period—I think it was 15 years; it may have been twenty—and after that had been concluded, that investigation, and the amounts ascertained, the results were presented to the executive officers of the company.

Mr. Jackson: Just a moment. What is the basis for your knowledge of this?

The Witness: During the time that I was over there I inquired as to how they got at this amount, and they showed me the records of the investigation as to the property that had been retired, how much it amounted to, and so forth.

Q. Well, now, just a moment. I don't want anything about the amount of it, Mr. Hopson, at all?

A. You want how it works?

1050 Q. How it works; that is what I want, how it works. Now, go on.

A. Well, the amount, anyway, was fixed at one cent; and it so appears on the books, one cent per thousand cubic feet of gas sold. There is charged into the operating expenses of the company each month an amount equal to one cent for each thousand feet of gas sold, as an operating expense, and at the same time there is set up on the liability side of the balance sheet of the company, among the accounts which are called reserves, an equal amount. That amount appears in the balance sheet of the company from month to month as it is drawn off. As property is retired, for instance, a boiler——

Q. (Interrupting.) Or a meter?

A. Or a meter. The original cost of the meter as ascertained from

the books of the company is credited or deducted from the fixed capital account of the company in which meters are charged when purchased, and a corresponding deduction—that is an asset account—and a corresponding deduction is made from this reserve account which I have just mentioned, which is an account on the liability side of the balance sheet. So that this reserve account is continually added to from month to month by the accumulation, by the sum total of the one cent per thousand, and is continually reduced by the original cost of the property withdrawn from service. The balance which is shown on the balance sheet of the
1051 company and in the company's — at any time, represents the excess of the amount which has been reserved and charged to operating expenses, over and above the charges or debits which have been made to that account, representing the original cost of the property withdrawn from time to time.

Q. Now, let me ask you something.

A. Just let me add one thing. There is another feature to it which is unimportant, which makes an adjustment to it, representing the item of salvage. The salvage reduces the amount that is charged to that account when you make the deduction at the time of the retirement.

Q. Salvage is charged to cash?

A. The salvage is charged to cash, and reduces to that extent, reduces the charge that is made to reserve account.

Q. Speaking about the expense account, plant withdrawn from service?

A. Yes, sir.

Q. Does that represent a cash transaction, the transactions involved in a year—are they simply bookkeeping transactions or real cash transactions?

A. At the time that the entry is made, it is a bookkeeping transaction.

Q. The company gets certain revenue from its business; it has certain out of pocket expenses for operating?

A. Yes, sir.

Q. From day to day and from month to month. Now, this is not one of these out of pocket expenses from day to day?

1052 A. No, sir.

Q. But nevertheless it charges—it treats it as an expense?

A. Because it——

Q. Well, does it?

A. It does.

Q. And if it has revenue enough from its business, there will be in its Treasuary at the end of each month, or at the end of each year, one cent for each thousand cubic feet of gas sold, which is to be treated just the same as any other expense of the company for operations, is it not?

A. Yes, sir.

Q. Now, the amount that is so there in cash and so collected from consumers, is also credited into this reserve account?

A. Yes, sir.

Q. And it is credited into the reserve account so that it or its equivalent, is used to buy pieces of property to replace those that are taken out of service?

A. That is true.

Q. So this could be really called a replacement and renewal account?

A. Yes, sir.

Q. Is that the idea?

A. That is right.

Q. And when a piece of property is retired from service, can you, under the rules and practices of the Commission, get securities authorized by the Commission, bonds or stocks to provide the money to pay for that if it is retired from service and something else takes its place?

1053 A. You can't, unless the Commission in their certificate which they have to make under the law with their orders, certifies that these securities were issued for purposes properly chargeable to operating expenses or to income.

Q. Well, that is an exceptional case?

A. Yes, they very seldom grant that.

Mr. Moran: They never did it for me.

Mr. Jackson: You probably never made a legitimate showing.

Mr. Moran: Oh, yes.

Mr. Jackson: Well, they decided to the contrary.

The Witness: Let me go a little further——

Q. (Interrupting.) Let me see. How is the property that is retired from service to be paid for? It is first bought and put into service, with the proceeds of securities?

A. Yes, sir.

Q. It is taken out of service for any reason; it is through, the company can't use it any more, and they have to get rid of it. The stock and bonds are still out. What takes its place now, in the first instance?

A. In the first instance——

Q. (Interrupting). This cash, doesn't it, that comes from earnings?

A. Yes, sir.

Q. And that is used then really to buy a piece to take the place of that which is taken out?

1054 A. After the property originally required as a new addition, taking the place of nothing, has been installed, any subsequent renewals or replacements of that, have to be paid for, under the rules of the Commission, out of earnings.

Q. Out of earnings?

A. They will not allow permanent capitalization for replacements.

Q. Not only they will not allow it, but it would be unsound economies and finances to do it, wouldn't it?

A. Yes, sir.

Q. You would not get it—you would soon have nothing, if you did not provide for renewals and replacements of property?

A. Yes.

Q. Ultimately you would have a plant that would be all gone?

A. That is correct. It is to eliminate replacements that the Commission makes these examinations of companies' books in connection with the capitalizations, to make certain of it.

Q. Other witnesses here testified that that instead of being one cent for renewals and replacements of plant withdrawn from service, should be 3 or probably 4 cents per thousand?

A. Yes, sir.

Q. You have examined the books of a number of various companies, have you not?

A. Yes, sir.

Q. Is it a practice for them to use as high as three cents per thousand?

A. Yes, sir.

1055 Mr. Hill: I object to that as immaterial, and the witness not shown competent.

Q. Do you know of any that is as low as one cent, outside of our company?

The Master: Let him state as to whether he thinks that is a reasonable or an unreasonable adjustment with respect to this particular property?

A. I don't think it is adequate.

Q. That is, the one cent?

A. The one cent.

Q. You think it ought to be as high or three or four—three anyway?

Mr. Hill: I object to that, as the witness has not been shown competent, has shown no qualifications to know how much it takes to replace property withdrawn from service of a gas company.

The Master: Objection overruled, and exception.

A. I believe that the only way that the adequacy——

The Master: Just confine yourself to this plant, please.

The Witness: Yes. The adequacy of the amount can be determined by considering the value of the property of the company, but most companies——

Mr. Jackson: It is the general conditions of depreciation——

The Witness: Most companies, however, in keeping the
1056 amount up, use a certain number of cents per thousand; and I know of several companies that use an amount substantially three cents per thousand.

Q. You said there was something you wanted to correct in your testimony?

A. There are two or three little errors here in this testimony that I would like to call attention to. On page 305, the second line, it says: "Materials and supplies expense accounts." The word "ex-

pense" should be stricken out, and down further it says: "Yes, but even assuming there was a sale." It should be, "Even assuming there was no sale."

On page 307, at the middle of the page, I said: "We selected * * * a typical month." The record has it, "a difficult month," which is entirely different from the meaning I had.

At the bottom of page 310, it says: "Coal account," it should say, "coal pile," in speaking of the inventory adjustment.

The first new paragraph on page 315, I said, "To illustrate the —— clearly, the company keeps practically all of their books by machine." I meant the telephone company.

There is one place where I was talking about the class of help which is employed by the company, and the statement, I think, was understood by everybody all right. I said that the class of help which these gas companies had had to employ during the war——

1057 Q. (Interrupting.) And since?

A. Sometimes put down more figures wrong than they did right. But that I meant that if they were not carefully supervised and keep track of that they were prone to make errors. I did not mean to make it as strong as it reads in the testimony.

Mr. Moran: This matter of this order——

The Master: Let me just ask a couple of questions. Won't you just state, please, briefly, I know you have stated it before, but please restate it—exactly what you have been doing at the plant?

A. I have not done anything, your Honor, at the plant. The work which we have been doing has been entirely in the office of the company where its books and records are kept.

The Master: Are all its books and records kept there?

The Witness: All its books and records are kept at that office.

The Master: How about its vouchers?

The Witness: Its vouchers are all kept there.

The Master: Detailed vouchers?

The Witness: Yes, sir, down to the——

The Master: We have heard a great deal of evidence about the use of these vouchers and the checking back and forth of sup-

1058 plies that are purchased or received. Are they all kept at the office of the company?

The Witness: Yes, sir.

The Master: And when you say you have been working on those, have you been checking those?

The Witness: Yes, sir.

The Master: Checking the books back to the vouchers?

The Witness: Yes, sir.

The Master: With the help of the vouchers?

The Witness: With the help of the vouchers.

The Master: Are those vouchers part of the permanent records of the company?

The Witness: Yes, certain classes of vouchers are regarded as permanent records of a public utility company, the vouchers that sup-

port the fixed capital charges. The detailed expense vouchers and the so-called material and supplies issue slips and items of that sort are customarily kept by large companies only a certain period of years; but the whole accounting system, including everything that tends to support the general books which you have here, are kept by the company as a part of its records.

The Master: And were part of the records for 1919 and 1920?

The Witness: Yes, sir.

1059 The Master: And those records are held for inspection and checking by any competent authority that wishes to go in there—that has the right to go in there?

The Witness: Yes, sir.

The Master: And they were consulted by you in all your testimony, and from the books, so far as your testimony relates to the accuracy of the accounts in the books?

The Witness: Yes, sir.

The Master: That is all I have.

Mr. Moran: Those vouchers are, or those books were, examined while you were there, or partially while you were there by the Commissioner's examiners?

The Witness: There were Commissioner's Examiners there part of the time when we were there—Mr. Ross and Mr. Howard.

Mr. Jackson: Were they there all of the time?

The Witness: No.

Mr. Jackson: Do you know anything about the extent to which the Commissioner's examiners went into the books of the company?

The Witness: I don't know as to that; they worked by themselves, and I did not—did not consult me or my men.

Mr. Jackson: I wish to rebut these expressions of counsel 1060 to the effect that there has been an examination. It may devolve upon the Commission to show that it has had no opportunity to make a full examination. There has been no time in this case, as far as I understand it, but I may get more definite information upon that point later.

Mr. Moran: Now, it has been mentioned here that the company filed an annual report for 1919. It is assumed that is filed every year. That is a requirement of the statute, with public service corporations, that they file a report every year with the Public Service Commission?

The Witness: Yes, sir.

Mr. Moran: Now, these books and records over there would enable an accountant to check any report that we filed, to determine its accuracy?

The Witness: Yes, sir.

Mr. Jackson: So far as the vouchers are concerned?

The Witness: The annual report is made up from the books of the company, and the general books of the company are merely a compilation and systematic summarization of what the vouchers show. That is what all books of account of companies are as far as expenses and disbursements go.

The Master: I am finished.

1061 Mr. Moran: We had up here the other day the matter of this order of the Public Service Commission in the Brooklyn Borough Gas Company case, case marked No. 2320 on the Commission's record, with reference particularly to the establishment of a heat unit standard for that company in its territory. It was offered in evidence the other day and objected to, and the merits of the objection were discussed. I suggested that I would not press the offer, in the hope that counsel might see fit to withdraw their objection. I mentioned it to them and have been unable to get them to withdraw the objection. I want to therefore offer it again in evidence in this case in connection with the claim against us that we are not entitled to equity on account of unclean hands and all other questions pertaining to the candle power and b. t. u. requirements of the situation.

Mr. Jackson: We object as incompetent and immaterial.

The Master: Objection sustained.

Mr. Moran: I would like to have it marked for identification. It is not objected to because the original is not brought here or——

Mr. Jackson: I think as to that paper, you have conceded yourself that it contains some manifest errors.

Mr. Moran: Well, it contains the error that the b. t. u.
1062 stated there is per thousand cubic feet instead of per cubic foot.

Mr. Jackson: That is the point.

Mr. Moran: But you do not want me to go into that, to subpœna the Secretary of the Commission down here?

Mr. Jackson: Oh, no. There has been some error in either the copy of the order or the original: probably it is in the copy of the order. It is absurd in its figure in that fact.

The Master: The objection is sustained, not on the ground that it is a copy, but that in the Master's opinion it is incompetent.

Mr. Moran: Exception.

(The paper was marked Plaintiff's Exhibit No. 46 for identification.)

Mr. Hill: I wish to renew the motion made by Mr. Chambers at the opening of the case.

I offer in evidence the judgment in the action of the Kings County Lighting Company against Woodbury, as Attorney General, and others, in the Supreme Court of New York County, which judgment is entered in the office of the Clerk of the County of New York on the 29th day of March, 1920. I offer it upon the theory that it held and decided that the plaintiff, not having ever adopted the provis-
1063 ions of the law which it now attacks cannot come into a Court of Equity and seek to have it declared a nullity, they having at no time lived up to the standard required by the law, in not having charged the price required by the law; and that that judgment decided and decreed finally that they were not entitled to go into a court of equity, and that as to that question it is res adjudicata in this case.

And I desire to move for a dismissal of the complaint upon that ground, and upon all the grounds stated in Mr. Chambers' motion

at the opening of the trial; and I refer to page 32 of the record and the following pages, for the specific grounds — the motion.

Mr. Jackson: I think that for a complete record in this case, it will be necessary for the Court to be fully informed as to that judgment and whatever was decided in that case,—how much the Court chooses to be bound by it in this case is a question for this Court—but I think——

Mr. Moran: Well, General, you do not have to argue that, because that judgment is only——

Mr. Jackson: No, I am only stating this as part of the offer.

Mr. Moran: You don't have to, because I am not going to object to it.

I have alleged it in my complaint, and I can't very well
1064 object to it. All the effect it will have—it will have the effect, anyway, of amplifying the allegations, I made in my complaint. On the question as to whether it is a bar to this action, or res adjudicata on this point, that is to be decided by the Court.

Mr. Jackson: Yes.

Mr. Moran: I don't say that it is—I don't object to it, because I have alleged it. It is a fact, it is an historical fact that such a decree was entered.

Mr. Jackson: Well, we join in the offer of the judgment roll for whatever may have been decided in it that is material and pertinent to the issues in this case, and as a bar, so far as any decisions, any questions were decided in that case; and we join in the motion to dismiss.

Mr. Moran: Well, the judgment now, or the judgment roll?

Mr. Hill: The judgment roll.

Mr. Jackson: The judgment roll, showing the issues and the decision upon it.

The Master: I am frank to say that I do not know whether it is competent or incompetent at the present time, and I would like to be advised as to it. I hate to admit in evidence a judgment
1065 roll unless it is competent in this case.

Mr. Moran: I don't see what the judgment roll has got to do with it. It is the decree of the Court.

Mr. Hill: It is the opinion and the findings of fact, and conclusions of law.

Mr. Moran: And the pleadings.

Mr. Jackson: You must have the pleadings to show that the same questions were at issue, to have the judgment constitute a bar.

Mr. Hill: And the pleadings between the same parties.

The Master: That is true.

Mr. Jackson: The same parties, the same issues; and that would be shown by the pleadings and the decision.

The Master: Do you object to the judgment roll going in?

Mr. Moran: Of course, the judgment roll does not include the Court's opinion.

Mr. Jackson: We want that in.

Mr. Hill: I want the Court's opinion and the written decision.

Mr. Jackson: For whatever weight it may have before the Federal Court.

Mr. Hill: And the findings.

1066 Mr. Jackson: I should imagine, Mr. Moran should not want a question so serious as that——

Mr. Moran: I am not objecting to it. I have alleged it.

The Master: Well, that is the pleadings, findings of fact, conclusions of law and the opinion, and the formal order of judgment.

Mr. Hill: And the formal order of judgment and the judgment.

The Master: Well, if that is not objected to, it may be admitted in evidence.

Mr. Moran: Of course, then, you want to complete the proceedings. You want the opinion of the Court?

Mr. Hill: Yes.

Mr. Moran: On the motion to reopen the case to take in subsequent years.

Mr. Jackson: I don't know that there is any reason why there should not be that history in the case.

Mr. Moran: And his disposition of that.

Mr. Jackson: Do you?

Mr. Hill: No.

Mr. Moran: His opinion in disposing of that.

Mr. Hill: His opinion on disposing of the motion to reopen?

Mr. Moran: Reopen the case, yes. I take it that so far as
1067 the Master is concerned, that the statutory court has disposed of that question as to the right to maintain this action. That was one of the questions, that and the candlepower were the two questions presented to the court; and in a memorandum they held them not to constitute any objection to the maintenance of this action. Now, if there is any question about that, and the Master wants any light on the subject, I would be glad to state my position about it.

The Master: Where are the briefs that were submitted to the District Court?

Mr. Moran: I furnished you my brief and the other side.

The Master: I mean, weren't the briefs submitted to the statutory court?

Mr. Moran: This was submitted to the statutory court. I gave you that. I think you have a copy of that.

The Master: Did you submit any brief?

Mr. Jackson: I don't know about that.

Mr. Hill: Did the Attorney General?

Mr. Moran: I don't think so. I never got any.

The Master: If the Attorney General wishes to submit any memorandum on his motion, I wish he would do it, because I propose to dispose of these motions one way or the other when we
1068 meet again. I have this brief of Mr. Moran's. If you have a brief on those questions that you had up before the statutory court, you had better send it down because you may have some new observations or something. I want to get that through with

and then decide these motions when the case is over, and the case will be over at the next hearing.

Mr. Hill: The oil contracts I will not offer now, because you are not finished entirely.

Mr. Moran: Well, we have finished, except the bankers. Oh, yes, and by the way, I forgot about it—we promised a statement showing the years 1917, 1918, 1919 and 1920, altogether, each year; and we thought we had them yesterday, but there were some errors and they are on the way here now. We will send those.

The Master: They may be considered in evidence with the appropriate numbers.

Mr. Moran: We will send the copies to the other parties.

The Master: As if they had been identified. There is no objection to that, is there?

Mr. Hill: No.

Mr. Moran: Just on one sheet—we put the whole four years on the one sheet, the dollars and the cents per thousand; in
1069 other words, it repeats what is on these exhibits, and sets side by side 1917 and 1918.

The Master: And you will send them to these gentlemen?

Mr. Moran: Yes.

(The statements were received in evidence as Plaintiff's Exhibits 47, et seq.)

The Master: And you will produce any of your officers for cross examination, if they wish to cross examine the next time?

Mr. Moran: Oh, yes.

Mr. Hill: Then I will offer in evidence at this time some oil contracts.

Mr. Jackson: Well, do you want to go into defense? Did you have in mind——

Mr. Moran: Yes, go ahead.

Mr. Jackson: Just as you like, Judge.

Mr. Hill: I will just as soon hold it until the next meeting.

Mr. Moran: We might as well have those oil contracts disposed of.

Mr. Hill: I offer in evidence certain oil contracts which have been entered into, and of which I have copies here. I have talked with Mr. Moran about them.

(The contracts were marked Defendant's D-2 for identifica-
1070 tion, D-3 for identification and D-4 for identification, respectively.)

Mr. Hill: I offer in evidence Defendant's Exhibit D-2, D-3 and D-4 for identification. They are copies of oil contracts made with certain gas companies. We offer them as bearing upon the reasonableness of the price which has been paid by the plaintiff in this case for the oil it has used.

Mr. Moran: Well, I object to them. On their face they are in places, some of them far remote from the scene of the activities of this company; and in point of time they are ancient.

Mr. Hill: Your Honor, it has been my idea, that if they are remote in time, there is evidence explaining any change that has happened between the periods they cover and this time.

The Master: How do we know they are in existence today? I mean, how do we know that they were not modified before January 1, 1919?

Mr. Hill: Well, I don't know that they even existed—some of them by their terms did not extend until January 1, 1919.

The Master: I notice this first one, Defendant's Exhibit D-2 for identification, in the covering letter it is stated that this contract cancels a previous contract; and it does not appear how long
1071 that contract had to run. It was dated May 25, 1913, and at a price of 3.05 cents a gallon. The price is materially higher in the contract offered, and there is no evidence what the surrounding circumstances were about the contract. And further there is no evidence that the contract has not been modified before the beginning of this—before the period of this case. It is pretty vague evidence, isn't it?

Mr. Hill: Of course, I could bring people here to authenticate it. But as to any facts of that kind, I assume, I recognize that it is a contract made some time ago; it runs into some of this period. Now, it would seem to me to be some evidence—that is, there has been evidence—there is evidence before your Honor, of changed conditions; and with that testimony in explanation, it would seem to me that that would not be incompetent.

The Master: I am trying to think, if I permit it to be received in evidence, how I could gather any light from it. The contract is so very different, the prices are so very different from the prices in this case, and the underlying conditions of the contract are so different. This is a contract for delivery in Trenton and Plainfield, and I don't know anything about the freight rates between the water
1072 front in Brooklyn and Trenton. I don't know anything about whether——

Mr. Hill: I would expect to supply those details.

The Master: And further, I don't know whether this contract was in force in 1919. It seems to me that would be most important.

Mr. Hill: That would be evidence on this question. There is a contract——

The Master: I suppose you could developed evidence to show the differential freight rate and that sort of thing, but I don't know whether the contract was in effect, January 1, 1919.

Mr. Hill: I presume the presumption arises that that was in effect for the period it was made for.

The Master: I do not think it is a presumption, Judge, on these contracts. As I understand, there is a great deal of modification of these contracts from time to time.

Mr. Jackson: Only when it is permitted by the term of the contract.

Mr. Moran: On the contrary, the coal companies never come through unless it is convenient to do so.

Mr. Jackson: There is a specification in the contract, always, that

permits it; otherwise, they are bound. If the parties want to voluntarily surrender rights, it is a different question. I don't
1073 know where they have unless the reservation was made in the contract.

Mr. Hill: Plaintiff would also have the same power to enter into a contract in the past that those people did, as to oil.

Mr. Jackson: And it is a question of prudence of management and ordinary foresight.

Mr. Moran: Well, we would be glad to be advised now, whether you want us to make a ten year contract now. Now, you can exercise some foresight there. You probably can get oil for 15 cents now; it may be——

The Master: But this one which relates altogether to 1914, I will not accept in evidence; that is, Defendant's Exhibit 3 for identification, on the ground that the evidenciary force of it is so weak that it would only confuse the Master rather than assist him. I will give you an exception. For the same reason I will exclude Defendants' Exhibit D-4 for identification, and give you an exception.

I will not permit the Defendants' Exhibit D-2 for identification to be received in evidence unless there is proof that the contract was in force and effect and oil was delivered under it since January 1, 1919.

Mr. Hill: And supplying such proof, it may be received?

1074 The Master: Yes, it will be received for whatever it is worth.

Mr. Moran: That is the one made in——

Mr. Hill: 1914, running to 1919. Well, I will take up and supply that on Friday.

The Master: And let me state, Judge, that it would be most difficult for me to draw any conclusions from that contract, unless at any rate, the cost, the relative cost of delivering oil at Plainfield, New Jersey, and at the water front in Brooklyn is taken into account.

Mr. Hill: I would expect to supply that.

Mr. Moran: I think, if that is to be considered, there ought to be some inquiry made as to the circumstances or inducements that were held out to make that contract for five years. That is rather unusual.

Mr. Hill: Well, here is what would be my idea to bring over here—some officer of the Public Service Gas Company of New Jersey.

The Master: Of course, that would be much the best way to handle it.

Mr. Hill: Yes.

The Master: Some one who could authenticate the contract, and who knew something about it.

1075 Mr. Hill: I will ascertain the fact if there was a delivery made under it in 1919.

The Master: It will be very desirable to have some one who can explain the contract.

Mr. Moran: And also some one posted on what they paid in 1919 and 1920.

Mr. Hill: I will also probably have them not posted on that.

Mr. Moran: If you bring in any fellow that does not know any-

thing about 1919 and 1920, I will say there is a plant there. And also what rate they are getting over there now and the b. t. u.'s.

The Master: We will adjourn to a tentative date at 10:00 o'clock Friday morning, a week from tomorrow, with the understanding that I will notify counsel of any change in the hour made necessary by engagements.

(Whereupon further hearing was adjourned until Friday, August 27, 1920, at 10:00 o'clock a. m.)

1075¼ [Endorsed:] Public Service Commission, First District, Aug. 21, 1920. Bureau of Statistics & Accounts.

1075½ United States District Court, Southern District of New York.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Before Hon. Gordon Auchincloss, Special Master.

Transcript of Reporter's Minutes.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York.

Barclay, 8477.

1076 KINGS COUNTY LIGHTING CO.

v.

NEWTON et al.

61 Broadway, New York,
August 27, 1920—11.15 o'clock a. m.

Met pursuant to adjournment.

Present:

The Master.
Mr. Moran.
Mr. Hill.
Mr. Jackson.

CHARLES E. GARDNER, called as a witness in behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Moran:

Q. Mr. Gardner, where do you live?
A. 790 Riverside Drive.
Q. And what is your business?
A. Banker.
Q. What are your connections?
A. Member of the firm of Hemphill, Noyes & Company, 37 Wall street.
Q. How long have you been in the banking business?
A. 20 years.
Q. And at the present time are your activities specialized in any way?
A. No, we are general bankers handling Government, municipal, steam railroad, public utility and industrial bonds and stocks.

1077 Q. Handling them in what way?
A. Buying them for our own account for resale to the public, and as members of the New York Stock Exchange.
Q. And you are actively engaged in that business yourself?
A. Yes.
Q. Are you familiar with the rates of return demanded and obtained by investors in public utilities at the present time?
A. I feel that I am in a general way.
Q. And have been for how long?
A. 20 years.
Q. You have been familiar with that for 20 years?
A. Yes, sir.
Q. What is the general condition of the investment market with respect to public utility securities?
A. The public is discriminating very greatly against public utilities.
Q. In just what way?
A. Refusing to purchase their bonds and securities.
Q. Not refusing entirely?
A. No, relatively.
Q. And has this resulted in the payment of a higher rate?

Mr. Jackson: Perhaps you might let him state, please, I think, in what way they discriminate.
Mr. Moran: I asked him that.
Mr. Jackson: I know, but I think that the witness—it might be better to quit leading him.
Mr. Moran: What is the question, Mr. Reporter?

1078 (The question was read by the Reporter as above recorded.)

Q. (Continuing:) For money borrowed by utilities?
A. Decidedly.

Q. What is the average rate of return demanded by investors now in utility securities?

A. I don't feel qualified to give an average rate but my experience would tend to show that the rates are ranging from seven and a half to as high as 13½ per cent.

Q. Will you just elaborate a little on that?

A. In my own words?

Q. Well, yes, in your own words?

A. Well, the recent issue of Adirondack Power & Light was 30 years 6's. They were brought out by E. H. Rollins and Sons, and my old firm, Harris, Forbes and Company. They were offered to the public to net 8½, yielding over 7¼, and we were invited confidentially into the syndicate, the price to the syndicate being 80½. Not of my own knowledge, but it is my understanding that the syndicate bought them at one point less. That is customary for the firms which form the syndicate and make the commitment, to charge so much for their services to the syndicate, so that I understand that the bonds netted the corporation 79½. They were 6's. Now, they run to 1950, roughly 30 years.

Mr. Jackson: What company was that again, please?

1079 The Witness: Adirondack Power & Light, the Speyer-Fields property. A six per cent bond having 30 years to run—a 30-year 6 per cent bond at 79½ is midway between a 7¾ and a 7.80 per cent basis. In a general way, corporations expect to pay a lower rate for a long term security; in other words, if those had been two to five years 8's, they would probably have had to be sold on better than an eight per cent basis. As evidence of that we might refer to this Southwestern Power & Light Company. I don't know whether this is in order because it is not within the State of New York, but it is a company which has made a good showing. It is controlled indirectly by the General Electric Company through various holding corporations; and these were five-year eight per cent bond secured gold notes, series A. They were offered to the public, 5 year eights at 98, to yield about 8½ per cent. And in a general way it is my understanding that that money cost the company approximately 11 per cent.

Mr. Jackson: Are you stating the times of these offers?

The Witness: Very recent, sir.

Mr. Jackson: Within 1920?

The Witness: Oh, yes. This Southwestern Power & Light was within five weeks, sir.

1080 Mr. Jackson: Does that time apply to the other company mentioned?

The Witness: Practically. I will give you the date of the letter of the Adirondack. We were invited to join that syndicate as of August 3rd, and declined it.

Mr. Jackson: I think that I would like to state an objection, going back to the first company mentioned, to the specification of these companies. I make objection to this evidence as being immaterial and incompetent, on the ground that it will be necessary, for ascer-

taining as to whether any of these prices offered or received have any bearing upon the question in this case, to go into the whole financial situation of each one of the companies. So I would like to object to it upon that ground, and move to strike out any evidence as to the specific company or particular company.

The Master: I understand the witness is going to go over a number of companies, and his evidence will be directed to the current rate of interest at the present time, of securities offered to the public here in New York, or offered to the banking groups; and the objection is overruled, and exception.

Mr. Jackson: So I may have an exception?

The Master: Yes.

1081 Q. These offerings that you referred to—is there behind that a statement of the earnings of the company?

A. Yes. In the case of the Adirondack Power & Light Corporation——

Mr. Jackson: I would object to any specification of that. You are reading now from a prospectus issued—a printed prospectus issued by the company for the purpose of selling its securities to the public?

The Witness: Circular prepared by the bankers.

Mr. Jackson: For the purpose of selling the securities to the public?

The Witness: To the public, yes, sir.

Mr. Jackson: Of course, there is no basis of fact for such a memorandum upon this question.

The Master: I think the witness had better confine himself to simply stating what the bonds of these various issues were issued at, so far as he knows.

Mr. Moran: Well, on that it is not important what the actual earnings are of the company, because the investing public relies upon the statements made, and that is what determines what they pay for the security. So, Mr. Jackson's point that it may not be the actual return from actual earnings is not well founded, be-

1082 cause it does not make any difference what they are. It is the information given to the public; in other words, when they pay so much for that security, they do it on the representation that those are the earnings and that is what determines the rate.

Mr. Jackson: Well, that is the difficulty with any specific proof, because, as you say—you suggest—the information offered to the public may be true and may not be.

The Master: I will let the witness states; according to the announcements, if this is a fact, that according to the announcements, the company was earning its bond interest; because I don't want to go far afield into examining into the particular status of any company. If he takes a half dozen companies, and states that the average for those half dozen companies—light, heat and power companies—was somewhere in the neighborhood of eight per cent, and that those companies were companies that were earning their bond interest, I think that we will have sufficient evidence before the Court as to what the current rate of interest is for light, heat and

power companies which are earning their interest charges according to their prospectus. That line of testimony, I think, would be sufficient to this inquiry. I do not think it is necessary to go
1083 into the particular standing of either of the various companies.

Mr. Moran: No, no. I would not think of that.

Q What announcement was made in connection with those issues, as to the earnings of the company?

Mr. Jackson. Well, may I have my exception?

The Master: Yes.

A. The announcement in the case of the Adirondack Power & Light Corporation, was that the corporation was earning over 2.3 times all its interest charges.

Q. Including the interest on the new securities?

A. Yes, sir.

Q And the other company that you referred to, the Southern Company?

A. Approximately twice.

The Master: Approximately what?

The Witness: Twice the entire—the earnings, the net earnings were approximately twice the entire interest charge.

Q Can you refer to another issue recently?

A Some of this information is extremely confidential. I am wondering how much publicity will be given to my testimony. Is that proper?

The Master: I think you will find that no one will read this record.

The Witness: I am sure I shall not.

The Master: Not that it is not a public record.

1084 The Witness: If it is material, and I am in order, we were approached by the owners of the Louisville Gas & Electric, a very large and representative company doing the lighting business of the City of Louisville, Kentucky, to help them accomplish some junior financing. We declined to participate in that financing, but it was handled by every reputable firms here in New York City, and the money cost them approximately 13½ per cent. Louisville Gas——

Mr. Jackson: Now, I will object to the evidence as to that company, and ask to have it stricken out. There is no evidence here that shows that the situation as to the Louisville, Kentucky, Company, has any bearing upon this case whatever, and the very fact that this witness refused to assist in financing the company, I think, is a presumption that the company was not in such a situation as to make the handling of its finances a profitable venture for this witness.

The Witness: May I explain?

Mr. Moran: No; just wait until the Court rules.

The Master: You *have* better explain a little bit about the company—how large the issue was and how many years it had to run.

The Witness: $3,000,000 2½ years 7's. In justice to that company, I should like to explain that the policy of my firm is,

1085 generally speaking, never to handle a security which does not show earnings of twice the fixed charges. Merely because that company did not show quite twice the fixed charges, we felt that for ourselves, we must decline the financing. That is not an indictment of the security itself, merely it was turned down under the policy of my particular one firm. It was handled by——

The Master: What was it issued to the public at?

The Witness: 98.

The Master: What does that figure out?

The Witness: Those were eights. Just a moment. (Referring to book.) $2^1/_2$ year—well, this book only goes as far as 7's, your Honor; 8's are a new rate. Approximately $8^1/_2$ per cent.

Mr. Jackson: Is it understood that the evidence as to this company is taken under my objection and exception?

The Master: Yes.

The Witness: Here it is exactly—8.45 per cent.

Q. Can you give another instance of a recent issue?

A. August 18th, Pacific Power and Light Company.

Mr. Jackson: What year?

The Witness: The present year, this month, Pacific Power & Light Company first lien and general mortgage gold bonds,

1086 dated August 1, 1920, running for ten years, offered at $98^1/_4$, yielding eight and a quarter per cent.

Q. That is, to the public?

A. To the public, yes. I have no inside information on that. We were not invited into that financing, but I know the general rule of these syndicates in purchases would be a spread of five, six or seven per cent below the offering price. From those offering prices there are always concessions to the banks with bond departments and dealers, small dealers, who do not participate directly in the underwriting. There is always a scale of prices.

Mr. Jackson: May my objection apply also to this company and exception?

The Master: Yes.

By the Master:

Q. Does your firm borrow money?

A. Yes, sir.

Q. Time money?

A. Time and call.

Q. Have you borrowed any—are you familiar with the time money market?

A. Somewhat.

Q. Can you state what the asking rate of interest in the time money market has been for the last six months?

A. There have been different rates according to the time. In a general way, I would say that sixty day money has ranged from

seven to eight and a half per cent, whereas three months' to
1087 six months' time money has ranged from eight to nine and a half per cent; and during a great portion of that time, it has been, as a practical matter, impossible to secure. While rates were quoted, none was available when you went for it.

Q. That, running over a period of three or four years, is a very high rate, is it not?

A. Unusual, extraordinary; but we fear that it may continue. That is merely a matter of opinion, that probably is not testimony.

Mr. Jackson: Well, I move to strike that out.

The Master: What do you mean, the last?

Mr. Jackson: That he fears it will continue.

The Master: Strike it out.

Mr. Moran: I want an exception to that. I think that is the very thing here that we are confronted by.

The Master: Well, it is pretty vague evidence.

Mr. Hill: The witness' fear.

Mr. Moran: Well, he says it is his opinion

The Witness: Well, I just came from one of the biggest bankers in the city, asked if he could see any——

Mr. Jackson: I will object to this.

Mr. Moran: State it.

Mr. Jackson: The conversation with the banker and the other banker——

Mr. Moran: Wait till the Court rules.

1088 The Master: I think we had better stick to such evidence as we can get on the current rate of interest. I have asked the witness what the current rate of time money was, and he has given some evidence as to the current rate of bond interest. If he has any others, he had better put them in.

The Witness: The Northern Ohio Traction & Light Company Car Trust 8 per cent gold certificates, dated August 1, 1920, due serially, each six months, to 1925, offered at par.

Mr. Jackson: May I object also as to the evidence to this company, upon the grounds before stated as to the other companies, and upon the further grounds that those as well as the other companies mentioned are very far from the field of operations of the plaintiff in this action, and are no measure of the financial condition or the interest market upon the securities of the plaintiff.

The Master: Objection overruled, and exception. They are admitted to show the current rate of interest on all kinds of securities. You *have* better continue with that.

The Witness: If I may state it informally, I brought that in to show the price that was necessary to pay on car trust.
1089 That is generally conceded to be one of the safest forms of investment, and this company shows over three times its fixed charges—the net earnings are over three times the fixed charges, and it is paying dividends at the rate of six per cent on approximately $5,500,000 of preferred stock, and at the rate of seven per cent on approximately $9,000,000 of common stock. It

would seem to me that that might be material, if the inquiry were broad enough to show——

The Master: What was it issued at?

The Witness: Par for eights.

The Master: How many years?

The Witness: Serially every six months from August 1st, dated August 1, 1920, every six months for five years.

Mr. Jackson: You are reading that information from a printed prospectus for circular advertisement issued by the bankers for the sale—was it issued by the bankers?

The Witness: Yes, sir, Cassatt & Company of Philadelphia, one of the best firms.

Mr. Jackson: And it does not necessarily follow that the final transaction of the sale of those securities was based upon that information?

Mr. Moran: Answer the——

1090 Mr. Jackson: There might have been more accurate information available to the purchasers or possibly to the bankers, before any actual sale of securities was made?

The Witness: I cannot conceive of a high——

Mr. Jackson: Well, you don't know as to that, do you?

The Witness: No, sir.

Mr. Moran: Make your statement.

The Witness: I cannot conceive of high-grade bankers issuing to the public any information regarding capitalization or earnings which would be inaccurate, because that is the first rule of our profession.

Mr. Jackson: What you mean is that you could not conceive of him doing it intentionally and knowingly?

The Witness: Yes, sir.

Mr. Jackson: But it might be possible that he should issue the information by mistake, and afterwards when he found that it was incorrect, withdraw it.

Mr. Moran: Answer the——

The Witness: I assume so, sir. We don't find those cases in real life.

Mr. Jackson: That is what I had reference to.

Mr. Moran: I don't think you finished the answer about this——

Mr. Jackson: I was not assuming that the bankers were
1091 intentionally dishonest.

The Witness: No. Pardon me, Mr. Moran.

Mr. Moran: I don't think you finished the answer about what those were sold for.

The Witness: Yes, I answered the Master.

Mr. Moran: Answer the Master on that.

The Witness: Par for eights, due serially every six months, running for five years.

By Mr. Moran:

Q. And that was to the public?

A. To the public, with concessions——

Q. That would cost the company more than that?
A. Oh, yes.
Q. How much more?
A. Because of the short term. Here, I will figure it for you. We figure a five year six months' serial issue, averaged 2^{3}_{4} years. The book only gives 2^{1}_{2} years, and three years, so the prices have to be averaged. Oh, approximately a ten and a half per cent basis.
Q. To the company?
A. To the company.
Q. Have you any other?
A. The Cincinnati Gas & Electric Company, 7 per cent three-year gold notes, offered to the public at 97^{3}_{4}, yielding 8.05 per cent.
Q. And the cost to the company?

Mr. Jackson: The same objection and exception to this?
1092 The Master: Yes.

A. Approximately 11 per cent, about—should I answer?

Mr. Moran: Yes.
The Master: Yes.
The Witness: Approximately 11 per cent, being a shorter term.

Q. Was any announcement made in connection with that issue as to the earnings?
A. Over three times the total interest charge.
Q. And that company, from its title, does the gas business of——
A. Cincinnati and vicinity. Cincinnati, Ohio.
The Master: What was the recent Pennsylvania issue issued at to the plublic?
The Witness: Par for the ten-year sevens.
The Master: Did you purchase any of those personally, your own firm?
The Witness: We did, a large amount.
The Master: Did you purchase them for a hundred?
The Witness: Oh, no, we were——
The Master: For par?
The Witness: We were in Morgan's syndicate.
The Master: Do you know what you paid for them?
The Witness: Pardon me. I fear that I haven't that with me, but I can tell you very approximately that they were offered to the public at par with a concession to banks and dealers of
1093 either one-quarter per cent or one-half per cent, and offered to the syndicate participants at either 96 or 96^{1}_{2}. Then the syndicate managers would take one-half of one per cent for their fee, which would make it either 95 or 95^{1}_{2} for a ten-year seven—either a 7.60 per cent or 7.70 per cent basis.
The Master: Have you bought any late issues of Government securities, issues of Government certificates of indebtedness?
The Witness: I do not recall personally seeing any such transaction go through the books of my company, but I have been away during the past three weeks. The one-year Philippine Railway fours, which are just as tax exempt as the Liberty three and a halfs,

are now being offered to the public to net six and three-quarters per cent.

Q. Hasn't the New York Central offered an issue within a few days?

A. One week ago yesterday, the New York Central through J. P. Morgan & Company, syndicate managers——

Mr. Jackson: You are talking about the railroad, New York Central Railroad?

The Witness: Yes, sir.

Mr. Jackson: Just for the record.

A. (Continuing.) Offered $25,000,000 ten-year seven per
1094 cent notes at par and interest, to the public. From that there was a concession to every bank of one-half per cent, and as I remember it, the syndicate price to those of us who joined with Morgan in their syndicate was 96½.

Q. And that would cost the company—the issue would cost the company?

A. Just about the same as the Pennsylvania. I think I testified between 7.60 and 7.70.

Q. And those were what was called collateral trust?

A. No, they bore no security. They were New York Central ten-year notes or debentures, without collateral.

Q. Weren't they secured by a bond?

A. Well, again, I have been away, and I have just returned——

Q. Well, the credit of the New York central is considered good, is it not?

A. Yes, very good.

Q. The New York Central, in your opinion, could borrow as cheaply as any utility?

A. We differentiate between railroads and the other public utilities.

Q. In favor of which?

A. Railorads. The railroads, generally speaking, can borrow at a cheaper rate than the other public utilities, by which I mean gas, electric light, street railway and telephone companies.

Q. Are you acquainted with the issue made by the Consolidated Gas Company in the spring?

A. We were interested in it.

Q. And that was——

A. I haven't the details with me.

1095 Q. Are you familiar with the issue made by the Brooklyn Edison Company this spring?

A. Not sufficiently to testify.

Q. Have you ever handled the securities of Kings County Lighting Company?

A. For 17 years I was connected with the firm of Harris, Forbes & Company, up to May 1st, 1918. During those 17 years we purchased an issue of, I think, so-called first and refunding five per cent bonds of the Kings County Lighting Company, due, as I remember, in 1954. They were sold many years ago, when, generally speaking, five per cent long-term issues were in demand. The first lot was

offered to the public at par, with a concession of one-half per cent to banks and dealers.

Q. That is a long time ago?

A. Yes.

Q. In connection with that work did you become familiar with the company?

A. In a general way.

Q. And you are now?

A. Yes, sir.

Q. You know the property?

A. Yes, sir.

The Master: What year was that, do you remember?

The Witness: What is the date of that issue?

Mr. Moran: 1904 it was taken out. There have been various issues.

The Witness: Between 1905 and 1914. I can squeeze it between 1905 and 1910.

Q. Well, Harris, Forbes & Company probably handled all the issues taken out by that company?

A. Practically. Personally, I sold hundreds of thousands
1096 of them.

The Master: Hundreds of thousands of what?

The Witness: Kings County Lighting fives.

Q. You know that company supplies gas in a portion of the Borough of Brooklyn?

A. I do.

Q. What rate of return, in your opinion, would that company have to pay in order to borrow money at the present time?

A. I think it would be possible for it to get the money only from its friends. I don't think the public would buy any securities of that company.

Q. That is on account of lack of earnings?

A. Earnings.

Q. Well, if you might assume that the earnings were sufficient to make the security good, that is, assure the payment of the interest on it and ultimate payment of the principal, can you give us an opinion what that company or a gas company of that size would have to pay for borrowings at the present time?

The Master: You mean from his friends or from the public?

Mr. Moran: No. It has no friends, I guess.

The Master: Well, I assume you mean those——

Mr. Jackson: Not even the stockholders?

Mr. Moran: What?

Mr. Jackson: Not even the stockholders?

The Master: I assume the witness is talking about any
1097 group that might have already been interested in——

Mr. Moran: Oh, yes, of course.

The Master: That they might be willing to put in money.

Mr. Moran: Well, I would exclude those. He would not be in a position to tell what a friend would do in case of need.

The Witness: I shall have to make, if the Master will permit me, a rather long explanation about that. A firm like my present one would not handle them at any price, unless we had a record of earnings to print and show the public, running for at least one year back. The last twelve months' earnings would have to show twice the interest charges, before my firm would consent to consider the purchase or the offering of the issue. Now, it happens in my profession that a banking firm, which has once financed a company feels under certain obligations to continue to finance that company, if the conditions warrant the offering of the security, with the recommendation of the banking firm to the public; and therefore, in cases of this kind where the property has gone sour for a period, but is being rehabilitated, it is rather general on the part of bankers to
1098 look to see the old banking firm which handled the original financing, look after the new, provided that banking firm be still in business or doing that kind of business. I doubt if such an issue could be marketed at any reasonable rate of interest by any banking firm who had never had a part in the financing of that company. Speaking for my own firm, I would not consider it at any price.

Q. Well, can't the lack of earnings in the past, be overcome, if in connection with the new issue the company is beginning to operate under a higher rate for gas which will show a return?

A. It is a rule in the security business that stuff should not be sold with an explanation. There is no such good—such a large amount of securities available for purchase and distribution for investment, that we discriminate against those——

Q. Which have a past?

A. Which have an unfortunate past. Life is too short. It does not pay to take the time that is required to sell that kind of a security. As long as I am a member of my firm, I would not permit them to buy that issue at any price, because I would not put a circular out to the public that was not entirely frank, and if I were frank I would show the earnings for a period of at least three years past.

Mr. Hill: I object to this statement, what his firm would do is no measure of present ability of this company to borrow money.
1099 Because I personally would not loan them a million dollars for several reasons, I would not regard that as evidence. The fact that his firm has certain rules that would prevent his firm from considering the marketing of their securities is a conclusion and not part of the issues in the case.

Mr. Moran: Let me ask a question.

The Witness: May I explain for the record?

The Master: Of course, I don't think the evidence does very much harm or good one way or the other. This witness is simply testifying in my judgment as to what he believes is the current rate of interest for securities. That is why I have asked him what the current rate

of interest on different kinds of securities was. It gives the District Court something in the record to permit them to find that a certain rate is not too high or not too low.

Mr. Hill: Exception.

Q. Well, what you state about your own firm—is that a practice of other firms?

A. I was merely bringing that in to show that that was merely the practice of all houses of standing—general practice.

1100 Q. Now, can we get your opinion on the rate that this company would have to pay assuming that it could show earnings in the past sufficient to justify the expectation that the principal would be repaid and the interest?

A. On a short term bond, secured note, or on a long term mortgage bond?

A. Well, either or both.

The Master: I think that question is very hypothetical.

Mr. Moran: Well, what can we do?

The Master: I don't see anything more necessary than trying to bring in proof—trying to establish proof what the current rate of interest is. Then we have in the record here a great deal about the financial position of this company; and just because the company may be unable to pay its bills now, the District Court would not be justified in establishing a rate which would permit them to sell it at a Ponzi basis—sell their securities.

Mr. Moran: Well, I think the——

The Master: If you get the current rate of interest, we have done the best we can.

Mr. Moran: I beg to differ with the Master in that, not that I claim that the Ponzi rate should be applied; but the public, through its Legislature and through its officials, has imposed a rate upon the company which has injured its credit and put it in a poor position to finance its additions and extensions, the public has got to

1101 bear that burden and has got to stand the expense of it, which goes into the rates that the company has got to pay for money at the present time and in the future. I think the sins of the public—if I might say it—the public authorities through their Legislature and so forth—must be visited upon all the public and not upon the gas company.

The Master: Yes, but we could not get into that, Mr. Moran——

Mr. Moran: Yes.

The Master: Without going into the inception of this company, and finding out exactly how many dollars were put into it, and exactly what was paid out, and one thing and another. We would never get anywhere if we went into that. We can't get at the facts as to whether the public has ruined this company, or what has happened; all we can do now, at the present time, is get the present rate of interest, so far as I can see.

Mr. Jackson: That was the basis of my objection as to the specifying of the other companies.

Mr. Moran: The objection is sustained, I understand?

The Master: Yes, the objection is sustained. It is too
1102 hypothetical a question.

Mr. Moran: Exception, please.

Q. The instances you have cited have been all bonds secured, or direct obligations, notes. Have *their* been any issues of stocks of gas or electric companies?

A. Not to my knowledge.

Q. Well, is that because you are not posted on that or because there have been none?

A. In a general way, I think had *their* been any, it would have come to my attention. I think that the real reason is that it has practically been impossible to finance, through the issuance of new stock, through rights or otherwise, during recent months. The Consolidated Gas Company which has done a great portion of its financing through issuance of its capital stock, found it necessary to make a note issue and to dress up that note issue by giving a convertible feature.

Q. Well, then, there is, as I understand it, no market for stock of gas companies at the present time?

A. Don't you see—Consolidated Gas Company stock is listed on the New York Stock Exchange; there is a market for that every day on the Exchange.

Q. I know, but I mean——

A. But bankers feel that new financing cannot be accomplished by new issues of capital stock.

Q. You mentioned in one of your answers that long term
1103 securities are not as popular now as they were at one time?

A. I did.

Q. Borrowings must be on comparatively short terms?

A. The greater portion of them are.

Q. And is there a necessity for that, or is it just a style?

A. There is a necessity or it would not be done. If I may make an explanation, the belief, or rather hope, of the corporations, is by paying a comparatively high rate for temporary borrowing—by which we mean generally from one to five or one to ten years—that they may be able to issue their long term bonds, some time in the future to better advantage. That is merely the opinion of some of the corporations. There are others which have a policy of paying the going rate for money whenever they need it, to put out their long term mortgage bonds at the best terms possibly at the times they need the financing. But the great preponderance of financing during the last few months or few years has been in short term issues.

Mr. Moran: I think that is all.

Cross-examination.

By Mr. Hill:

Q. Your testimony as to rates applies to new flotations?

A. It was intended to.

Q. That is, issues which have been out in the past and which now are quoted on the market——

1104 A. I did not get that yet.

Q. Issues which came out in the past, and which now are quoted on the market, are selling at a less rate of interest than that which you have mentioned?

A. Yes, and no. Our profession is very difficult to explain, at least we like to think it is. The market price for securities is all dependent upon that law of supply and demand. When an issue which was put out in the past—say anywhere from five to fifteen or twenty years ago—has become so thoroughly distributed that it is difficult to pick up small odd lots in case where an owner might have $7,000 and be desirous of purchasing an additional $3,000 to build his block up to an even $10,000, and that limited constant demand would constantly sop up small amounts released by estates or sellers, it goes without saying that the price of that issue holds up very much better—and that applies to smaller issues, than the price of the larger issue which is being constantly traded in and which would follow the fluctuations of the money rates. I am selling today a very excellent public utility issue which matures on May 1st, 1920, of a company with good credit, a company paying 6 per cent dividends on all of its preferred stock and all of its common, and able to pay perhaps nine or ten per cent on its common—I am selling that bond to net approximately 13 per cent.

Mr. Moran: That is all old issue?

1105 The Witness: That is an old issue.

Q. Well, you take the New York Central—four or five years ago, they issued a six per cent debenture?

A. Yes, sir.

Q. They issued them to the stockholders, as I remember?

A. As rights first.

Q. As rights, and you bought your rights. Now, those are selling now for about 90?

A. May I refresh my memory with the morning paper?

Q. Absolutely.

A. I think that is approximately it, between 87 and 92, somewhere around there.

Q. Somewhere along there. It was about 90. I was looking at it last night.

A. Yes, sir.

Q. That rate—I don't know the term of that bond or of that debenture.

A. 20 years, wasn't it?

Q. Well, assuming it a 20 year, if that is your judgment, what rate of interest would that be?

A. Well, you see, it would not have 20 years to run now; that was put out in 19— what year was it, do you remember, Judge? 1916?

Q. Approximately that time, 1916 or 1917?

A. So the security might have say 16 years to run now.

Q. Yes.

A. 6 per cent 16 year bond at approximately 90—7.05 per cent basis.

Q. Now, assuming a gas company that had $2,000,000 of capital stock, and that $2,000,000 had been paid for that capital stock, and then it had a bond issue against property above that capital
1106 stock?

A. Yes, sir.

Q. And it was earning reasonable rates, rates which the Court said was reasonable and proper, and the new money was going into property; and the bond lien or the lien on the bonds would be against the $2,000,000 capital stock, and against the new property; and the earnings, as I have assumed, to be fair and reasonable from the property investment; what rate of interest would you think the company should pay?

A. May I speak in my own way?

Q. Absolutely.

A. That would be a second mortgage bond?

Q. Second mortgage bond, but the first mortgage bond issued against property at that time?

A. With earnings for a three year period of say twice the fixed charges?

Q. Yes, I can't assume that.

A. Oh, a short term issue?

Q. Yes.

A. What term?

Q. Ten year.

A. May I explain that in utilities it is customary to make them one to five, as a short term, or 20 to 50, as a long term.

Q. All right, one to five?

A. Your question is, Judge, what rate per cent would the money cost the company?

Q. Yes.

A. I would say 11 per cent.

Q. If there was a leeway of $2,000,000 in stock, it would still be 11 per cent?

A. I don't understand what a leeway means.

1107 Q. Well, I mean——

Mr. Moran: An equity.

Q. An equity.

A. Equity?

Q. When you buy—when a corporation issues stock for $2,000,000, there is a theory that there is $2,000,000 behind there, isn't there?

A. Yes, sir, a theory.

Q. Now, if there is a mortgage of a million on top of that, and it comes time to refinance, and they borrow still another million, and the first million of borrowing went into property, so that there was $3,000,000 in all upon which the mortgage was a lien; and when they borrow the second million there is five million in all?

A. Pardon me, Judge, you said two, one and one.

Q. Well, I mean—yes, it is $4,000,000, upon which the last

million is a lien second and subsequent to the first. That would be good security, wouldn't it?

A. I don't feel qualified to answer that question. It requires too much explanation. If I may be permitted to take your time, the practical way of doing all that is to authorize a second—or call it what you may, refunding mortgage or general mortgage—and put up 150 per cent of that general mortgage as collateral to a short term issue. In other words, a short term mortgage issue is the exception and not the rule. It is accomplished by creating a junior mortgage and then putting up a large excess of par, 133⅓ per cent
1108 to 150 per cent—in certain usual cases, 200 per cent—of the other mortgage, putting that up as collateral to the short term issue which would be put out in the form of collateral trust notes.

Q. My assumption all goes to this company, as there is $2,000,000 of capital stock. Now, I am assuming $2,000,000 in money or property was turned in as against the issue of that $2,000,000 of stock. Then there is a certain bond issue——

Mr. Moran: Long or short term?

Q. There is now a certain bond issue, maturing in 1954, we will say of $1,000,000. I am starting with the assumption that when that bond issue was made that there had been $2,000,000 worth of property or $2,000,000 in money gone into the stock, so that first bond issue of a million was against, was a lien upon $3,000 in property, wasn't it?

A. Yes, sir.

Q. Now, I am assuming still another bond issue, I don't care by what scheme.

A. Yes.

Q. I have no knowledge of the technical side of it?

A. I am trying to be very careful, that is all.

Q. I am assuming now another bond issue of $1,000,000 in notes. Now, that is a lien, it is a first lien upon the new property that goes in, to the amount of a billion, isn't it?

1109 A. I don't see how it could be, because these old——

Q. Your first mortgage is against future acquired property?

A. Yes, sir, that is the practice.

Q. All right, then, I will assume that, that your first mortgage is a first lien on the entire $4,000,000. What this second mortgage, then, is a lien second and subsequent to $1,000,000 on $4,000,000 worth of property, isn't it?

A. Yes, sir.

Q. Now, that kind of a bond issue—a bond issue secured by that kind of a mortgage, floated as to the terms which would be the most advantageous for its sale, what ought that to cost the company? What ought that money to cost the company?

A. Well, if I may be permitted to qualify my answer; if it were the kind of a security, which would come up to the standards of the best bond dealers in the United States, I think that that money would cost them at least 11 per cent.

Q. It would?

A. I am very honest there.

Q. That is, you discriminate, or you say that there is a discrimination against gas companies?

A. Yes, sir.

Q. Greater than there is against railroads?

A. Entirely so.

Q. These railroads are limited by statute as to the rates they can charge, are they not?

A. Yes, sir.

Q. And they have asserted that for some time their earn-
1110 ings have not been large, haven't they?

A. Successfully so, I should say.

Mr. Moran: Do you want to know why the discrimination there?

Mr. Hill: Yes, I ask that.

The Witness: We are getting involved in a study of psychology, but we trace it back to the time when there was practically no investment generally known outside of Government bonds and then municipal bonds. By municipal we mean any political subdivision—states, counties, cities, townships, school districts, etc. It has been a matter of education of the public to meet the needs of finance. They first considered the only choice investment old U. S. Government 7's, say. Then they were educated, as the next step, that the next best thing was well selected municipals. From that step they went to railroads, because of the need of this country for development of the means of traffic and travel, and it was but natural that along at the tail end of the procession should come the utilities, whose development has been more recent than that of the steam road; and therefore, the public has that somewhat generally fixed in mind as the relative one, two, three order from security and desirability.

1111 Mr. Moran: Well, there is a——

The Witness: I might add that it is becoming a general impression on the part of bankers and the best posted, wide-aware investors, due to talks with gas experts, that hardly a company manufacturing artificial gas in the country, as has been stated to me by three different experts—that there was hardly a gas company making artificial gas in the United States of America which was earning its operating expenses and fixed charges, and some of them seem to consider it a serious situation.

Mr. Moran: This discrimination against gas utilities——

The Witness: But following that up, that information becoming general—whether it is true or not, I can't testify—but that information is becoming more or less general and brings a discrimination against companies. If I may be permitted to wander so far afield, I had a wealthy investor in my office yesterday who said that the only public utility security which he would consider for a minute, would be an absolute first mortgage on a hydroelectric company which was paying dividends on its capital stock, and had for some years.

Q. Now, the telephone companies—they are not paying the
1112 rate that you have mentioned, are they?

A. I believe so.

Q. Are they? That is, there is an old issue of American Telephone & Telegraph——

A. Seven year convertible sixes, due 1925.

Q. Well, I am speaking now of an old issue, four per cent?

A. That is the one, put out—dated——

Q. A very old issue.

A. Oh, the fours of 1929?

Q. Yes.

A. I will figure that basis out for you in just a minute. That issue was put out many years ago, and became a legal investment for savings banks and trust funds in the State of Connecticut, which puts it in a special class; and it was all distributed years ago and not many of them come along, relatively speaking, so that is selling at a good price, there is a special reason which would not be material, I assume to this inquiry.

Q. That is, that is made just in the State of Connecticut——

A. Well, I mean Connecticut and other——

Q. It is not so in this State, I know.

A. Connecticut and other states which are not so particular as Connecticut is. If I may follow your thought along, more recently the American Telephone & Telegraph Company put out its seven year convertible six per cent issue, which was offered to the public at 94.

Q. That is convertible into their stock?

A. At 110.

1113 Q. And taking the discount——

——, ——.

Q. And the stock is quoted about what?

A. 96 or 97. Taking the discount on the six per cent convertible bonds, take that issue convertible into telephone stock at 110, sold at 94, that is the equivalent of making it convertible into stock at 104, do you see?

Q. Yes. That recent issue of the American Telephone & Telegraph is secured by what?

A. It was an unsecured debenture, convertible.

Q. Just their note?

A. Yes, sir. You see, if I may explain——

Q. Sure.

A. It being a holding company, they have nothing to mortgage.

Q. Don't they own the trans-continental lines?

A. Yes, but that would not be the basis—I mean main control of the telephone.

Q. They own the New York Telephone Company and the New Jersey Telephone Company?

A. Through the stock, sir.

Q. Through the stock?

A. Yes.

Q. But they have certain kinds of property of their own?

A. Oh, yes, but not sufficient to form the basis of a large and generally accepted mortgage, perhaps.

Q. Now, that four per cent bond.

A. Last sale, 20th day of August, 83.

Q. That would figure at about what?

1114 A. 83, due in 1929, nine years—6½.

Q. But you say on account of the fact that those are legal for savings banks and trustees——

A. Trust funds.

Q. Trust funds, in Connecticut and certain other states, does not make that a fair comparison?

A. No, it is recognized that that is a special market, Judge.

Q. Now, there was a time, however, that you and the houses you were connected with did sell at par the bonds of this very company, at five per cent?

A. Yes, sir.

Q. Now, there have been other times in the past when there has been a stringency in the money market, have there not?

A. Yes, sir.

Q. When the rates have gone up substantially as high as they now are?

A. No, sir.

Q. I haven't any knowledge myself—and I am asking permission—when was the last peak prior to the present the last peak rate prior to the present high money market—about when?

A. 1913.

Q. In 1913? And it went up to what rate then?

A. Securities, generally?

Q. Only in round figures?

A. We would say five to six per cent.

Q. It did not approach this——

A. Former high?

Q. It did not approach the present high price?

A. The present prices are the lowest on record, sir.

1115 Q. Well, I know, but interest rates are the highest, then?

A. Oh, no, sir.

Q. It did not reach the present high interest rates?

A. I misunderstood you in peak. I was thinking of prices. You are speaking now of rates?

Q. Yes.

A. The previous peak in rates would be the breaking out of the world war, when the exchange——

Q. In 1914?

A. In 1915, when we had to close the Exchange.

Q. *The* continued how long then?

A. Approximately between 16 and 19 days.

Q. This has now continued for a year?

A. Yes, sir.—been getting worse every month.

Mr. Moran: They began to go up longer than a year ago?

The Witness: Rates of interest—wait a minute, we are getting confused here. He is asking about the present high rates for securities, if it has continued. It has, and it is worse today.

Q. The rates have been markedly higher for about a year?

A. Yes. The rates, you see, not the prices.

Q. The rate per cent that you have to pay investors to get money is what I am talking about?

A. Yes, sir, it has been worse every month up to the present.

1116 Mr. Moran: Well, didn't they begin to go up more than a year ago?

The Witness: Oh, yes, but he asked me if they had been.

Mr. Moran: The present high level.

Q. Well, when did it commence to go up?

A. At the entrance of this country into the war.

Q. Well, then, this started in 1917, in April, 1917?

A. Yes. You see, there was a peak of high rates with the closing of the New York Stock Exchange in 1914. Then came partial recoveries. Then the present movement apparently started with the entrance of this country into the war; and practically since that time we have had constantly mounting rates for money.

Q. Historically, do you know the history of rates after our Civil War?

A. I have them on file, but I would not feel qualified to testify.

Q. Well, substantially, in a lesser degree, the same condition existed then that exists now?

A. Yes, sir.

Q. That is, particularly Government bonds?

A. Yes, U. S. Government 7's, sold at par and under.

Q. Do you know how long that high rate of interest period continued after the Civil War?

A. Why, approximately five years, according to my recollection, when the start came for the better, when the change came.

1117 Q. So you look for a change in this, if history is to repeat itself——

A. I don't assume that, sir.

Q. You don't assume that history will repeat itself?

A. No, at least not within the same time. I feel that this great world conflagration has brought about just a terrific destruction of property of all kinds and human life included, that the whole world must turn in and make up that loss.

Mr. Moran: Before there will be——

Mr. Jackson: Except the bankers, do you mean?

The Witness: Yes, we will try to do our part.

The Master: As a matter of fact, it is very difficult, isn't it, to make any prediction of the future, because we do not know what the Government debt is going to be?

The Witness: No, sir, very idle.

The Master: And you can't tell: if the Government retired two or three billions of Liberty notes, Liberty bonds next year, you would find interest rates would go down, wouldn't you?

The Witness: I think not, because already they have retired over a billion.

The Master: Well, that is over more than a year.

The Witness: But it did not make a ripple, sir.

The Master: Any material reduction in the Government debt would naturally put interest rates down?

1118 The Witness: If you will pardon me, that is not my personal view. I feel that the demand for capital throughout the entire world is so extraordinary and enormous that the United States of America might retire five billion dollars' worth of its securities without having any great, or perhaps really appreciable effect on the world wide rate for money. We are figuring this very week with the Government of France, as you all know on from $100,000,000 to $150,000,000 of eights; and we don't know how $150,000,000 of eights, even of dear old France, is going to be sold in this country, unless we dress them up with some extraordinary features which by the clergy might be called almost gambling, in the callable feature and so forth. I just came from Morgan's office on my way over here. Not more than par can be asked as an asking price for the French loan should it be consummated. The recommendation of the expert of the First National Bank was for a list price of 98½. Now, with that competition, people merely will not bother with public utilities to the previous degree.

Q. This is somewhat theoretical, but our domestic demand for money is partly induced, is it not, because every manufacturer has excessive demand for his wares and is making extraordinary
1119 profits, and because he is able to conceal, probably, certain of his profits, if he extends his business?

A. No, sir, I cannot agree with that. I believe the extraordinary demand for capital is forced by the high cost of materials and labor and everything entering into production.

Q. But you know that every manufacturing enterprise in the country is now—nearly every one is building and extending their business?

A. Don't you think that has stopped within the very recent past?

Q. It has?

A. We get very exhaustive reports on those. There was a falling off in production of motor cars and trucks in the City of Detroit for the week ending August 21st, of between seven and eight thousand.

Q. Between seven and eight thousand cars?

A. Yes, sir.

Q. And that releases a lot of men?

A. Yes, sir, 1,500 at least.

(Discussion off the record.)

(The following question, discussed informally off the record, was restated to the witness as follows):

By the Master:

Q. If the Kings County Lighting Company's credit was good, if it had earned for a period of three years two and one-half times its bond interest, and twice its bond interest including the new se-

curities proposed, and at this time, applied for a loan, one
1120 to five years maturity; what rate, in your opinion, as a bond expert would it be required to pay?

A. 10¼ to 11 per cent.

The Master: We will take a recess until half-past two.

(Whereupon a recess was taken until two thirty o'clock p. m.)

1121 Afternoon Session.

Cross-examination.

By Mr. Jackson:

Q. Mr. Gardiner, in the testimony you have given you have spoken from the standpoint of a security broker rather than from the standpoint of a banker loaning money, have you not?

A. Yes, we feel in our business that we are trustees for the public and should protect them in their investments.

Q. Well, I mean in this way, that your business is principally the brokerage of securities, is it not?

A. Yes.

Q. Rather than the loaning of money on securities.

A. No, it is about 50-50.

Q. All right, then what I mean is this: You are not speaking in your testimony of giving any opinion as to the value of securities, to loan money upon them; you are rather testifying to the availability of the securities.

A. Yes sir.

Q. And from the standpoint or phase of your business of the brokerage of securities.

A. Yes, the selling of them.

Q. You thought it seemed to be the general opinion of these public utility corporations that it is better at the present time to issue short term securities and pay the higher rate, with the idea
1122 that in the near future the market would be better for securities, so that they could replace the short term securities with long term securities at a lower rate; is that the idea?

A. With the hope.

Q. I say they are now practising it; they are now following that practise of issuing the short term securities, with that hope.

A. A larger proportion is following that out here. In the case of the Adirondack Power & Light we found they carried out the other idea and put out their 30-year bonds.

Mr. Moran: There are quite a few 30-year issues going out?

The Witness: Yes, 20 to 30-years.

Q. Most all business, as you are informed and as you observe it being conducted at the present time, is being conducted in the hope and the expectation of a rapid return to normal conditions.

A. I don't feel like answering yes to that question, except as far as the hope goes.

Q. The fact that the majority of these public service or public utility corporations are following that practise of issuing at the present time these short term securities at the higher rate, that accounts in a measure for the present market price of those securities, does it not?

A. Yes. If I may add an explanation, the banks generally
1123 became so disgusted with their experience in long term bonds, that there came a sort of revulsion of feeling and, instead of investing as had been done in the past for one or two generations in the future, they determined that it would be wiser to buy shorter term securities upon which they could demand a larger rate and, as they express it, see the color of their money at an early date.

Q. While you are answering so, perhaps you might give us an idea as to the reason for the banks being disgusted with the long term bonds.

A. Because of the general declines brought about by world wide conditions, bringing a scarcity of capital.

Q. Are the world wide conditions that you are mentioning world wide disturbances due to the recent war?

A. Largely brought about by that.

Q. And they developed during the war and have continued to a certain extent since the war?

A. Yes sir. In fact they are worse today than they were during the week of the Armistice.

Q. But that worse condition is one of the direct consequences of the disturbance?

A. I believe so.

Q. And of course generally that condition is due to the general disarrangement of all business affairs and the effort to readjust.

A. As indicated in my direct testimony I feel that it is more due to the frightful destruction of property, that those values
1124 must be recreated.

Q. Those are some of the elements of the disarrangement.

A. Yes, if that is——

Q. And of course with regard to all those things, all business life, all our personal, individual and imaginal life must readjust itself.

A. Yes sir.

Q. And that is the process that business is now going through and all affairs.

A. I believe so.

Q. And all industries.

A. Yes.

Q. And it is on its way, without question, to a return to normal conditions; wouldn't you say so?

A. I would not feel qualified.

Q. You do not expect things to grow more chaotic until we are involved in an early ruin, do you?

A. No, because I am an optimist by nature.

Q. I have that in mind, and general business men are optimists.

aren't they? And generally we expect and are working toward an early return to normal conditions.

A. Yes, indeed. We are working for it.

Mr. Moran: That means we are bending our efforts to it.

The Witness: Yes.

Mr. Moran: But the trend is not necessarily to——

The Witness: No.

1125 Q. As an incident of that disturbance and as a part of the readjustment of conditions, and as the direct result of the destruction you have mentioned, more in the old world than in this, there has been a great demand for capital.

A. Yes sir.

Q. Capital of the individual and every corporation and every municipality and every state—has had a demand for capital to rebuild with; is that not so?

A. Yes.

Q. And of course following the law of supply and demand, the rates for capital have risen?

A. Yes sir.

Q. And that is one reason why since the war the rates for capital have risen, because it was not until after the war was over that all individuals and different concerns started their work of rebuilding; that is true naturally, is it not?

A. I think so.

Q. And of course, as every individual and business interest, after getting the capital to restart, gets on its own feet and begins to earn money, in each instance it will be producing and accumulating its own capital, and therefore in the aggregate there will be less and less demand for borrowed capital.

A. No, I do not assume that.

Q. We will stop at that then. You say, then, that your prophecies or opinions that you have given upon your direct testimony, as to the market rate of interest at the present time and as to the
1126 probabilities of what this plaintiff will have to pay in order to market its securities, are not based upon an assumption such as I made in my last question?

A. Will you read that?

(The reporter read the question.)

Q. Have you in mind the last question? Read him the last question so he will see what I have in mind.

A. May I explain?

Q. Make your answer here, surely. Explain any way you like.

Mr. Moran: Let me suggest——

Mr. Jackson: Not on the record.

Mr. Moran: Yes.

Mr. Jackson: You are not suggesting on the record, are you?

Mr. Moran: I want to object to your question.

Mr. Jackson: I do not want you to suggest or give anything that will be a suggestion to the witness for an answer.

Mr. Moran: No, I will object to the question on the ground it
a compound question, in which you ask the witness if in giving h
testimony with respect to the current rate of interest he has not bas
it upon some assumption, and also as to whether certain opinio
he expressed are not based upon assumptions. Now, with r
1127 spect to the current rate of interest, that is a fact, he does n
have to use any assumptions and does not use any assum
tions. In other words, your question involves a statement of fa
testimony and opinion testimony and he could not have relied upo
any assumption in making it.

Mr. Jackson: I am willing that the witness having in mind th
distinction should answer it in any way he sees fit.

The Witness: In testifying to what this company probably woul
have to pay I was basing it upon present conditions and not upo
future conditions. In the public utility business it is a general im
pression, or at least I believe it is a general impression, that they a
not permitted by the rates granted to earn a sufficient amount to pe
mit of making capital investments out of earnings. Isidore New
man of New Orleans, who sold out the New Orleans Railway & Ligh
Company and the Little Rock Railway & Electric Company, and th
Birmingham Railway, Light & Power Company, to interests repr
sented by Bertron Griscom & Company, who formed the America
Cities Company, told me that he had gotten sick of being interest
in any form of industry whose measure of prosperity was taken b
the amount of new capital required from year to year. An
1128 we have gotten past expecting steam railroads or the oth
forms of public utility corporations to be able to finance them
selves through surplus earnings. In other words, I believe that a
this country and perhaps the world grows and develops, the requir
ment for new capital for extension and enlargement and new build
ings will keep on increasing. That was why I could not see it you
way on the previous question asked.

Q. But the attractiveness of capital in any one of those industri
that you have just mentioned, just as well as the attractiveness fo
capital in any other industry at any other time, depends upon th
amount of capital available and the demand for capital, does it not
A. Yes, sir.

Q. So that any time when the demand for capital creeps up t
and begins to absorb the available capital, or overreaches the avail
able capital, then the rate of capital increases.

A. Yes sir.

Q. And at any time there is more capital available, and accord
ingly as it is available and overreaches the demand, the rate fo
capital decreases, naturally?

A. Yes, sir.

Q. And, to come back to the question I asked before, it is natura
to assume and it would be in accordance with the general law
1129 that as an individual and as every industry throughout th
world begins to get upon its own feet and produce its own
capital and depends more and more upon its own capital, then th

aggregate of all those interests throughout the world, being in the same condition generally, the demand for borrowed capital will be less, and therefore the capital that is available through banking interests, banking enterprises, businesses such as yours, will naturally be available at a lesser rate of return, will it not?

A. My opinion is not based on——

Q. That would be the ordinary——

A. Yes, theoretically.

Q. That would be the ordinary theory?

A. Yes sir; it is natural.

Q. And that would be the ordinary practical result, and that is the history, the ordinary run of those things, is it not?

A. Yes sir. But at the present day we are doing—I am speaking of the country when I say "we," the world is doing—only the most necessary financing first, and there is so much of it dammed up which will be secondary and thirdly and fourthly, kinds of finance——

Q. You think there are greater and greater enterprises coming?

A. Yes. In other words——

Q. So every one of us capitalists *are* going to have a good time for a long time ahead.

1130 A. I believe that the days of cheap money have passed into history for some time to come.

Q. That might have been the belief of many men within a year or two after every war and every great disturbance we have had, might it not?

A. Yes sir.

Q. And still within a brief period after every great disturbance of that nature we have had normal times and the condition of capital and all those things have come back and the rates upon capital have come back to normal rates.

A. It took about forty years after the civil war to bring an average rate back to four or five per cent.

Q. Are you prepared at the present time to go through the different years after the Civil War and state the average rate of capital return in each one of those years for a period of 40 years?

A. No, I have it on file at the office, but I did not think it would be required. We look at it largely through certain high points. The railroad receivership era of 1892 and 1893 and the previous panic of '71, I think it was.

Mr. Moran: '73.

The Witness: '73? Yes, 1873, that is it. And then the money disturbance of 1907, preceded by a lesser disturbance in 1903.

1131 Q. Well, if you have the high spots in your mind we might just as well have them if you can give them. How high did the average interest rates go in the resultant period after the Civil War?

A. I don't feel qualified to answer that from memory.

Q. How high in 1903?

A. Will it be enough if I say not approaching present day rates.

Q. Not as high as present day rates?

A. No sir.

Q. You have not it in mind, as to the exact figure?

A. Well, you see, we would have to take governments and average them, rails and average them, public utilities and average them, industrials and average them, and then average the five classes.

Q. Well, after 1903, the higher period, there was a return to the normal period.

A. More normal.

Q. You did not call it a return quite to the normal period?

A. No, not to the previous——

Mr. Moran: Mr. Gardiner, are you using the date 1903 there? Is that the date you mean? I didn't know there was any——

The Witness: There was a little disturbance, a minor one.

Q. Then there came another high period in 1907.

A. High rates.

Q. Yes, a period of high rates; that is what I am speaking of. Do you recall how high those rates went?

A. Not so high as at the present time.

1132 Q. But they approached higher toward the present rates than the highest point in 1903?

A. Yes sir.

Q. And then that abnormal period passed?

A. Yes.

Q. And we came down to normal again?

A. Practically.

Q. Practically. Well, as you view these things, it seems to be somewhat difficult to get back to normal again.

A. It is hard to say what is normal.

Q. That is the point. Now, what have you in mind as normal; what do you call normal, as you are speaking here?

A. That, of course, is purely just a matter of one man's opinion, because of experience which I chance to have had in my own mind I consider normal when a high grade steam railroad four per cent. long term securities sell at approximately par and when a high grade public utility long term security sells according to its class as a 4½ per cent or a 5 per cent obligation at par.

Q. How long is it to your recollection since any such condition existed in this locality?

A. If I say about 1910 would that be near enough?

Q. Since about 1910?

A. Yes.

Q. Did it exist in 1910?

A. Well, you are getting down very fine with me here. I should have——

Q. I am not expecting you to be absolutely accurate; we are only speaking in generalities, I imagine.

A. 1910 to 1912 I think might be taken as the period.

1133 Q. Do you think that was a normal period?

A. That is my recollection.

Q. We have during the period of 50 years ordinarily to meet in business perhaps three, four or five such abnormal periods.

A. Four or five, I should say.

Q. Four or five in a period of 50 years. Those must be expected in any business.

A. Yes.

Q. When Judge Hill asked you in his hypothetical question as to the rate which a certain company under certain conditions would expect to have to pay for the issuance of its securities, and you answered about eleven per cent——

A. $10\frac{1}{4}$ to 11, I think.

Q. (Continuing:) $10\frac{1}{4}$ to 11, I think he referred particularly to a gas making and distributing corporation, did he not?

A. I would have to appeal for the question again.

Q. However, you had such a corporation in mind, did you, a gas company?

A. Yes, gas or electric.

Q. And your answer to that question was also based upon your opinion that the practice of these companies at the present time is, in issuing these short term securities for a higher rate.

A. Yes sir.

Q. And that the market for those securities is in accordance with that practice?

A. Yes sir.

Q. Speaking of the discrimination that you have men-
1134 tioned, that the investing public has against these public utility corporation securities, of course there are several reasons for that you could imagine, can't you?

A. My province is more to recognize it than to explain it.

Q. Well, of course you can recognize several reasons, can you not?

A. Yes sir.

Q. Counsellor Moran called your attention to one reason which you seemed to recognize when you saw it, when he held it up to you, and that was the reason that pestiferous legislatures have been insisting on perhaps too low a rate for these public utility corporations.

A. Yes sir. Too low a rate for their product, you mean?

Q. Yes.

A. Yes.

Q. You can imagine reasons that are equally potent towards causing a discrimination of the public against these public utility corporations, that are entirely the fault of the corporations, can you not, in their prior management and in their present management?

A. Not being blessed with a very vivid imagination I regret I have not that power at this time.

Q. Well, I cannot perform that function with anything like the ability that counsellor Moran can, but let me try to and see if I cannot imagine the situation for you. You have had some experience with these public utility corporations and their securities?

A. Yes sir.

1135 Q. You have had some experience with this Kings County Lighting Company?

A. Yes sir.

Q. And you have followed the Kings County Lighting Company and some of these other public utility corporations for about how many years?

A. Twenty years.

Q. You know that there is such a thing in these public utility corporations and in the manipulation of their securities as the watering of stock.

A. I have heard that term.

Q. It is commonly so termed. And that is a condition that is not met with in government securities, is it not?

A. U. S. Government?

Q. Yes. Well, U. S. Government.

A. No sir, not in U. S. Government securities.

Q. So that when our investing public has been satisfied at one time with an investment in U. S. Government bonds at a low rate of interest, three or three and a fraction per cent, they were satisfied with it at one time, were they not?

A. Yes, but there was a special reason for that also.

Q. But they were satisfied with buying, when they had money to invest, the U. S. Government securities.

A. Not on the part of investors. They were purchased by national banks as the basis of the National bank note speculation.

Q. We are talking about some years ago now.

1136 A. Well, how far back do you wish to go?

Q. Well, I am not going back to any special date. We are going back far enough so as to take us into those good old times when these public utilities corporations were turning the flood gates of water to the greatest extent into their securities. Is that definite enough?

A. No sir.

Q. You mean to say you would come into the present time, to cover that period of time.

A. I cannot identify it as a period.

Q. In speaking of the discrimination that the public may have against public utility corporation securities, there is one reason for that discrimination to be found in the fact that public utility corporations have in the past watered their securities; it has been notoriously a common practise, has it not?

A. I don't feel qualified to answer that question.

Q. Well, you have known of many such instances, have you not?

A. Possibly. But I don't bring them to mind.

Q. Well, we are not going to ask you definitely about the Kings County Lighting Company, so you do not need to be hesitant in your answer.

A. I do not mean to be, your Honor. At the moment I could not tell you one company off hand, quickly.

Q. But haven't you that in mind, that that is fairly to 1137 be assumed as one of the reasons why the investing public

has a prejudice or exercises a discrimination and shows a discrimination against public utility corporations, as against a security such as the United States Government bond.

A. I don't feel so, sir. If you will permit me, the average——

Q. Now, wait a minute, please.

Mr. Moran: Now, let him answer.

Mr. Jackson: No, please.

Mr. Moran: I think the question has been——

Mr. Jackson: I have accepted all his explanations except upon this point. Because, I do not want to be accused after I get through taking a whole lot of trouble getting it. What I want to know is get what I asked at the beginning of that question.

Q. Is it not fairly to be assumed as a general proposition that that is one of the reasons which may account for such a condition of mind?

A. I think not, because the——

Q. Well, all right, go ahead and say because.

A. The public knows nothing about equities. I mean comparatively speaking they do not know about equities——

Q. Now, isn't that the very reason——

Mr. Moran: No, let him finish, General.

Mr. Jackson: We will get along.

Mr. Moran: No, you won't get along.

1338 Mr. Jackson: There is not a chance of a scrap between him and me.

Mr. Moran: But you are dragging me into it now.

Mr. Jackson: But I think he is intelligent enough to insist upon being understood. I am going to let him explain.

Q. But isn't that very fact that you are mentioning now one of the reasons why the public may, with some sad experiences, and more than their sad experiences have multiplied, steered clear or be inclined to steer clear of public utility corporations stock, for the very reason that they are not informed by some of these beautifully worded and attractive and alluring circulars that the bankers issue describing the high points of beauty about this security, that they do not get from those circulars the exact information as to the real financial condition and the dividend paying quality of that security.

A. You have brought out the stocks and I haven't been conscious of testifying to anything pertaining to stocks.

Q. In the general and public mind, if any public utility corporation or any other corporation has what might be called in banking circles a black eye, as to its stock, wouldn't you see a reflection in the mind of the public when you came to try and sell them that company's bonds?

A. Yes.

1339 Q. So there is a connection between the stocks and the bonds in that way?

A. Yes, but please do not misunderstand me. You have used the word stock; I have not been conscious of hearing that before and I

wondered whether we were switching from a consideration of bond finance to stock finance. I want to be very frank with you.

Q. I appreciate it, that is the reason I am asking you frank questions.

A. The investor looks to the earnings. The investor looks to earnings, he does not understand values.

Q. I agree with you, and I do not think there is going to be the slightest disagreement between us. So I am encouraged to ask you one or two more questions. The investor looks to earnings.

A. Yes, largely.

Q. In your experience and observation with these public utility corporations, have you ever come across such an expression, as indicative of a certain practise called starving maintenance?

A. Yes, sir.

Q. Now, so we will be sure to get an illuminative description of that on the record, I am going to ask you to tell us what it is.

A. In a few words, the proper upkeep of a property.

Mr. Jackson: Read his answer, will you?

(The reporter read the answer.)

Q. Well, you do not mean that; you do not mean the
1140 starving maintenance is the proper upkeep of the property.

A. Oh, the failing to.

Q. Failing to, yes, that is it.

A. Yes, I missed my connection.

Q. Isn't there something more included in that expression? Doesn't it also include the idea that you have been failing in the proper upkeep of the property for a purpose?

A. I could not answer that, sir. We have——

Q. Have you ever known of this—I beg your pardon.

A. We take the figures or the condition as it is. We do not know why.

Q. Have you ever known of this in the management of these public utility corporations—that the management having the inside control of the stock would fail in the proper upkeep of the plant and all connected with it for the purpose of saving that money for the declaration of larger dividends?

Mr. Moran: Just a moment. I object to that.

Mr. Jackson: Pardon me.

Mr. Moran: Are you through?

Mr. Jackson: I do not want to interfere with your objection.

Mr. Moran: I object to it as incompetent, immaterial and irrelevant.

1141 The Master: Read the question.

(The reporter read the question.)

Mr. Jackson: Now, just a moment, your Honor, and I will explain where we are at on this. This bears upon the testimony of the witness explaining in part or in whole the reasons for the con-

dition that he has described in the public mind, a discrimination against the securities of public utility companies, and I propose to show—if it is necessary to state it now; it is perfectly obvious what I am after—that there are reasons for the discrimination in the public mind against those securities that are entirely the fault of the corporations themselves, as suggested by Mr. Moran to this witness, the fault of the legislature in not providing at this time a higher rate. As long as he brought that out, I think we are entitled to contest that.

The Master: Of course, I do not attach much importance to that phase of the testimony, whether on your side or Mr. Moran's side.

Mr. Jackson: But it leaves a record that reads very terrible when you have not anything explaining against it, you know. Like all the vicissitudes of this company, when they are all gathered together and it all looks as though they were one cause, and
1142 the cause was solely the legislature of *the* New York State, you know, we will have a record here before we get through, if we do not contest these various points, such that if the citizens knew about it they would rise in arms and hang the legislature to the lamp post.

The Master: I thought I pointed out to Mr. Moran my view of the thing anyway, that in order to establish the facts of the legislature or the fault of the corporations, or the fault of someone else, that this company was not financially able to sell its bonds at a favorable rate of interest—in order to establish that fact he would have to go into the question as to how much money had been put into the company at the time of its inception, what had been done with the company through the period of its existence, financially, and that I was not prepared at this time to go into that. I do not think it makes any difference whether Mr. Moran feels that the legislature has condemned this company or whether you feel that the company has condemned the company. All we are trying to get out of this witness, so far as I can understand, is the prevailing rate of interest. I think you are getting terribly far afield from it, are you not?

1143 Mr. Jackson: The only reason why we are trying to get out of this witness the prevailing rate of interest generally is for the purpose of applying it to this company.

The Master: Well, I do not care much whether there is a feeling among the public at the present time that gas companies are bad investments or that all companies are good investments, or one way or the other; all I want to get is the sum total of the investors' and bankers' minds, so to speak. That is, what they will take securities at.

Mr. Jackson: But that is only valuable as it is going to be applied specifically to this company——

The Master: Yes, but we have heard of the financial condition of this company; we have listened to testimony as to what prices various securities of different character have been issued at in the last few months, and we have got, it seems to me, to my mind, sufficient evidence in the record now for the District Court to make a finding respecting the rate of return that this company should be permitted to receive.

Mr. Jackson: That is what I want to be perfectly sure of; because the witness has predicated his answers upon certain conditions, financial conditions of these companies generally.
1144 And of course if this company shows that it is within the general rule, of course it expects to profit by that testimony. Now, when he speaks of a discrimination, and that is the reason for the higher rate of interest, that fixes it generally and that will be applied to this company, and this company will have to pay it, because of the testimony he gives generally. He says for the reason that the higher rate of interest of public utility companies that it is because of the discrimination of the public mind against these securities as compared with some other securities.

Now, there is not any question about it, and I think I can show it by a few questions to the witness, that there may be exceptions to that rule in case it is shown that the company in question or any company in question has a particularly good financial standing and has received no black eye in the past. If this company, the Kings County Lighting Company, should be one of such companies and should have a particularly good standing financially, no matter what might be the high rate of return for companies generally, if this company because of its especially good financial standing should be able to get a lower rate of interest for the marketing of
1145 securities, surely that should be shown before the court; because then the specific situation of this company would be of more value to the court than the information about companies generally.

The Master: There is in evidence the fact that some time around 1908 or 1910 or 1912, some where around there, the company sold its bonds—that is, the company's bonds were sold to the public at par, its 5 per cent. bonds. Now, we have had a lot of evidence about the financial condition of the company since, we have had a lot of evidence about the current rate of interest, we have heard what the Pennsylvania Railroad is paying, we have heard what the United States Government pays for its certificates of indebtedness. I am not comparing this company to the United States Government so far as solvency is concerned or to the Pennsylvania Railroad, but I am simply bringing out that as a possible guide or as a mark that, if the United States Government pays 6 per cent. on its certificates of indebtedness, what would ordinary borrowers have to pay with good credit.

Mr. Jackson: If we can get from this witness a description of conditions such that they will more closely apply to this specific company, than the general conditions he has mentioned of
1146 other companies that have no relation or are in another class entirely from this company, surely it has more value in the eyes of the court than the general testimony as to companies that are not in the same class or are in no way near this company in respect to condition.

The Master: I entirely agree with you.

Mr. Jackson: I am trying to get conditions that more specifically apply to this company.

The Master: You go ahead now.

Mr. Jackson: I do not intend to ask more than a few questions, but that is the purpose of it.

The Master: All right, you go ahead.

Mr. Jackson: I am not trying to go afield, but just trying to come closer to what might be the condition of the company. Will you read the question, please?

The Master: You were going to develop this and apply it to this particular company. You were going to focus the witness's attention upon this company.

Mr. Jackson: I only jotted down two or three questions, because of his testimony as to the discrimination in the mind of the public and the suggestion that the discrimination is because the
1147 legislature has not granted them a rate. At the same time I think we ought to have the other reasons for the discrimination upon the record, some of those reasons perhaps being applicable to this company, and it may develop they are applicable, so as to show the situation as to utility corporations—if it does apply.

Mr. Moran: The witness has said that the investor looks to the earnings, and when a company has not the earnings they discriminated against it, or when any particular class of companies has not got the earnings they discriminate against that, and whether the lack of earnings are due to low rates or what not, it is a lack of earnings nevertheless. Now, in our case here the lack of earnings is due entirely to the rate.

Mr. Jackson: The witness, of course, when you are saying what the witness has said, did not say quite all you have stated. However, I do not suppose that you intended to overstate his testimony.

Mr. Moran: Didn't he say that they looked to earnings?

Mr. Jackson: That is not quite it.

Mr. Moran: I have built the rest of it up, of course.

Mr. Jackson: With quite a few variations.

1148 Mr. Moran: No, and if I am wrong about that I will withdraw the whole thing. I think the witness said that the investors looked to earnings and did not know much, if anything, about equities. Isn't that right, Mr. Witness?

The Witness: Yes sir.

Q. That is just exactly what I said I agreed with you about, and there is not any disagreement at all about the investor looking to the earnings and perhaps not paying much attention to the equities. That is, your investor wants to be in that situation and that is one reason why he depends upon the standing in the community of a banker who puts out the security; it is because he likes to depend upon the banker who advises him, to only put forward to him for his purchase a security that is reasonably certain of earnings and that has valuable equities underneath the securities.

A. Yes sir.

Q. And that is why you as a banker, jealous of your reputation, only intentionally put out good securities with good equities underneath.

A. Yes sir.

Q. And of probable earning values.

A. Yes sir.

Q. And that is what you want to do when you put securities before the public for sale?

A. Yes sir.

Q. But in these United States Government bonds the investors have been since the operations of our Government
1149 fairly secure in the promises of the Government to pay the interest specified in the bonds, have they not?

A. Yes, sir.

Q. And in these public utility corporations the investing public has been a great many times grossly deceived as to the earnings, the actual earnings and the equities underneath the securities, have they not?

A. Not to my knowledge, because the two companies with which I have been connected have been of such high standing.

Q. As a banker investigating the conditions of various utility corporations and advising your customers, and also regulating your own course of business as to what securities you will handle and what not, you know from your general information, but what I have asked is the fact, do you know that the investors have in these public utility corporations been deceived, whether intentionally from without or in their own idea of what might be—they have been deceived and they have not had the returns upon the securities, and there has not been the equity behind these securities that they have been led within or without themselves to believe when they bought the securities. Is that not so, as far as you are informed generally?

A. Yes sir.

Q. And that has been due frequently to two things, the watering of the stocks of these corporations, public utility corporations
1150 issuing stocks above the intrinsic value behind them, and also the policy of the management, in order to manipulate the stocks for their own private profit, having withheld proper investment in maintenance and paid dividends temporarily so as to raise the value of the stocks and induce the public to buy, and then, they having the management and controlling the maintenance, put the earnings into maintenance so there were not any dividends to be paid, so that the stocks would lower in value and the market price would lower, and the investor would want to dispose of them because they were not realizing anything on them, and then when the management had got the stocks to a low value again the management would buy in again to their profit. Now, that manipulation is what is understood as the purpose behind the practice of starving maintenance; isn't that as you understand it, or something on that idea?

A. No.

Q. Something of that practice.

A. I have heard of such cases, but of my own knowledge I do not chance to know any.

Q. All right.

A. What has come under my observation has been——

Q. I am not speaking now of your observation, your personal observation or your personal connection with any company; I
1151 am talking about your general information as a man in the business.

A. I say I have heard of such cases. But you ask me——

Mr. Moran: Wait a moment now; let the witness have some opportunity here.

Mr. Jackson: I want him to have all the opportunity he desires. Let him go ahead.

The Master: Go ahead, Mr. Witness; just answer as best you can.

The Witness: The last part of his question was whether that is not the main reason for starving maintenance, or something like that—the last part of your question.

Q. We do not want any quibbling about my language. I want you to get my idea and answer fairly my idea.

A. My idea is in most cases starvation maintenance is forced by a lack of earnings.

Q. Well, that is legitimate starvation maintenance and I am not talking about a legitimate starvation maintenance at all; I am talking about the starvation maintenance that is a part of the manipulation from the management's purpose, to the profit of the management or those who are inside in control of the stock, and at the expense of the outside general investing public.

A. I know of no such cases.

Q. I did not ask you that. I asked you if in your general
1152 knowledge and information in your business had not in mind that there have been such practises in some companies, these public utility companies.

A. I have heard of it, yes.

Q. And that is one of the considerations that you in your business must have in mind when you examine into one of these companies in order to determine whether its security is a security of character, such that you as a banker would wish to recommend to your customers, is it not?

A. Yes sir.

Q. The fact that the public have had some of those experiences with public utility corporations may be a reason for this condition of the public mind discriminating against public utility stocks as against some securities where it is well known that there has been no such manipulation; may it not be?

A. I suppose so.

Q. Do you think that it would help any one of these public utility corporations to market its securities, if for a period of one year to three or four it had been industriously disseminating by propaganda and circulars mailed to all of its customers and spread broadcast in the public press, that it was on the verge of bankruptcy and toppling over.

A. No sir.

Q. You know as a matter of fact that today one of the reasons

why you say that you would with extreme reluctance—or to
1153 that effect—undertake the marketing of, say, this Kings County Lighting Company's securities, is because of this generally spread and to a large extent the general belief that this company, as well as other companies, in like business, for whatever cause it may be, whether because of too low a rate or what—but for whatever cause it may be, that this company and other similar companies are almost at the point of shutting down because they are not making their operating expenses, as they concede or as they claim; that is the trouble, isn't it?

A. One of the troubles.

Q. And that is the situation that would tend directly to raise the interest rate upon the securities of this plaintiff or any other plaintiff similarly situated, is it not?

A. It is. Capital is timid.

Q. When you propose to market a new issue of securities, as a general proposition do you have to conduct some advertising campaign in connection with it, some dressing up, something to make it look attractive and something to persuade the public to invest in it?

A. In our own case we operate through salesmen very largely.

Q. But generally all the bankers market securities.

A. All we do is print a circular; I do not know what you mean by dressing up.

Q. And they make what we might term something in the
1154 nature of a drive, they put it on the market and they advertise it in the newspapers.

A. Yes sir.

Q. They make it appear that it is a new comet and they want them to get on and ride.

A. Yes. I do not know much about comets, but——

Q. It may be like comets in this respect——

A. Some of them have a tale.

Q. And there is more shine than substance, perhaps. If one of these companies, say for instance this Kings County Lighting Company, has been very industriously persuading the people by all this propaganda that it is on the verge of ruin and that its securities are worthless, consequently and very naturally all that propaganda continued up to the present date would have a direct tendency, would it not, to raise the rates of interest that it would have to pay in order to market its securities at the present time?

Mr. Moran: I object to that as grossly improper.

Mr. Jackson: I will tell you why I am going to have it proper.

Mr. Moran: Will you please allow me, General——

The Master: Just a minute. I will let him answer if you will press this as much as you possibly can.

Mr. Moran: The General never waits until I finish my
1155 objection.

Mr. Jackson: I beg your pardon.

The Master: You go ahead and object.

Mr. Jackson: I thought it was just as forceful in what you stated of it as if it was longer.

Mr. Moran: No, I rather conclude that the court has not observed that it assumes a mass of facts that have never been suggested on this record.

Mr. Jackson: But this is cross examination; we have not come to the defense.

Mr. Moran: But you cannot in cross examination propound a question to a witness based upon facts that have not been put in the record. Where is there a word in this record about any propaganda by this company; where is there a word in the record and who has said it had any propaganda?

Mr. Jackson: We want all the conditions on which he may base his opinion. I am going to put the propaganda in.

Mr. Moran: Then recall him.

Mr. Jackson: Then I will recall the witness afterwards. You better let me ask the question.

Mr. Moran: No, I won't let you ask the question. I object.

1156 Mr. Jackson: I appeal to the Master to let me ask it.

The Master: The objection is overruled and exception allowed. Of course, Mr. Jackson realizes that his cross-examination does not strengthen his case unless he subsequently establishes a basis of fact on which his cross-examination rests.

Mr. Jackson: I will establish it now by asking Mr. Elsman to produce here the complete issues of the literary production of the Kings County Light Company called the Gas Service News. I would like to have him produce complete issues for 1919 and 1920 and we will see about the propaganda or the dressing up of those securities that you are trying to sell, and see whose fault it is, and that will point my questions.

(To Mr. Elsman:) I did not hear you answer. Have you considered those issues vital enough to keep a file of them?

Mr. Moran: Wait a moment, Mr. Elsman. I suggest that we go on with the testimony in the case.

Mr. Jackson: Well, I think I would like to ask him now whether he will produce the file.

Mr. Moran: You want the file of the Gas News. We cannot have it here today, although we will send for it. Do you want it here today?

Mr. Jackson: No, not today. I do not want to lumber up

1157 the record with it, but I might want to pick out a few of the choicest literary parts directed to preparing the public for the purchase of those securities.

Mr. Moran: It is unnecessary, General, for you to explain. You simply command and we will bring it to you.

Mr. Jackson: You are exceedingly kind.

Mr. Moran: But you must use it when we get it here.

Mr. Jackson: I am going to use part of it, because I was nearly brought to tears one night by receiving a copy at my house, and I want to show how one can be affected.

The Master: Is there anything more from the witness?

Redirect examination.

By Mr. Moran:

Q. Reference was made to investors being deceived, not intentionally but being misled anyway and losing, I concluded. Have there been some gas and electric corporations that have defaulted on their bonds in recent years and the property sold out at foreclosure to the great loss of the bondholders?

A. In the whole country or in the State of New York?

Q. In the State of New York.

A. I don't think of any at the moment.

1158 Q. Do you know of any foreclosure in New York State in the past five years?

Mr. Jackson: Will you pardon the suggestion right there—I do not like to interrupt—but as your witness on the direct went all over the country, don't you think you might give him that leeway now?

Mr. Moran: I am calling attention to New York now; one state at a time.

A. I do not recall any in the State of New York

Q. Well, do you recall any in the country—gas or electric company, gas particularly?

Mr. Jackson: Perhaps the witness is hesitating because he is trying to comply particularly and exactly with your question, which was limited to his recollection. Maybe he is trying to recall a specific company.

Mr. Moran: No.

Mr. Jackson: You do not mean that, do you?

Mr. Moran: If he knows.

Mr. Jackson: You mean if he knows a situation where such a thing had happened.

Mr. Moran: Yes.

A. I do not recall any.

Q Then reference was made to the effect that — have been misled, that it was itself misleading. There has not been any such

1159 thing, has there; how is it?

Mr. Jackson: I guess I will have to call Mr. Moran to the witness stand.

Mr. Moran: How is it now?

Mr. Jackson: Mr. Hopson will be my next witness.

A. I am not a statistician, you know.

Q. I know, but there is in the record now a statement to the effect or a question to the effect that the investors in the bonds of gas and electric corporations have been misled and deceived to their loss and injury. Have there been foreclosures of mortgages under which bonds have been issued, the foreclosure resulting in loss to the bond-

holders in the last four or five or ten years, to your knowledge, anywhere in the United States?

A. No.

Mr. Jackson: That is not the only deception.

Q. Then what was the import of the answer, Mr. Gardiner?

A. I am afraid he tired me out.

Mr. Moran: Well, that is what I thought. I thought so too.

The Master: I had the same impression.

Q. Then it is not a fact that bond houses have deceived or that the investors, the public, in the bonds of pubic utilities, gas and electric, have been deceived?

A. Not that I know of.

Q. And that is not the reason why the investing public is
1160 discriminating against them at the present time.

Mr. Jackson: I object to that.

The Master: Objection overruled.

Mr. Jackson: It does not follow from the witness' answer that because he has not the knowledge of the deception that the investing public has not had discrimination, because they may have had experiences that have not come to the witness' knowledge.

Mr. Moran: You can answer. It has been overruled.

The Master: Objection overruled and exception.

A. I think not.

Q. What is the reason of discrimination now, the immediate reason; regardless of what brought it about, why does the public not go into the gas and electric securities now as they go into others?

Mr. Jackson: I object to the question. It is based on the assumption that the witneses knows what the reason is. If the witness assumes to know that reason and knows all of the reasons then it is another question; but he has not assumed he knows all the reasons, and he has suggested to me that he did not know them all.

The Master: Objection overruled. Let him give his opinion.

Mr. Jackson: Exception, please.

1161 A. It is my opinion that because of the fact that they are younger securities, the first class of investment, as was perhaps brought out, was in our own Government bonds, then along came the municipal issues of political subdivisions, then came the railroads. Later on came the public utility companies. They are a younger class of investment and do not command, I may say, the same element of respect and confidence that some of the older forms of investment do.

Q. Well, they never did command the same respect.

A. No sir.

Q. Do they command a less respect at the present time than they have earlier?

A. Decidedly.

Q. And why do they command such a low degree of respect at the present time?

A. Because of the falling off of their earnings.

Mr Jackson: Not because of their youth necessarily?

The Witness: No.

Q. Because of the earnings?

A. Yes.

Q. Is it not a fact that gas and electric securities command a less respect since the advent of regulatory bodies in the United States than before, if you know, or have you an opinion on that?

A. In my opinion, yes.

Q. They command less respect since?

A. Yes.

1162 Recross-examination.

By Mr Hill:

Q. Is there any reduction of watering of stock and weird financing of gas companies since regulatory bodies have come into existence?

A. I should say yes.

By Mr. Jackson:

Q. And is that one reason why the public respects them less?

Mr. Moran: That is a good question.

Mr. Jackson: Sure it is.

A. I am a little bit rattled. Your question?

Mr. Hill: My thought was it was necessary to have regulation.

The Witness: No, you said is it something.

The Master: I am going to cut this off very soon; I have got all the information I can get out of this witness. You had better slow down. I am through so far as I am concerned. I have all I want, all the information that this witness was called to give. I mean if you have got other various angles, I do not think it is proper to ask this witness many further questions on this subject.

Mr. Moran: I would like to have him answer that question.

The Witness: Read Judge Hill's question first.

1163 (The question was read by the reporter as follows:

"Is there any reduction of watering of stock and weird financing of gas companies since regulatory bodies have come into existence?")

A. Yes sir. Now read Mr. Jackson's question.

The report- read the question as follows: "Q. And in that one reason why the public respect them less?"

A. No sir.

Mr. Moran: What is the reason?

The Witness: Principally because of the reduction of earnings.

(Witness excused.)

Mr. Moran: One of counsel asked for a statement of the 1917 and 1918 expenses, and I took it it was for the purpose of comparison. So I have had the accountants prepare a statement setting up the 1917, 1918, 1919 and 1920 expenses in parallel columns, in the figures of the accounts in the uniform system, and I would offer that for the record.

The Master: Is there any objection?

Mr. Hill: No.

Mr. Jackson: It is prepared as a statement from the books, I suppose?

Mr. Moran: Yes.

The Master: It is prepared like all the rest of these?

1164 Mr. Moran: Yes.

(Received in evidence and marked Plaintiff's Exhibit No. 48.)

Mr. Moran: Then there is our franchise, the plaintiff's franchise, which consists of the consent granted by the Board of Improvement of the Town of New Utrecht, which has since become the 30th Ward, that consent being manifested in a contract with the old company, the Kings County Gas & Illuminating Company, made on the 28th of December, 1889, between the Board of Improvement of that town and the former company.

Mr. Jackson: And what is this paper you are referring to? How is it authenticated, the paper you have?

Mr. Moran: Well, it is the original and I will offer that in evidence.

The Master: Will you substitute a copy?

Mr. Moran: Yes.

The Master: I mean is it necessary?

Mr. Jackson: I think I shall put in a saving objection, covering any question of the authenticity of this paper.

The Master: Do you question its authenticity?

Mr. Moran: Oh, it has been received in evidence a great

1165 many times and has been litigated in the Court of Appeals a number of times.

Mr. Jackson: If I may have a saving objection to cover any such point.

Mr. Moran: Oh, yes.

Mr. Jackson: May I have that, your Honor?

The Master: It is not a question of authenticity, is it? It is an accurate paper?

Mr. Jackson: He is offering this paper and I am assuming that it is. Upon his assumption that it is I am willing to rest without any further fundamental proof, unless it should be discovered that it is not authentic, then I would wish my objection and exception to apply to it.

Mr. Moran: Yes. You will notify us of that before the close of the hearing?

Mr. Jackson: At any time it is discovered. If I would like to make any correction hereafter I would have an opportunity to and I will save my objection.

The Master: Of course, if it is not authentic I would like it proved now.

Mr. Moran: It is the original. I cannot prove the original; I do not know any living man who signed that paper.

Mr. Jackson: That is all the question I have. I take it
1166 that counsel is offering a perfectly authentic document, but not having had a chance ——

The Master: Then you will notify us before the close of the hearing whether there is any question about it?

Mr. Jackson: I will have to examine it.

The Master: You do not question its authenticity, do you?

Mr. Jackson: No.

The Master: It is admitted in evidence and the Attorney General does not object.

(Received in evidence and marked Plaintiff's Exhibit No. 50.)

Mr. Moran: That contract ran for ten years and was then extended for a period of fifteen years by another agreement, made on the 19th day of March, 1899, and I would like to offer that in evidence. That is the original too.

Mr. Jackson: If I may be allowed an objection and exception to that.

The Master: I am admitting these in evidence, and if there is an objection to their accuracy it has got to be made before all the evidence is in; because it is only fair to the other side to know what the objection is. If it is simply to its competency or
1167 relevancy, I will overrule that objection; but if it is to the question of proving the original paper in this way I think they are entitled to know what the objection is.

Mr. Jackson: All I would have to do would be to take those exhibits and show them to one of the counsel who knows what they are and then I am ready to take counsel's assurance without any further proof. I have not any question about it myself.

The Master: They will substitute copies of them. Will you, Mr. Moran?

Mr. Moran: Yes, I will substitute copies for the originals.

Mr. Hill: I am not objecting to them, but it is simply your franchise. You have been doing business over there and we assume you have been doing it right, and we expect to have a stipulation or concession as to value. I cannot see where I want to object to anything.

(Received in evidence and marked Plaintiff's Exhibit No. 51.)

Mr. Moran: In reference to the matter of unaccounted for, we were to get and were entitled to put in from the reports of corporations

made to the Second District Public Service Commission their
1168 percentages of unaccounted for. We put in some for the year 1917 on one of the exhibits, and the right was reserved to give later statistics. We have here a statement prepared from the 1919 reports of certain companies, which I would like to offer in evidence.

Mr. Jackson: I will object to this being received in evidence as incompetent and immaterial, no evidence as to the general situation or condition of any one of the companies mentioned, or that they indicate that there is any standard by which anything could be determined in this case; it is far removed from this locality and there is nothing in evidence from which by comparison anything of value could be derived.

Mr. Moran: I am inclined to agree with Mr. Jackson, but I shall——

The Master: I will let it go in with the other testimony respecting unaccounted for.

Mr. Jackson: Exception.

The Master: We took a very wide field, a wide range, with that testimony.

(Received in evidence and marked Plaintiff's Exhibit No. 52.)

The Master: Have you anything more, Mr. Moran?

Mr. Moran: No.

1169 The Master: Do you close your case?

Mr. Moran: We close our case. The plaintiff is through.

The Master: Is there anything further?

Mr. Jackson: There is further cross examination that I want to bring down between now and Tuesday.

Mr. Moran: I will bring you over a statement of those dividends, not the dates and amounts.

The Master: When are we going to meet again? When is our next hearing?

Mr. Hill: Any day except Monday.

The Master: Then I will make it Tuesday at three o'clock, subject to change to eleven o'clock in the morning.

(Further hearing thereupon adjourned to Tuesday, August 31, 1920, at 11 o'clock, a. m.)

1169¼ [Endorsed.] Public Service Commission, First District, Aug. 28, 1920. Bureau of Statistics & Accounts.

11691/2 United States District Court, Southern District of New York.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Before Hon. Gordon Auchmuloss, Special Master.

Transcript of Reporter's Minutes.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York.

Barclay, 8477.

1170 KINGS COUNTY LIGHTING CO.

vs.

NEWTON et al.

61 Broadway,
August 31, 1920—2.15 P. M.

Met pursuant to adjournment.

Present:

The Master.
Mr. Moran.
Mr. Hill.
Mr. Jackson.
Mr. Deegan.

ANDREW J. GONNOUD, recalled, testified as follows:

The Master: What do you desire to prove by Mr. Gonnoud?

Mr. Hill: I desire to show the number of employes in the various departments during 1916, 1917, 1918 and 1918, and then compare the number of employes with the amount produced, amount of gas produced.

The Master: Has he got the number of employes, approximately?

The Witness: I have the number of employes approximately on certain days in each one of these years. That is what Judge Hill asked for—the first Tuesday in January.

1171 Mr. Moran: You only took one day?

The Witness: Well, that is what you asked for—one day in January and one day in July.

Mr. Moran: Two days.

Mr. Hill: Two days each year, then?

The Witness: Each year.

The Master: Well, give*n* them then, will you?

Mr. Hill: Yes.

Cross-examination.

By Mr. Hill:

Q. What days did you select?

A. January 4th, Tuesday, 1916.

Q. The first Tuesday in January?

A. Yes, and the first Tuesday in July.

Q. In each of the four years, you have the employes on the first Tuesday of January, and the first Tuesday of July; is that right?

A. Yes.

Q. How many employes did the plaintiff have—and state it by departments, if you have it that way in your data—on the first Tuesday in January, 1917—or 1916, is that?

A. 1916.

Q. 1916.

A. Works, 52; shop, 65; commercial, 44.

Q. In June, 1916?

A. July, 1916.

Q. Well, the first Tuesday in July, 1916?

A. Works, 49; shop, 55; commercial, 45.

1172 Q. The first Tuesday in January, 1917?

A. Works, 54; shop, 50; commercial, 45.

Q. The first Tuesday in July, 1917?

A. Works, 50; shop, 48; commercial, 59.

Q. The first Tuesday in January, 1918?

A. Works, 55; shop, 37; commercial, 78.

Q. Now, July, 1918?

A. Works, 55. Just here we have the pay-roll combined, the shop and works monthly payroll was combined on this.

Q. In July, 1918?

A. July, 1918; that is, the monthly payroll.

Q. All right.

A. But the weekly payroll was separate. Now, the works, 55; shop, 14; commercial, 93; shop and works monthly, 34.

Q. That is, you would add together 55 and 34 and 14—that is 103, and that would be the same work performed by that 103 that was performed by the 55 and the 37 in January, 1918?

A. Not the same work, but in the same department.

Q. Well, the corresponding duties?

A. Yes.

Q. All right. January, 1919?

A. Works, 70; works and shop, monthly, 33; commercial, 93.
Q. Have you got shop alone?
A. Distribution weekly, 10; that would be the shop.
Q. July, 1919.
A. Works, 56; works and shop, 22; commercial, 101; distribution weekly, 13—that would be the shop. Of course, the
1173 shop includes the outside department, too, the street department.
Q. January, 1920?
A. Works, 75; works and shop monthly, 30; commerical, 107; distribution weekly, 38.
Q. 75, 30, 107 and 38?
A. Yes.
Q. And what is your commercial?
A. I gave it—107.
Q. July, 1920?
A. Works, 82; works and shop monthly, 23; commercial, 116; distribution weekly, 49.
Q. What were the hours of labor? How do the hours during which the employes labor compare in those various years? Was there any change in the hours of labor—shortening of a day?
A. No, not to my knowledge.
Q. There has not been since you went there in 1918?
A. No, no shortening of the day that I know of.
Q. They work how many hours a day?
A. The men at the works work eight hours, eight-hour shifts, three shifts a day.
Q. Yes.
A. The men at the shop work eight hours, and the employes at the commercial office work seven and a half hours. Now, there might have been some minor changes in some of the hours there, in some of the watchmen and so forth. I know there was in the engineers, which switched from 12 hours to 8 hours a day.
Q. How does the amount of your capital account compare now with any previous time, as to whether it is now larger or
1174 smaller than in the past?
A. The capital account is larger now than it was.
Q. That is, it is larger now than it has been at any previous time in the history of the country?
A. Yes.
Q. Have you any other data on the employes there which you get out, which you thought would be helpful, along the line I have been inquiring?
A. No, I haven't any with me.
Q. You went there in January, 1918?
A. Yes, I became an employe of the company in January, 1918—1919 it was.

Mr. Hill: I don't know of anything further I wish to ask Mr Gonnoud. Is there any further with Mr. Gonnoud?
Mr. Jackson: Just a minute.

By Mr. Jackson:

Q. By the way, that $225,000 borrowed at the bank since August, 1919, I think it does not appear what the rate of interest was. I had in mind to ask you that.

A. Six per cent.

Q. And what bank is that?

A. Central Union Trust Company.

Q. That is in New York City?

A. New York City, 80 Broadway.

Q. Did you get word from Mr. Moran to bring some samples of your stationery?

A. Yes, just about an hour or so ago I received word from
1175 him.

Q. Have you had a chance to do it yet?

A. No; it would be impossible to get those things over now, on account of the strike conditions over there. It would be impossible to get those over there on account of the strike conditions at present, today. We could not possibly get them over here.

Q. Mr. Jackson: Well, as the question of time and expedition in this case, and as to any disposition of the defendants to unduly delay it, is somewhat under consideration, I will just read on the record, if you don't mind, that I made a request of Mr. Moran this morning that he produce, as I would like to ask Mr. Gonmoud about it this afternoon, a sample of every form of financial or accounting stationery or of statistical record that the company uses, in addition to the books in evidence.

Q. Now, you think that you could produce those when, Mr. Gonmoud?

A. Well, we could get those over here by to- — believe.

—. — you think in the morning or——

A. Well, it is ha- —.

Q. It depends on the transportation?

A. It depends largely upon that. You have to get those—of course, we have to collect——

1176 Q. Those are not very numerous, are they?

A. Oh, yes. Carrying on any business has a multitude of forms.

Q. I know; I don't want any other business than yours. And that would be about how many sheets of paper—inside of fifty?

A. No.

Mr. Moran: More than fifty?

The Witness: Oh, yes; more than a hundred.

Q. About a hundred?

A. I imagine. I could not say offhand how many forms.

Q. Well, they have them all available so that it would be a very short time to get them out, wouldn't it?

A. Yes, it would be a comparatively easy matter.

Mr. Moran: You people might have helped yourselves to those things, you know, whatever we had.

Mr. Jackson: There might have been a lot of things done a year ago, but this is only asked this morning.

Mr. Moran: Well, it was only asked of us *as* one o'clock.

Mr. Jackson: I am not going to argue the point of time in this case at all, because I am going to get exasperated if it is mentioned any more, and when I get exasperated I use vulgar language, and I never like to use vulgar language, so I don't want to get excited today.

1177 Q. Mr. Gonnoud, I think there was another item that did not appear on the record, and that was the number of hours per lamp per year of your street lighting?

A. I don't know what it is offhand, but it is in the public service Commission report for the year 1919. It is based on the City schedule.

Q. Will you accept whatever appears there? That is your report?

A. Yes, that is my report.

Mr. Jackson: Well, we will make that statement then, if that is satisfactory. I think there is nothing else, just now.

Redirect examination.

By Mr. Moran.

Q. Mr. Gonnoud, you said that the commercial department in July, 1920, had a payroll of 116 employes?

A. Yes.

Q. In January, it had 107?

A. Yes.

Q. What employes are carried on the commercial payroll?

A. On the commercial payroll are carried as shown there all ledger clerks in the accounts receivable department, the general bookkeepers, cashiers, collectors, meter readers, stenographers, messengers, addressograph operators, tabulating department employes, and so forth.

Q. Will you take the 116 employes. How many of those are males and how many are females, if you can tell? Half girls?

1178 A. Possibly about 60 per cent are girls, 40 per cent men.

Q. Now take the 116. Have you got a piece of paper there?

A. Yes.

Q. And pencil. Divide those up. Tell me how many meter readers you have.

Mr. Jackson: Are you going to concede that the females are deadlier than the males?

A. On that particular day, we had, I think, 11 meter readers; that is, we were breaking in new meter readers for meter readers who were about to leave the company. You see, in any tabulation of this

nature, you have got to take into consideration the labor turnover. We always have, especially in these times and in the commercial department in particular, people who are leaving the company and people who are breaking in to their positions, so that any one day does not mean anything. The next day might have shown possibly 104 people instead of 116.

Q. How many meter readers, regular meter readers, do you have now?

A. We have eight.

Q. Eight regular meter readers?

A. Yes, sir.

Q. How many meter readers?

A. We have eight, as a rule.

Q. You have had that number during this year, this current year, practically?

A. Yes, we had seven during 1919. During the year 1919,
1179 we had to put on a supervisor there in order to get better results from the class of labor we had. The class of labor is much inferior to what it was; that is, we can't get the results from them. It is due to the fact that they can go out and get other positions and they won't be pushed. You can't get the work out of them that you could formerly, and therefore, you have to have more employes and you have to have new employes breaking in all the time. In the meter reading department we have to have boys or young men who are learning to read meters. We can't send a green man out to read meters.

Q. You say you have eight regular meter readers?

A. Yes.

Q. And that you had seven in 1919?

A. At the beginning of 1919, yes.

Q. Are these men busy reading meters all day?

A. Yes, they read meters every day.

Q. How many hours do they work?

A. They work seven and a half hours, or enough to finish the book. If they do not finish their trip, they have to work sometimes a little longer.

Q. Does a meter reader cover as much ground as formerly?

A. Yes, he reads more meters now than previously.

Q. How is that brought about?

A. Increase in business.

Q. You mean increase in number of consumers?

1180 A. Increase in number of consumers, and they are——

Q. They are more compact on the street, is that the idea?

A. Not alone that, but more compact in their territory. There is a house here and there, where there weren't houses before in some of the widely scattered territory.

Q. Can you dispense with any of your meter readers?

A. No, we can't possibly dispense with any of them.

Q. Do you know what wages they get? Do you recall from memory?

A. They get—when learning they get $55 and $60, and when they become proficient, they get $70, and in addition to the $70, they are paid a bonus, what we might call a bonus. It is 25 cents for bringing in efficient work, bringing in as complete a book as possible, which on the number of trips we have could not amount to more than $5 a month.

Q. Now, you have collectors?

A. Yes.

Q. They are on the commercial payroll?

A. They are on the commercial payroll.

Q. How many of them now?

A. 18.

Q. And does it run about 18 during 1918?

A. About 18 all along during 1919 and 1920.

Q. Are they men and women?

A. They are all men.

Q. All young men?

A. No, not all young men, some of them are older.

Q. And what do they get, do you recall?

1181 A. They get paid a base salary of $85 a month, and then they get an additional compensation for efficient work, based on the number of collections and the amount of money they collect.

Q. Are they busy all the time?

A. Yes, all the time.

Q. Out on the district?

A. They are out on the district all the time.

Q. Do they collect from all the consumers, or do some of the consumers pay by check or come in?

A. Some of the consumers pay by check and by mail; other consumers pay at the office of our receiving tellers; some at the main office, and some at either of the two branch offices.

Q. Can you tell us whether a large percentage of your revenue was sent in by check, or do you have to go around and collect it?

A. We have to collect—we do collect over a third of the amounts by collectors.

Q. By collectors going around?

A. Yes.

Q. Are these 18 people busy?

A. Yes, they are busy all the time.

Q. Can you dispense with any of them?

A. No.

Q. Now, you have ledger clerks, consumers' ledgers clerks?

A. Yes.

Q. How many of these?

A. We have 11 regular consumers' ledger clerks.

Q. Has it run about that number in 1919?

1182 A. It ran about 10, up until November, when we put on an extra clerk.

Q. How many consumers' ledgers have you?

A. We have 75.

Q. And you have 11 clerks to handle those?

A. Yes.

Q. Are they busy?

A. From the time they get there in the morning until they go home at night, they are busy all the time.

Q. Are they boys or girls, men?

A. Girls.

Q. All of them, exclusively?

A. Exclusively girls on the ledgers.

Q. And what pay do they get?

A. Well, they vary from $60 to $85, and we have two girl supervisors who get $95 per month.

Q. They supervise—are they in addition to the 11?

A. They are in addition to the 11. And we have some juniors there beside that, who assist in getting out—getting the work out. You see——

Q. You have then 11 consumers' ledger clerks, two assistants and two supervisors?

A. No, two supervisors, and I think there are at the present time, three or four of those other girls we keep there for breaking in and for assisting in the work, carrying on the general work around balancing time and so forth. They are busy all the time.

Q. What do you pay your assistants?

A. We pay our assistants about $50, $50 up to $65 a month.

1183 Q. And are those consumers' ledger clerks busy all the time?

A. Yes.

Q. Can you dispense with any of them?

A. No.

Q. Could you in 1919?

A. No.

Q. What other clerks?

A. We put in considerable night work in 1919 and part of 1920, due to the shortage of help.

Q. Are these consumers' ledger clerks old employes or recent employes?

A. Working on the consumers' ledgers they are mostly recent. There are only one or two that have been there over—we have about two or three, I should say, who are there over a year and a half.

Q. Now, let us go through this as rapidly as possible. What other clerks have you got in there, Mr. Gonnoud?

A. We have clerks working on the general books, we have the clerks——

Q. Now, just a moment. You have general bookkeepers on the general books?

A. General books and subsidiary records.

Q. How many of those?

A. We have one general accountant, who has an assistant, one payroll man, and one man who keeps sundry accounts receivable, and two men on the material and supplies. That is our accounting division.

Q. Those are what you call the bookkeepers?

A. Yes, those are bookkeepers. Bookkeepers and clerks, we call them.

1184 Q. Can you dispense with any of those?

A. No, we could not dispense with one of them.

Q. How many stenographers on your payroll?

A. Six.

Q. Six stenographers—what do they do?

A. Our stenographers write letters to the consumers, collection letters and make up all the orders for purchase of material and supplies. They make up lists of the tickets that are passed through the several departments, they make up monthly statements and they do all that is required of the stenographic department.

Q. The entries in your books are made on the typewriter, are they not?

A. No, they are not. The journal entries are made up on the typewriter, but the entries in the books are made in pen and ink. But the journal entries from which they are posted are made up on a typewriter.

Q. Have you any messengers on this payroll?

A. Yes, we have at the present time four messengers, I believe.

Q. What are their duties?

A. They carry the interdepartmental mail. Over there we have the main office at 48th street, and then we have the two branch offices, and then we have the shop and the works. They are so widely scattered that the departmental mail has to be carried between those several departments. Besides that they carry the mail

1185 and papers from one department to another in the main office. We are situated there in a building, an old converted flat building, and it is inconvenient getting from one department to another—no elevators—and they are required to run from one department to another. They also do the mailing, they mail out all the correspondence.

Q. Are they busy most of the time?

A. They are busy all the time.

Q. What are they—young boys?

A. They are young boys.

Q. You pay them $15 or $20 a week?

A. No, we pay them about—I think they average from $35 up, a month.

Q. Name some more now of the leading groups in this establishment?

A. We have a department called the tabulating and addressograph department. In the tabulating department we have four clerks, and in the addressograph department we have two. An addressograph operator receives $95 a month; his assistant receives $60. In the tabulating department, the head of that division is a girl who receives $100 per month, and she has three assistants, two machine operators on the Burrough machines who receive $70 per month, and one other girl assistant who takes care of the posting of the irregularities—that is, the cut off tickets, and verifies into the index

books—she receives $65. And in the cashier's department,
1186 we have the cashier—we can't dispense with any one of those in that department. In the cashier's department we have the cashier and his assistant and the paymaster. They take care of all the receipts and disbursements of the company's funds, including the paying off of the men, the help. Then we have also in that department to consider the tellers. There are two tellers at the main office, and one teller each at the branch offices, who receive the payments made by consumers. Then besides that in the branch office we have a branch manager, so-called branch manager, at each of the branch offices. They receive—the one at Bath Beach, I believe, receives $75 a month, and some commission from the sales of appliances, and the man at Bay Ridge office receives about that same salary. I can't say offhand what his salary is, and a commission.

Q. On this commercial department do the people's names appear who are in the sales department, on the sales of gas appliances?

A. Yes, the name and occupation. The name and occupation of everybody that is working for the company.

Q. How many of those are on there?

A. In the sales department there are about three, three regular salesmen.

Q. Do any men in this department assist in the operating, the physical operating of the plant?

A. Excluded from its physical operating. It is a very
1187 hard matter to take any one day and segregate the number of men who are working on capital work, that is, extensions and improvements, such as mains and services, and the men who are working on operating. In our shop we have men who are continuously laying main and services, that is, during normal times, and at the works we have men who do capital work, men of course, in the——

Q. (Interrupting.) Men in this list that you furnished to Judge Hill, the numbers given are not necessarily the numbers of men engaged in the—whose time is charged to the expenses of operation?

A. No.

Q. It may be part charged to operation and part to capital?

A. Yes, part to capital.

Q. You have in the commercial department some men who turn on and off gas, don't you?

A. Yes.

Q. Three?

A. We have three in there who turn on and off gas and receive $95 a month.

Q. In the commercial department since you have been there, has there been any surplus of employes?

A. Not since I have been there. The fact of the matter is it has been somewhat the opposite, we have been short handed, due to the labor situation. We have not been able to pay as high salaries, as other companies, and therefore we can't get the employes.

1188 Q. You mean you can't get the best employes?

A. We can't get the best efficient employes, and we can't

keep employes very long. They are leaving. Going back over that period—of course, during the war period, before we entered the war we had all male bookkeepers, and they did a great deal more work than the female bookkeepers. They were more efficient, they had been with the company for years and years and they knew their business, and we did not need to put in any controls to insure the accuracy of their work.

Q. Your quarters there are cramped?

A. They are considerably cramped.

Q. Is it your opinion that you could get along with fewer employes in the commercial department if you had more commodious quarters and better arranged quarters?

A. Yes, we could. We could cut down somewhat—not very much, however—we could cut down a few, and then the whole situation is such over there that you see it has an effect on the morale of the organization. They feel cramped, they don't do as much work as they could if they had better quarters. There is a lot in the psychology of that, a person who has nice quarters and a nice desk to work upon, they can do much more work than they can in cramped quarters.

Q. These are the same quarters the company has had for a number of years?

A. Yes, I believe so.

1189 Mr. Moran: That is all.

Recross-examination.

By Mr. Hill:

Q. You say that the data which you have given me here as to one day does not mean anything?

A. Well, yes, I said that, I believe, it is on the record.

Q. Well, is that the fact?

A. When I said "anything," perhaps I should have qualified that and said that it is not a criterion by which to go.

Q. Can you give me the average by the year?

A. Yes, we could work up the average for the year, the average number for the year.

Q. Would that be a better criterion?

A. It would be a better criterion, but still in all it would not tell the whole story. In order to have the whole story you must know the amount of turnover we have over there, the amount of employes we hire and the amount of the employes that leave the service of the company.

Q. That is, you must know the percentage of labor turnover?

A. You would—you ought to have the labor turnover, and then, of course, you ought to have the class of labor you have.

Q. Well, prior to 1919 meter readers were not borne, were they? They had to be trained then, didn't they?

A. They had to be trained, but we had men who stayed
1190 with the company longer. Positions were not so available then, and they stayed right with the company and stayed right with us.

Q. Oh, you did not have to train as many, and your labor turnover was not as great?

A. No.

Q. How long does it take to train a man to read a meter?

A. Well, it is according to the man. Sometimes it only takes a week, sometimes it takes several weeks.

The Master: Judge, how excessive do you claim the labor item is?

Mr. Hill: Well, now, your Honor, in 1917——

The Master: I mean have you worked it down to cents per thousand cubic feet at all?

Mr. Hill: Pretty nearly. Take 1917, they had 98 men in their works and shops. In 1920, they had 151. They sold in 1917, 1,232,000,000 cubic feet of gas; they only increased that a few million feet in 1919, but the first six months of this year they have increased it about 400,000,000, about a third.

The Master: Have you worked it out according to the payroll? What I am trying to get at is the cents per thousand cubic feet?

Mr. Hill: I haven't worked that out——

The Master: Supposing they had three or four hundred
1191 men there one year and only a hundred the next year and the expense per thousand feet is the same; it does not make any difference—we don't care how many men they employed.

Mr. Hill: The wages have gone up, and so the cents per cubic foot has gone up, as will appear in these schedules. The explanation which will be quickly given by the plaintiff to that is the marked increase of wages. Therefore, I thought that if I got some fair criterion as to the number of men—while I recognize wages have gone up so that the price, the cents per thousand cubic feet has gone up, gone up markedly—that is, I concluded from the repairs, they spent three cents plus in 1917 for repairs, and in 1920, they spent 8 cents plus for repairs per thousan l cubic feet.

Mr. Moran: Oh, no.

Mr. Hill: Absolutely. I will just call your attention to it and furnish you the data. I ask you to refer to No. 13. Take labor and material on the first page, you will find 3.36 cents. On the second page, I will ask you to just add up.

Mr. Moran: I have got it all added up.

Mr. Hill: All right; what does it read?

Mr. Moran: I have it all added up. 7.51 per thousand cubic feet.

1192 The Witness: Sold.

Mr. Hill: Now, let us see. On the second page of D, you take .9 of a cent, 1.65, .48, 1.4, 3——

Mr. Moran: Let me suggest, those are not carried out far enough. What you ought to do is add up the dollars, and carry it out to cents per thousand cubic feet.

Mr. Hill. Using the cents per cubic foot you have furnished, it is 6 plus, if my additions are correct.

Mr. Moran. I am afraid your additions are not correct. I had it checked three times.

Mr. Hill. I am very proud of my ability in that line.

Mr. Moran. I have had it checked three times.

The Master. We are on this other question now, let us get through with that.

Mr. Hill. All right. I simply cited that as an example of everything. The cents per thousand cubic feet has gone up markedly, but the explanation for that is the marked increase of wages. Now, while I recognize that wages have increased, the same amount of work should be done by the same number of men, so I have
1193 gone to the number of men and then thought to compare that with the thousand cubic feet.

Mr. Moran. You are talking about the works now?

Mr. Hill. I am talking about—Yes, I was talking about that, just to answer that question for his Honor.

Mr. Jackson. It illustrates that cents per thousand cubic feet does not always show the true cost in proportion.

Q. Now, in the figures which you gave me for 1917, you showed 15 employes in the commercial department; am I right about that?

A. Yes.

Q. That included meter readers, did it not?

A. Yes.

Q. That included collectors?

A. Yes.

Q. And it included an addressograph department?

A. The addressograph, yes.

Q. That you have mentioned?

A. Yes, the addressograph, not the tabulating.

Q. It included any messengers which you had?

A. Yes.

Q. And that force handled the sales of 1,047,000,000 cubic feet of gas sold, did they not?

A. Yes.

Q. Now, in 1919, you had over twice as many, did you not?

A. Yes.

Q. And they only handled——

A. No, in 1919?

Q. Yes.

A. Yes.

Q. And they only handled a fifth more of gas, did they,
1194 that was sold? Is that right?

A. Yes, I will take your figures for that.

Q. Well, it is——

A. Yes.

Q. It may be between a fifth and a quarter?

A. Yes, that is correct.

Q. So that your number of employes, both in your shops and

works and in your commercial department, has increased in much greater proportion than your sales, has it not?

A. Yes, it has there, yes, but the different kinds of—when we speak of the commercial department here, we say 93, but 93, for instance, in 1919, included a good deal more girls or women labor than the 45 in 1917 or 45 in——

Q. How do you know that?

A. What is it?

Q. How do you know it?

A. I know it——

Q. Were you there in 1917?

A. No, but the payroll—I have looked at the payrolls, and the names are right there.

Q. How many women were there in 1917?

A. Offhand, I think there were about four or five; I could not say, but I think that is about the number of women that were there.

Q. How authentic is that recollection of yours?

1195 A. Why, it is authentic.

Q. There used to be women bookkeepers at that time, were there not, back in those early days?

A. There were women bookkeepers, but not in our department.

Q. And stenographers?

A. We had a male stenographer at that time.

Q. But you had to train a certain number of men then, just as you do now?

A. No.

Q. You had to train some of them, did you not?

A. Very few. Those men stayed with us for years and years.

Q. But you had to train some?

A. Very, very few.

Q. The men, as I suggested before, were not born meter readers back in 1917, were they?

A. They grew up with the company, however. They were with the company for years.

Q. They were trained?

A. Yes, they were trained.

Q. And you had certain labor turnover, even in that time, did you not?

A. There was very very little turnover.

Q. But you had some turnover?

A. Oh, we always have some slight turnover.

Mr. Hill: That is all.

Redirect examination.

By Mr. Moran:

Q. Didn't the change from men to women take place since you have been with the company to a large extent?

1196 A. Yes, sir.

Q. You went there as a regular employe in 1919 and you worked there as an accountant in 1918?

A. Yes, sir.

Q. You witnessed this transition from men to women, did you not?

A. I did, yes, sir.

Q. You witnessed the green help coming in from day to day?

A. I did.

Q. And you were aware that they were not able to do the same amount of work that the men did who were in that same employment?

A. Yes.

Q. You witnessed that?

A. Of course.

Q. And you know it?

A. Yes. I saw the amount of work that they could turn out. Why, the figures showed there. It just shows we have more employes and they are doing more work, of course, than the 15, but the increase is not in the same proportion, to the amount of gas we sold, because of the inefficiency of the labor which we are getting now and the great amount of turnover.

Recross-examination.

By Mr. Jackson.

Q. Now, there is also a very natural reason in the fact that given a certain plant, you can always produce from there on a greater amount with a less proportion of additions to your working force, can you not?

A. All conditions being equal, yes.

1197 Q. That is the reason why, having your plant over there at the present time as it is, you can increase your production and decrease the unit cost——

Mr. Moran. I object to that. I do not think the witness is qualified; he has not been offered as any expert on that.

Mr. Jackson. The witness has been testifying outside the sphere of just bookkeeping in answering your questions, and I think we are entitled to so much of his opinion——

The Master. Read the question.

Mr. Jackson (continuing): That is along the same line as the opinion that he has been giving.

(The question was read by the Reporter.)

Mr. Jackson: That is——

Mr. Moran: Just a moment. Let the Court rule on that question, please.

Mr. Jackson: Wait until I finish the question.

Q. (Continuing:) That is, I mean to say that you can from now on increase your production at a greater relative rate than you need to increase your plant or your working force, can you not?

Mr. Moran: Objected to. The witness is not qualified to express an opinion on any such question, involving the whole gas
1198 making field of manufacturing, distribution, everything in the world. He is not offered here as such a witness. The plaintiff does not accept him as a witness qualified to express an opinion on any such subject.

The Master: He has been testifying to the results, from accounting standpoint of the operation in the past, but I think you have to stick as much as possible to the accounting system, and the auditing of this company's books.

Mr. Jackson: This question is only asked this witness in view of the last question that his counsel asked him.

The Master: As to whether since 1915, from the accounts as he has examined them, he can answer that question, and if so, what the answer is.

Mr. Jackson: I will accept that amendment, Mr. Master, although it is possible the proposition is one of common knowledge. However, did you hear the Master's amendment?

The Witness: Will you read it to me?

The Master: Simply state whether from an examination of the books, from your knowledge of the financial affairs of the company since 1916, the unit cost of production has decreased in pro-
1199 portion to the account of the increase in the amount produced. That is what we want to know, is it not?

Mr. Jackson: Surely.

Mr. Moran: Well, I object to that. The costs are all here, received in evidence. They show on their face that instead of decreasing it has increased by 50 per cent or more.

The Master: We will let him state that, then. It is something he has some knowledge of, though. He has testified from the books, the books are in evidence, and the papers could be gotten to answer Mr. Jackson's questions—from the books, but he prefers to ask the witness. The witness may answer. Objection overruled and exception.

Mr. Moran: If the witness wants to look at any paper I presume he can do it.

The Master: Oh, yes.

A. For the whole cost there has been no reduction, as a matter of the whole, that is, the complete cost. But in some of the departments, for instance, in the commercial department——

Q. Have you in mind that you are answering the question?

Mr. Moran: Yes, and he has answered it fully.

1200 Mr. Jackson: Well, I think not. I would like to have the question read in its entirety to the witness because I think it can be answered by yes or no.

(The question was read by the Reporter as follows):

"Q. That is the reason why, having your plant over there at the present time as it is, you can increase your production and decrease the unit cost; that is, I mean to say that you can from now

on increase your production at a greater relative rate than you need to increase your plant or your working force, can you not?"

Mr. Moran: Just a moment. That was objected to. The Master propounded the question to the witness and that was the one that he was answering.

The Master: Read my question.

(The Reporter read the question as follows):

"The Master: Simply state whether from an examination of the books, from your knowledge of the financial affairs of the company since 1916, the unit cost of production has decreased in proportion to the amount of the increase in the amount produced."

Mr. Jackson: Now, read the answer.

(The Reporter read the answer.)

The Master: I think he is answering the question.

The Witness: The cost of labor in that department has
1201 decreased in 1920 over 1919 in cents per thousand.

The Master: Where does that decrease show in any of these exhibits?

Mr. Moran: On the last one there.

(The witness indicates on exhibit to the Master.)

The Master: Is there anything more from this witness?

Mr. Hill: I would like you to furnish me the yearly average of men, if it will be more and a better criterion than the two separate days which you have given. Will you do that?

The Witness: Yes. It will take some time to do it, that is the only thing.

Mr. Moran: How long will it take?

The Witness: I have not any idea; it will take ten days to do it.

Mr. Moran: It will take ten days to do it.

Mr. Hill: The two days was your suggestion to me, was it not before this hearing started?

The Witness: No, I think it was your suggestion. I was trying to explain at that time the condition of affairs, especially in the commercial department, about the great turnover, and the great change in the number of men, and tried to impress that the cost per thousand was the only thing that would possibly govern
1202 there, and you stated or said that you would like to have two days, and I tried to raise an objection there, but you insisted that you thought that that was the best way to handle it, and I said I would get it for you.

Mr. Hill: That was three weeks ago, was it not?

The Master: Let me ask, is it your contention that if he shows the average it will be in excess of the amount shown on these days?

Mr. Hill: It will be just the same, I think.

The Witness: It won't be just the same.

Mr. Jackson: This witness has attempted to destroy the value of the evidence submitted, of the schedule, by showing it would not be taken as a fair criterion. Of course, what we want is a fair criterion, something that is of value, and something that does mean something.

Mr. Moran: You see, Mr. Master, it appears that the defendants make the contention that the company is expending excessive amounts for employes, and to establish that they are seeking to make a comparison of numbers, one year with another. The witness, in connection with his testimony has said that numbers are not reliable. For instance, he points out the commercial department, where there were 11 meter readers as against
1203 eight regular meter readers. At that time they had three meter readers, novices who were picking up the business, and they appeared on the payroll on that day. It would not be fair to compare the 11 meter readers at that time with whatever number they had in 1917; obviously, the witness was correct about it, he pointed that out. Take the number of men engaged in the works department, on a given day or even during the year, and compare it with the number during another year. That won't prove anything, because these men work in part on capital expenditure which do not appear on these expense accounts at all. We might have a lot of men working putting in our boilers down there in the yard, doing a lot of capital things. It won't do to compare them here. And in fact, it won't do to compare numbers at all.

The commercial department seems to be the point of attack principally in numbers and point of expenditures, and that would naturally show the greatest increase, on account of the fact that there they can use girls instead of men. Now, it is a matter of common knowledge that the labor market has been in an unsettled condition for a couple of years anyway; during that time we have had to get whoever we could to do our bookkeeping and so forth, and we have girls. In your absence, I think it was, the
1204 witness testified that a third of the people in the commercial department are now girls.

The Witness: Over fifty per cent.

Mr. Moran: Over fifty per cent are now girls, whereas back in 1917, the period they are seeking to compare, out of all that were there, there were only four or five girls. Two girls it takes now to do the work of one man before. It seems this way of charging this plaintiff with extravagance is illogical and unfair and does not bring us any place. The test is whether we have any people there in the period in question, 1919 and 1920. I take it we are interested in at the present time—whether there are any people there who can be dispensed with. We have eight meter readers; the witness says they are busy going about the streets all day long. We have eighteen collectors who are busy all day going about. We have four stenographers or five, as the case may be, and they are busy going on doing their work.

Now, it would seem to me that it is for the defendants, if they challenge this, to go at it in some more direct way and point out some person whose services can be dispensed with or some
1205 expenditure for help that is unnecessary. I know this about the company: The number of help in the commercial department, even if conditions were normal won't increase gradually;

there will come a time when they have got to open a new set of books, increase the number of consumers' ledgers, and they will have to take on that day 30 per cent, probably more, bookkeepers, than they had on the day before to handle that set of books.

Take the condition over there at the office, your Honor was over there and saw it. It was no place for a business of this magnitude to be carried on. Now, back in 1917, with the business they were doing then, and back in 1916, with the business they were doing then—and, by the way, I may say their business has increased over a hundred per cent since 1915—they are in the same quarters that they had been, and it is not at all surprising perhaps that the number of people who could handle the business in those quarters in 1916, when you come — crowd the number that is required to handle it now, they are pressed for space.

It seems to me if they are going to challenge the good faith of the plaintiff in these expenditures for help, the defendants should go at it in some more direct way, in some way that is convincing, and when they say that we have more help at the works than
1206 we need there, say that we have idle men, that we have got more gas makers, more gas makers' helpers, more firemen, more something, and point them out. It was suggested that the witness now get up something to test their claim, which the witness says will require ten days to work out. I was present when Judge Hill discussed this matter of making those comparisons, and we agreed with what the witness said, that we could not work up anything that would be reliable or convincing, because it has all got to be compensations here and adjustments there, to account for it all.

The Master: Any further questions of this witness?

By Mr. Hill:

Q. Your books would show how much labor is charged to capital in the aggregate, would they not, in any year?

A. Yes. It will not show it in the aggregate. The Public Service Commission report shows that.

Q. The books must show it, do they not?

A. It does not show it in the aggregate. The books show it, yes.

Q. It shows by a computation and you can get the aggregate?

A. Yes, sir.

Q. And your books show the expense of labor that goes into production and distribution, do they not?

A. Yes.

1207 Q. That will give you an ability to allocate your labor in capital and production and distribution, without any great trouble, will it not?

A. The amount of money, yes; but we were not able to establish the number of men that agree with that amount of money very readily.

Mr. Hill: I feel after Mr. Moran's statement that we are directing our attention, particularly, to the commercial department, and his very lengthy discourse on that. I should not permit that statement

to go unchallenged. We are directing our attention also to production and distribution, and so we state, the figures which this witness has given us, if they are dependable, show an increase of 65 per cent in labor in the works and shop from 1918 to the present date, and that the increase in the sale of gas during that period is not over 35 per cent.

The Master: Is there anything more?

Mr. Jackson: I want to suggest, without making any reply to Mr. Moran, when he speaks of the comparatively convincing way of proving things, he is relying in this case upon the figures in his books, plus the speeches of counsel and the opinions of experts, and we so far are relying upon the facts and figures of his books.

By Mr. Jackson:

Q. Now, then, I would like to ask how does the man hours per thousand cubic feet sold in 1918 compare with 1919?

1298

A. It would be ——

Q. Can you show that by some ——

A. It would be about the same.

Q. (Continuing:) By some schedule from the books. I will not accept your ——

The Master: Have you got that?

The Witness: No, I have not.

The Master: Then, just say so, that you have not got them.

The Witness: No.

Mr. Jackson: I won't accept it, then, and I will move to strike it out.

Q. But first, I will say, can you tell without referring to the books?

A. No.

Mr. Jackson: Then I move to strike out his answer, when he says it was so and so.

The Master: I will strike it out. He says he cannot produce them.

Q. Can you produce a statement showing how the man hours of gas sold per thousand cubic feet in 1918 compares with 1919?

A. Such a statement could be produced, yes.

Q. Will you please do it? How long will it take you?

A. It would take ten days or two weeks.

1299

Q. And the other statement that Mr. Hill asked to have prepared—this average statement—you say that would take about ten days?

A. It would take all of that. Ten days or two weeks; I could not promise just when I would finish it.

Mr. Jackson: Then in order to save the time, in case that these hearings should be otherwise closed before that time, I think we could arrange to have that statement, subject to check, delivered to counsel and inserted as one of the exhibits, could we not?

The Master: I do not think that I will adjourn this hearing for a week or ten days.

Mr. Jackson: I do not wish to adjourn it.

The Master: In order to have these compilations made. In the first place, I am trying to think how the District Court—I, first, and then the District Court Judge—has got to look at these facts. We have got to get some workable composition to find out what it costs to make gas. Now, it does not help me at all to know how many employes there are at the gas company. I have got to know a great deal more about it—the work they are doing, the character of their help, the amount they are being paid, and a great many other considerations, before it means anything. When you present to me a schedule showing that in 1917 there were so many man hours, that so many men worked for so many hours at such a cost, that
1210 in 1918, they worked for so many hours at such a cost and so on down, it does not mean much to me. It seems to me to be the only way you can go at this question, as to what it costs to make gas, to adopt a unit per thousand cubic feet, and apply that standard to every possible expense that you have.

Now, if you want to attack that amount and show that it is too large in any particular point, I want to hear it. With reference to this labor question or the commercial expenses at any rate, from these schedules that have been put in, the cost per thousand cubic feet is somewhere about five or six cents; the other labor and various other expenses—promotion expense, for instance, I suppose there is some labor in that, I do not know whether there is or not, and office expense—it is less than a cent per thousand cubic feet—and your distribution expense is somewhere around four or five cents per thousand cubic feet. The street lighting expense is below a cent per thousand cubic feet.

Let us assume for the moment that counsel for the defendant can prove that there has been some extravagance in labor, surely they could not expect or hope to knock off more than a cent on the unit there that is given by these figures; on the other hand, these various compilations that have been put in show, for 1919 at any rate,
1211 at net cost per thousand cubic feet of gas of materials alone as almost 40 cents. Now, that is a big item; then the oil, the coke, and so forth. If there is going to be any drastic reduction claimed by the defendant, they will have to claim it on those items, and I do not think that I am justified in extending the hearing to take any additional evidence with respect to the present cost of labor at this plant. There is sufficient in the record. There may be a contradictory assertion and explanation and so forth, but there is sufficient in the record to permit the District Court to make a finding as to the cost of labor in this case, in my opinion, and for that reason I do not believe I am justified in extending the hearings for the purpose of making any additional compilations respecting the labor item. I think it has been gone into very fully.

Mr. Jackson: I will say briefly as to that, of course, as to whatever item may be attacked, and knocked off, I think as long as i.

is ascertainable, it is the duty of the defendant to attack it and knock it off, even if it is a small item. We claim that the——

The Master: Well, I do not think you can do that by simply getting up a schedule of hours. I do not see how you can.

Mr. Jackson: That is the point. I just wish to remark on
1212 that a moment. We claim the cost per thousand cubic feet that the plaintiff has adopted throughout as his standard is not always a full and fair showing of the facts, as bearing upon the issues in this case, and that system of showing, when confined to that and no other illustrative method or regrouping of figures to show the comparisons upon some other basis than the cost per thousand cubic feet—that when you confine your inquiry simply to the cost per thousand cubic feet that method may be used by accountants as a camouflage for hiding the true state of facts.

The Master: That is perfectly true, but you have developed here that they had more employes *these* year than they had several years ago, and have attempted to explain it. Now, you have the contention of both sides.

Mr. Jackson: I do not know as counsel for the plaintiff fully apprehended the drift of the figures, and I do not know perhaps that it would be necessary, as long as there is a reasonable regrouping, and he has offered here without contest the various regroupings that he thought would best illustrate his point, and he has regrouped them and regrouped them to his heart's content. Now, when we suggest that as to a very few items we would like a showing different for
the thousand cubic feet cost to show the fallacy in respect of
1213 which we claim there may be a fallacy, even though it does not apply any more than to a minor item, it is our duty to show that, and so far as that may be extended or as there may be anything hidden, and as this system of looking at any of these figures may bring any light, it seems to me that the defendant is entitled, when we are not going into any long showing of the opinions of experts, who come up here and look at these summaries shown by these schedules and say that that is the reasonable showing, and they put in their proof, and they prove their case wholesale in that manner or attempt to—when we, relying upon the books, simply ask what is the showing of your books, not just as to the thousand cubic feet in this matter, but as this is grouped to show there something different, if it can be argued. Now, if we want the argument of the figures from their books, it seems to me we are entitled to a reasonable set of different groupings, if we may sincerely believe that we can argue to the Court a different showing upon them.

The Master: It is my duty, of course, to keep out evidence that is too indefinite.

Mr. Jackson: I appreciate that, your Honor.

The Master: Evidence that is too vague to help in the de-
1214 ciding of the case.

Mr. Jackson: I appreciate it.

The Master: And it seems to me that any computation based upon hours of labor over a period of four years, would need so much ex-

plaining and would be so indefinite, even after the explanation, that it is my duty to refuse to permit it to be offered.

Mr. Jackson: That, of course, is upon the idea that the hearings might be extended.

The Master: Not only that, but I think we would be here for days explaining the conditions of labor—whether you could get a hundred per cent out of labor in 1916 or whether you could get 60 per cent out of labor in 1919, and there would be employers giving their expert opinion on the subject indefinitely it seems to me.

Mr. Jackson: We did not have in mind going to that extent.

The Master: I know we all feel people are not doing a hundred per cent work the way they used to before the war. Now, we have to go into all that, and it is too indefinite.

Mr. Jackson: No, we are not going to make an issue of that and try that out, even though counsel sees fit to insert that item.

1215 The Master: It would be inevitable that counsel for the plaintiff would bring that up.

Mr. Jackson: He may argue as he chooses from it, but we had in mind simply to put in those figures and make that showing—whatever those figures may show to the Court. It is a regrouping of their book, showing in another manner than the way they have chosen. It is not necessary that the case be tried entirely upon the plaintiff's theory of how it should be tried, and we have ventured to suggest that the showing from his books may be something else if you take another set of books—if you take another set of figures from his books. For instance, here—and we urge this particularly because we think it will be very illuminative, and I have an idea personally that in order to eliminate that from this hearing, the accountant may have exaggerated the length of time that it will take this bookkeeping force that he has down there to put in such a schedule—the test, and a very valuable case in this respect is just what we have asked for——

The Master: Let me ask this question first. Does the Public Service Commission require any such report?

Mr. Jackson: No. The Public Service Commission, I do not believe it is a proper theory, to simply say offhand that we have

1216 kept our books under the classifications that the Public Service Commission has required. Upon this hearing the Court is not bound to inquire into it, or to no greater extent than the Public Service Commission has inquired into it.

The Master: I understand, but I was just asking whether they had required reports on hours of labor; that is, the number of hours the employes of the corporation have worked during the year.

Mr. Jackson: Now, if you do not mind, I will ask a question directed to that, from one of the accountants here from the Public Service Commission. I will ask you, Mr. Howard, if you do not mind my asking, because I cannot answer—did you hear me ask the question of Mr. Gonnoud, as to how the man hours compare per thousand cubic feet in 1918 as against 1919?

(Mr. Howard: Yes, I heard you ask it.)

Mr. Jackson: From the reports of this company that are filed with the Public Service Commission, can such a schedule or statement

be prepared? Is there a showing upon those reports from which those figures can be made to appear?

(Mr. Howard: I think there is a schedule which——)

Mr. Jackson: Speak up so we can all hear you.

1217 (Mr. Howard: Yes, I think there is a schedule which required in months, weeks and days, and the men on part time, so a very good estimate could be made; but as I remember it, two years ago, there was a concession to the company on account of the reduction in their forces during the war, and the bulk of that was eliminated, so I do not know whether it can be compiled through those reports.)

The Master: Well, that answers my question. I recognize I am not bound by what the Public Service Commission does; but the Public Service Commission today was willing to waive that requirement. I refuse to delay this hearing for the preparation of any such computations. If it was not important enough for the Public Service Commission to insist that the companies continue during the last couple of years—that they continue to make up these schedules—it reinforces my determination not to permit the hearing to drag while waiting for the computation to be made. The Public Service Commission, undoubtedly, Mr. Jackson, if they thought the computation was very valuable, would have insisted that it be maintained.

Mr. Jackson: I do not concede quite that. I concede that our obligation upon this inquiry is entirely different from the obligation or the purpose of the Public Service Commission, in either demanding reports or prescribing a form for reports or in investigat-

1218 ing reports. It is *on* another question entirely, I think, here.

And as your Honor's statement is based also upon the consideration of dragging the hearings, will your Honor suspend a ruling upon that, until we see if it can be some way arranged so that such an exhibit can appear in the record at some time before the case is—in such a way that it would not be excluded?

The Master: I will not promise even that. The matter of time is a question with me, but I won't promise to let that evidence in any way, Mr. Jackson. I find it very vague.

Mr. Jackson: I will add, too, to what I said as to the purpose of the reports to the Public Service Commission, that they are prepared for statistical purposes and not for rate hearings, which is the specification of my general idea of it.

The Master: I will give you an exception to my ruling, if you wish it.

Mr. Jackson: Yes, thank you.

Mr. Hill: I have nothing more of Mr. Gonmond.

The Master: We are through with Mr. Gonmond, are we?

Mr. Hill: I am.

Mr. Jackson: Isn't there something else he can give us, or

1219 have we all the statements from him that he has been permitted to make or he is competent to make?

The Master: Now, do you want Mr. Elsman?

Mr. Jackson: Yes.

RALPH ELSMAN, resumed.

The Master: Do you want to ask any questions, Judge?
Mr. Hill: I do not think of any.

Cross-examination (continued).

By Mr. Jackson:

Q. Mr. Elsman, I think you were requested to produce the issue of the Gas Service News?
A. Yes, sir.
Q. Have you got them?
A. I believe we have them here, Mr. Jackson. Yes, sir, we have them in the room here. If I could get Mr. Gonnond, I can get them. I have them here, Mr. Jackson. Here are three copies.
Q. Will you let me see them, Mr. Elsman?
A. Yes, sir. (Handing counsel.) That is all that we have.
Q. You show here the Gas Service News, a printed publication headed Volume I, No. 1, Brooklyn, N. Y., June 7, 1920?
A. Yes, sir.
Q. And Volume I, No. 2, Brooklyn, N. Y., July 19, 1920?
A. Yes, sir.
Q. And Volume I, No. 3, Brooklyn, N. Y., August 12, 1920?
A. Yes, sir.
1220 Q. Are those the total number of issues of this to date?
A. Yes, sir.
Q. Do you know how many of each of these issues your company prints and publishes?
A. Approximately.
Q. About how many?
A. About 40,000.
Q. And what is done with them?
A. They are distributed to each one of our consumers.
Q. At about the date of the publications?
A. Why, they are right on the——
Q. I say at about that date they were distributed?
A. At about that date; yes sir.
Q. They were sent out how?
A. They were sent out by messenger.
Q. To the houses?
A. Yes, sir.
Q. And what force did you use for that messenger service?
A. Why, they——
Q. From whom?
A. I don't recall the name of the company.
Q. Same company engaged in the business of furnishing——
A. To distribute circulars, yes sir.
Q. And has that item of expense been included in these exhibits that you have offered here?
A. I am unable to say.
Q. Pardon me?

A. I am unable to say.

Q. Has the expense of printing and publishing this paper
1221 been included in these expenses that you have offered in evidence?

A. Let me just look at it.

Q. If you are not able to——

A. (Interrupting.) Just let me look at it. I want to look at the dates that are here.

Q. If you are unable to say, I will ask Mr. Gonnoud here.

A. All right.

Mr. Jackson: Mr. Gonnoud, can you tell me what I asked?

Mr. Gonnoud: I will say part of No. 1 might be there. I cannot say if all of it is in these exhibits here. Our exhibits bring us down to June 30th, and two of these issues are after that date.

Mr. Jackson: But your best judgment is that which issue was in?

Mr. Gonnoud: No. 1—Volume I, No. 1.

Mr. Jackson: And also the expense of the distributing force?

Mr. Gonnoud: Yes.

Q. Have you also used in distributing those issues any portion of the force that you ordinarily employ in the business of the sales of appliances?

A. No, sir.

The Master: What is the cost per thousand cubic feet of these things?

The Witness: The total cost, your Honor, is $295 for the
1222 whole lot, and I think it cost us $225 to distribute them—or $250.

The Master: What does that work out on the spread?

The Witness: Well, I do not think you would find it.

The Master: Mr. Jackson, do you maintain that it is in some of this compilation?

Mr. Jackson: The item that the witness just mentions. To that extent, I will not question about it further.

The Master: You do not maintain, then, it is in this?

Mr. Jackson: If it is in, I will raise no question about it.

The Master: I do not know whether it is in or not. I was just wondering.

Mr. Jackson: I only know from what the witness states.

The Master: There is not any question but what it costs $500, is there?

Mr. Jackson: It seems to be very small per thousand cubic feet. I do not care to lumber up the record with the whole of these issues, and I do not know that the whole is quite so pertinent on the point on which I wish to offer them; but upon the issue of Volume
1223 I, No. 1, and Volume II, No. 2.

Mr. Moran: There is no Volume II.

Mr. Hill: They are both Volume I.

Mr. Jackson: Yes, Volume I, Nos. 1 and 2. I wish to offer the last or fourth page, numbered 4, of both, and have the contents

there, which are in big, black faced type, and will not appear very long, upon the record—that the contents appear verbatim upon the record, as bearing upon the question of the propaganda conducted by this company, and the question whether any part of its difficulties is its own fault, also the question as to what rate of interest this company may have to pay in the near future upon the disposal of its securities.

Mr. Moran: I object to the offer.

Mr. Jackson: Further, in just a word of argument, if I may be permitted, I think we will not be able to ascertain and probably it is not ascertainable just how or to what extent the company has succeeded in affecting the market on those securities by this propaganda, but our contention is that that market necessarily must be influenced, and if we take the purpose and intent of the company as any indication of the results, it will be affected to at least the extent of the persons who read the circular. And how far that may reflect it is impossible to state.

1224 The Master: The court, in determining the rate of return that this company is entitled to make will not pay the slightest attention to any statements of the company except those based on facts, and I will not receive these in evidence, as being wholly incompetent, immaterial and irrelevant, of no probative force one way or the other to the District Court. You may have them marked for identification.

Mr. Jackson: May I have them marked for identification.

The Master: And exception noted.

(The two papers were marked as one exhibit, Defendants' Exhibit D-5 for identification.)

Q. There is another question I would like to ask; it may be better from your accountant, Mr. Compond, but perhaps you, Mr. Elsman, can tell me. Would it take much time to produce here the daily record of production and the daily record of consumption for 1920 and 1919?

A. The daily record of production and the daily record of consumption? We can give you the daily record of production—yes, we can give you that, and on there will be the send out. That won't be the consumption, though. We cannot give you the consumption. That is taken from the meter readings.

Q. Yes, all right.

A. We can give you the daily send out.

Q. The daily production and the daily send out, would that be very difficult or take much time?

A. No.

1225 Q. To have them before us and make whatever computation we want from them?

A. Yes. I have it on my desk now. We can give you that. I have it every day.

Mr. Moran: The amount of gas manufactured for the 24 hours of the 365 days of the year, and the amount of gas sent out.

Mr. Jackson: Have you got it convenient for 1918? That is really what I had in mind in comparing it.

Mr. Gonnoud: Offhand, I think the 1919 report showed that comparatively. I think they showed the same day of last year.

Mr. Jackson: If it is not too much, will you try and show that; just show the 1918 and 1919.

Mr. Moran: That will be some figures, you know. It will be 1,400 entries.

Mr. Jackson: I have in mind looking at it and if it is too much, we won't lumber up the record with it.

The Master: Can't you just bring the books here?

Mr. Moran: Yes, bring the books over.

The Master: I would like to do it the quickest way that we can—at it.

Mr. Jackson: We do not want to lug the books around.

The Master: But you might see if you wanted it, and if you did the stenographer could take it down.

Mr. Jackson: That is true.

1226 The Witness: We have them right here now. We have that in the form of charts for 1919 and 1920, all charted out.

Q. You have that in the form of a chart?

A. All charted out.

Q. Show me the peaks of consumption from 1910 to 1920?

Mr. Moran: Yes, we have got that, made and sold. I have seen it.

Mr. Jackson: You see, your Honor, it is necessary for us to ask some of these schedules from the plaintiff because there really has not been the opportunity to go over these books and get out the various showings that we would like.

Mr. Moran: Those statements were filed with the Public Service Commission in March.

The Witness: There it is (handing counsel).

Mr. Jackson: That is showing the peaks of consumption?

Mr. Moran: Yes.

Mr. Jackson: Not showing the daily records of consumption?

Mr. Moran: Yes.

Mr. Jackson: All right.

The Master: Why don't you look at those now?

Mr. Jackson: May we not have a copy to look over this evening, to see if there is anything we want? That will do, won't it?

1227 The Master: Yes. Do not bother with it, now; just go ahead with the next question.

Q. Perhaps you have stated it, but let us have it again—when were the generators increased in capacity?

A. I think that work was started in October, 1919, and it ran over into——

Q. The increasing in the generator capacity?

A. Yes, sir, and in 1919, and I think the work was finished in January, 1920.

Mr. Moran: You do not mean additions, new generators?
The Witness: No, sir, but——
Mr. Moran: Wait a minute. You do not mean new generators?
Mr. Jackson: No.
Mr. Moran: There have not been any installed in a number of years?
The Witness: I know what he means.

Q. There was testimony as to the generator being increased in capacity?
A. All the machines were increased in capacity. It was not alone the generators.
Q. Well, you increased some part of the plant so that its capacity exceeded other parts of the plants, did you not?
A. We changed the design of the machine and increased the size of two sets to enable us to get more gas out of them. That involved——
Q. Those were not merely repairs, they were additions and extensions?
A. A good part of them were repairs and some part of it was extension and additions.
1228 Q. But the capacity was increased?
A. Oh, yes.
Q. And that work was done in 1919 and 1920?
A. 1919, and most of it—yes, 1919 and 1920.
Q. As I understand it, the oil that you received in 1919 was all of your customary good quality?
A. No, it was not the same quality as we received in 1915. The oil in 1919 was of a lower gravity than that of 1915. It was beginning to be lower gravity.
Q. Wasn't that the oil that caused your trouble?
A. If you are speaking of the trouble that we had last May, no.
Q. And that trouble began, when was it?
A. About May, I think.
Q. Of 1920?
A. Yes, sir.

Mr. Jackson: Mr. Moran, let me ask, as I have made a question here concerning it, whether you think that the impounded moneys may be included—if he has made that clearly appear, or shall we have a statement that sets that forth more definitely?
Mr. Moran: Well, I can give you a statement of just what the amount of money was that ought to have been impounded. You mean the amount of moneys that accrued and would have gone into the bank on the first order between July 1st and March 29th, 1920?
Mr. Jackson: Yes. I did not know whether the amount could be obtained from what is in the evidence.
1229 Mr. Moran: Yes.
Mr. Jackson: Do you want to make a little computation?
Mr. Moran: No. Mr. Gonmond, I think, can tell us right off. He will give it to us. Do you want it now?
Mr. Jackson: Yes.

Mr. Moran (after consultation): He does not know offhand. He will put it in the record any time you want it.

Mr. Jackson: All right. Do you want to make a note and get that, Mr. Gonnoud?

Mr. Gonnoud: Just what is it?

Mr. Moran: I will tell him. The impounded money, 15 cents per thousand, between July 1, 1916 and March 29, 1920.

Q. You said, Mr. Elsman, that you knew it was impossible for your company to sell any securities and it had been impossible?

A. Yes, sir.

Q. How did you know that? Had you tried to sell any?

A. Why, no, I knew it was useless, no.

Q. Had you tried to sell any, I asked you?

A. No, indeed.

Q. Have you any securities now for sale?

A. We have not; no, sir.

Mr. Moran: Oh, yes, you have.

The Witness: I have got——

1230 Mr. Moran: $701,000 in bonds.

The Witness: No, we have got certain securities which are in the banks as collateral for a loan.

Q. That is $101,000?

A. Which can be sold as soon as the loan is released, yes, about $701,000 altogether of our bonds. The balance is on deposit in the Empire Trust Company as collateral for the 15 cents. Those are the only securities.

Q. What was the total amount of that collateral that was pledged as security?

A. $225,000? $101,000 and five per cent first refunding mortgage bonds.

Q. Have you any more collateral there?

A. No, we have no more there. The balance of the bonds under that issue are pledged as collateral with the Empire Trust Company.

Q. When you borrowed that money from the bank, or at any time since, have you left with the bank any statement as to the financial condition or prospects of the company?

A. Oh, no.

Q. Did you make any in writing to them at any time, to the bank?

A. No, sir.

Q. On the borrowing of that money?

A. No, sir.

Q. Will you produce here all your correspondence—you or the other officials of the company—in reference to the company business with any and all oil companies during 1919 and 1920?

A. We will be glad to. I think I have it here now. No,

1231 it is not.

Q. I do not suppose that could be done so that we could look at it— look over it *over* this evening?

A. Well, they are about that big, General. (Illustrating.) But I would be very glad to give it to you.

Q. You describe about a foot thick of papers?

A. Just about.

Q. Well, I had in mind that I would like to examine them upon the efforts you have made to secure bids for oil?

A. Most of those efforts are made by me personally, not by correspondence.

Q. And that correspondence relates to your efforts to secure bids for oil from different companies?

A. Yes, it will show the companies from which I solicited bids, other than those from which I solicited bids verbally.

Q. Then to avoid bringing along the whole pack of correspondence, say that you select all the correspondence that you have during 1919 and 1920 upon the subject of securing bids?

A. I have a resume of that in my bag if you would like to see it.

Q. You mean copies of the

A. Of the company's from which we solicited bids.

Q. It would be of more value to me to have what you wrote the company and what they replied?

A. I would be very glad to give you that. I could also
1232 tell you that; I can tell you now if you want to know what they replied.

Mr. Moran: This is not getting out any evidence.

Mr. Jackson: No.

Mr. Moran: Just inquiring will the witness do this or something else. I submit that is not a proper way of examining a witness. This correspondence we have had in the file has been down to the Public Service Commission. If it was brought into court it would not delay the hearing.

Mr. Jackson: If it will be where I can have it available, that is all I ask.

Mr. Moran: It will be available where you want it at any minute.

Mr. Jackson: I cannot send down to this company's office for any correspondence, and when I want something that the correspondence shows I would like it copied. I could look at this file ad glance over it and it would not take very long.

The Witness: Why, I have a resume of everything in those letters right here.

The Master: Let us look at your resume.

The Witness: That is for the year 1919, your Honor (Handing Master paper). We did the same thing in the form of coal.

1233 & 1234 The Master: There are not more than a dozen letters there.

The Witness: I know, but there is lots of correspondence back and forth about shipments of oil and things of that kind. It is all in that correspondence. All these oil contracts were negotiated verbally. It takes me three months to negotiate an oil contract. It means many visits. I can tell you anything you want to know about it.

The Master: I should think you could cull out the letters that have anything to do with this. You do not need to bring all correspondence, but just bring the ones that have particular reference to the bids and then refresh that memorandum.

Mr. Jackson: That is, particularly your correspondence in 1920.

The Witness: I do not believe there was much in 1920.

Q. What? None in 1920?

A. I do not believe there was much correspondence in 1920. I think it is——

Q. You mean, then, by letter that you did not make any efforts for bids in 1920?

A. Oh, no, indeed. I mean I had to go right to the man and see him in 1920.

Q. That is what I asked you when I said that through written correspondence you did not make any effort for bids in 1920?

1235 A. I never closed a contract on written correspondence, for an oil contract in my life.

Q. That is not quite an answer, Mr. Elsman: I want to know if there were any letters about it?

A. I presume there were; yes, sir.

Q. Will you bring the letters up?

A. I would be very glad to, yes, sir.

Q. I can save, I think, the correspondence being produced on the subject by telling you just what I have in mind. When you got this poor quality of oil in May of 1920 I want all the correspondence between you and the company with respect to that poorer quality of oil.

A. There was none.

Q. Did you make any written complaint to the company about that quality of oil?

A. No, sir—no written complaint.

Q. That is what I said. Have you made any claim against the company by reason of their having furnished you a poor quality of oil?

A. I made quite a lot of complaints verbally, and a claim, yes.

Q. Have you made a legal claim, or given a legal claim to *to* your counsel, or otherwise?

A. Oh, no indeed.

Q. How soon after this poorer quality of oil began to be furnished to you in May, 1920—I assume that was a shipment or a boat load?

1236 A. Oh, no, it has been a series of shipments. We are getting it today.

Q. I know, but the first shipment you had. It was a shipment or a boatload of the same poor quality of oil; is that it?

A. No, this trouble really started back in January, this accumulation of poor oil.

Q. No, but I understand this poor quality of oil that caused the trouble in your plant started in May, 1920?

A. The trouble occurred in May, but you cannot lay the trouble

due to any one particular or two particular shipments of oil of an different quality. It is cumulative.

Q. But I think you have stated several times that this poore quality of oil that caused this trouble was received by you in Marc or May, 1920?

A. We were getting a poor quality of oil at the time we had the trouble, yes.

Q. As I understand it, and I do not want to misquote you—you began to get the poor quality of oil then?

A. We got the poorest quality of oil that we received in May, bu we are getting a poor quality of oil this year.

Q. A poorer quality than you had been getting before that?

A. Yes, sir.

Q. Now, we are getting to be understood. But you got a marked decrease in quality in May, 1920?

A. It seems——

Q. No—did you? Answer without explanation and I will get to the point quicker?

A. Just ask the question.

1237 The Master: Did you get worse oil in May than you had before?

The Witness: Yes.

Q. And markedly so. Is that what you meant to say when you said you got a particularly poor quality of oil in May, 1920, or has I misunderstood you entirely?

A. April or May.

Q. Then it is so that in April or May you did get a markedly poor quality of oil; is that what you say?

A. Yes.

Q. I just want to understand the situation. How long after that time—I am trying to fix a time here, understand—how long after that time did this emulsion or sludge first come to your notice?

A. It came to our notice one afternoon when we were unable to get any gas through the lines. I do not know, it is about May, I should say.

Q. I am trying to fix this time. Just recall, as nearly as you can, when that afternoon was, in about what month?

Mr. Moran: You have a letter here from the Commission.

A. I have a letter here. I can hunt it up and give you the exact date.

The Master: Give us approximately the time.

The Witness: I think it was sometime in the first part of May that I recall.

1238 The Master: Was it a week or month after the shipment of the poorer quality of oil you received?

The Witness: I am trying to explain, Mr. Master, that the trouble does not occur by any one particular shipment or any particular period of time; it is cumulative.

The Master: But he asked you whether you got worse oil in April or May than you had previously?

The Witness: Yes.

The Master: Then he asked you how soon after that, that is after April or May, did you have this trouble with your pipes?

The Witness: It started about the same time——

Q. When was it brought to your attention?

A. A few days after the shipment, I should say.

Q. That is, a few days after the oil began to be used for gas making purposes, I believe?

A. Yes.

Q. That would be how many days after the shipment?

A. That I cannot say.

Q. Can you tell me approximately?

A. I can tell you exactly if you will give me time to look through the correspondence.

Q. I want it approximately?

A. A few days after that oil was received, yes, when we about had shut down.

Q. My questions are bearing on this sludge proposition. I want to know a little more about it.

A. Yes.

Q. I want to clear up some points in the record, and I want to find out, if I can, just what season of the year and just about what time in the month that sludge first came to your attention.

A. Well, I have a record of it here in a letter which I wrote to Commissioner Nixon explaining it.

Q. If you will; it will not take but a minute?

A. No.

Q. Let us take the date of the letter.

A. I am sorry, General, I am mistaken. I have not it here. But it is a letter to Commissioner Nixon.

Q. And you fix the date by the fact of what—that you wrote to Commissioner Nixon immediately upon——

A. A few days afterwards. As soon as I got time to write to him after the Deputy Commissioners had visited the plant with their engineer.

Q. Then the very first thing you did was to telephone to the Public Service Commission?

A. The very first thing I did was to telephone the Public Service Commission after a couple of days' struggle or a day's struggle.

Q. That is what I am trying to get at. You had a struggle first?

A. Oh, yes, indeed.

Q. It was brought to your attention by *home*?

A. It was brought to my attention by the superintendent of the plant.

Q. By the superintendent in your plant?

A. Yes.

Q. What did you do when he brought it to your attention?

A. I went down to the plant.

Q. You went down to the plant and looked at the situation?

A. I did, yes.

Q. What did you see?

A. Why, I saw that we were trying to pump some heavy emulsion in the form of—it looked like black mortar—out of a 20 inch connection between the inlet side of an exhauster and the outlet side of a condenser, and that we could not get it out.

Q. Just let me get that now. That 20 inch connection you mean is a pipe of 20 inches in diameter?

A. A "T."

Q. A "T" pipe?

A. No, it is a piece of pipe called a "T".

Q. Oh, a "T"?

A. It is 20 inches in diameter.

Q. And that extended between what points?

A. The inlet side of the exhauster and the outlet side of the condenser.

Q. And what length is that pipe?

A. Oh, it is about four feet, about 18 inches, I should say.

Q. And where was he at work, pumping it out?

A. Right at the "T", the top of the "T". There is a drip that runs into the "T".

Q. He had a pump at that point and was trying to pump it out?

A. No, we have steam siphons, drips on all our connections, and we found we could not move this emulsion by the operation of our steam siphons.

1241 Q. No, but what was he doing when you first saw it; that is what I am trying to arrive at?

A. He was striving to move it by means of a hand drip pump on the "T", on top of the drip connection.

Q. You look at this then, and looked at this sludge?

A. No, that is 10 feet under the ground when I looked at it.

Q. What do you mean by that?

A. That "T" connection was ten feet under the ground when I looked at it. They are ten feet under the ground.

Q. These connecting pipes are ten feet under the ground?

A. Yes, sir.

Q. And you made an effort to get down there, did you?

A. Yes, we did that night.

Q. And did you uncover the whole 10 feet?

A. I did not say 10 feet; I said 18 inches. But we opened a trench of 15 by 15 by about 15 feet deep to get down underneath the pipe.

Q. And then what did you see there?

A. We saw a pipe.

Q. I know, but what about the sludge?

A. Why, the sludge was inside the pipe.

Q. How did you see it as to condition and how full was the pipe?

A. We did not see that until we had tapped the pipe, and then it is about a six hour job to tap the pipe. We saw that the drip was full of sludge. After we had tapped the pipe with the pres-

1242 sure on and we recovered consciousness, we found out that there was about 15 inches of sludge in the 20 inch pipe.

Q. That is what I wanted to get at. I recalled you had said there was 18 inches of sludge in the 20 inch pipe, and I wanted to know how you took that sounding, how you knew it?
A. Just with a plain ordinary stick.
Q. You tried it to see how much was in there?
A. Oh, no. I didn't. The men did.
Q. You had a pipe that was 20 inches in diameter, did you?
A. Yes, sir.
Q. And how long was it?
A. Oh, that pipes runs from the condenser to the exhauster and from the exhauster to the scrubbers—oh, I imagine those pipes are about 138 feet.

The Master: Mr. Jackson, what are we getting at? I want to have just a little hint as to just what we are getting at.
Mr. Jackson: I will tell you. I have a couple of more questions then I think I will get——
The Master: All right.
Mr. Jackson: Yes.

Q. What did you do with that sludge when you took it out of the pipe?
A. We pumped it out into the yard.
Q. Where?
A. Out in the yard.
Q. Where did you put it in the yard?
A. Let it run around in the yard, between the generator house and the boiler house and engine room, and then after it dried I took it and threw it down into the dump.
Q. Where is the dump?
A. Just down in a little place between the docks and the oil tanks where we put our oxide, a runway there that we do not use very much.
Q. A ditch, is it?
A. No. I think you saw it when you were there. I pointed it out to you.
Q. Is it a ditch?
A. No.
Q. How big is it? Give me the dimensions?
A. Well, the yard at this point is about——
Q. The dimensions of this dump, I want.
A. Oh, it is not particular- dump. It is about as big as this table.
Q. That is about six feet by four, is it?
A. About that.
Q. That was about the size of the hole that you call the dump?
A. Oh, no, I do not know how deep the hole is.
Q. Was this a hole, this dump?
A. Why, it was one.
Q. And the size of that hole was six feet by four feet?
A. Oh, General, I could not tell you.
Q. I would like to have it just as close as you can tell, even though it is very amusing to your counsel.

A. Well, let us see. There is a little place between the new toluol house and the coal pile, which I imagine is about six feet
1244 by four or five feet, and just beyond or just in the piling, the other side of the piling of the cable run. Now, just how deep that hole is I cannot tell you.

Q. Well, about how deep?

A. I could not tell you.

Q. Is it six feet?

A. No, it is pretty soft land there. I could not tell you.

Q. Seven feet?

A. I could not tell you.

Q. Ten feet?

A. I could not tell you.

Q. You would not say it was fifty feet deep?

A. No, it is not that, no.

Q. Your best judgment?

A. I don't know.

Q. If you stood on the bottom, could you reach to the top?

A. I do not know.

Q. That is the hole where you put the sludge, is it?

A. We put some of it there.

Q. Where did you put the rest of it?

A. The rest of it we hauled down to the ash dump on the dock and hauled it away in barges.

Q. How many barge loads did you have?

A. By the time we got ready to take it away, it was just powder. Why, there was not any part of a barge load worth mentioning.

Q. And for how long a time did that sludge continue?

A. Well, it is continuing up to the present day.

Q. Well, do you mean it has been dried and reduced to powder?

1245 A. No, I mean when it first comes out in the form of sludge it is a thick mortar.

Q. That does not dry and turn to powder, does it?

A. If you will let me explain I will endeavor to tell you what it does. After the water evaporation, it turns into a substance that looks like lampblack, but it is not lampblack, because if it was lampblack it would burn.

Q. You say after the water evaporates out of it?

A. Yes, sir.

Q. Where does the water get in?

A. It is in the condensation in the pipes.

Q. But when you put that material originally into that apparatus, this was oil, was it not, and this was the residue of oil?

A. That is what I presume it is, yes.

Q. How did that turn into water in your machines?

A. You can search me, I don't know.

Mr. Moran: There is water used in making the gas.

Mr. Jackson: Yes, the witness did not know quite how so much water got in your machines. But that is what I am getting at, an your Honor will see the drift of my questions. It may not be a

big an item as the whole coal bill or oil bill, but we want to inquire into it, I think.

Q. This sludge came out from your machines in the place
1246 of the material that had formerly come out, that you called your tar product and which you burned?

A. Not at all.

Q. Have you facilities in your apparatus for separating the sludge from the tar?

A. No. Yes, we have facilities for taking out tar.

Q. Does it separate tar from everything else, and the residue of the oil?

A. That is all we get out of the gas.

Q. This tar that comes out is simply the residue, the settling, what has settled, to be simple in language; it is the residue of your oil after you have gasified it, used it for making gas, isn't it, and your tar when it came out, as the tar residue, was in such a condition that you could burn it, and you just took that residue and burned it; that is what you did when you used the tar?

A. Oh, we get tar in a great many places in gas works.

Q. I am talking about the tar that you get that is the residue from your oil, that you burn and charge up as fuel?

A. What do you want me to say?

Q. I want you to say that the tar that you get is not purified tar, but has a tar emulsion, that is, the residue was oil, and that has enough tar in it to have burning value, and so you burn it?

A. Oh, the tar contains water that we get, there is a certain amount of water in our tar always.

Q. The condensation from the steam that is in there?

A. No.

1247 Q. What is this steam that you are talking about, some of the steam that you throw in to make gas into your carburetor?

A. No, the steam that we use to go into the making of gas is the steam that we introduce in the generator to make our blue gas under the coal.

Q. It is supposed to unit- with your blue gas and be the first process of your gas making, is it not?

A. Yes, but the tar that we get in the form of water comes out of the wash box. We use water in the wash box to seal off the gas.

Q. The tar separates from this oil residue that you burn, does it?

A. The tar itself contains water.

Q. Possibly some percentage, H_2O?

A. Use quite a lot sometimes.

Q. Was there any greater percentage of water in this sludge than there is ordinarily in the tar that you burn?

A. There is no comparison, General, between tar and sludge.

Q. I did not ask you that. How do they compare as to the water percentage?

A. Oh, that emulsion which first came out was practically a sludge mass. It was as solid as sand.

Q. Not much water in it?

A. Well, there was water in it, but still it had solidified to some extent. The water was in it, but in a solid form.

1248 Q. That product came out in the place of the tar product that usually comes out?

A. No.

Q. Instead of your tar product?

A. No.

Q. Did you get any tar product while you were getting the sludge at any time?

A. Yes, sir.

Q. Separated from the sludge by your machine?

A. Yes, sir.

Q. Part of the machine leaked tar and part of it leaked sludge, is that the idea?

A. We do not get tar out of the machines to any extent.

Mr. Moran: Just say yes or no.

Q. That is not a fair way of answering the question.

A. I know what is in your mind, General, and I will try to answer clearly.

Q. You have a better idea than your counsel has indicated.

Mr. Moran: He has been trying to tell you for some time and you would not let him.

Mr. Jackson: No, he hasn't. It is in his mind, and if he is willing to answer it, I will take his answer, and have been willing to all the time.

The Witness: Well, here is what I wanted to say, General. In the place of that sludge that we get out of that pipe, we for-
1249 merly got water and drip oil. Now, the tar that comes out of that pipe comes out with that drip oil, is a very, very small proportion of the tar that we get. It is just a trace. Now, we get tar out of our machines that goes through the wash box. That is just a trace, but the place where we get our greatest amount of tar is in the condenser and in the relief holder, in the shaving scrubbers and in the purifiers.

Q. Where does that collect?

A. That I am trying to tell you. It collects right there. We get it through those points, and we also take out a great deal of tar from our centrifugal driven exhausters. Those are the big exhausters that pull the gas out of the relief holders and push it through the purifying boxes. We formed those drips you heard me speak of there, that are pumped by steam siphons. They formerly pumped those drips and got out of there water and drip oil, what we call drip oil. Now, when we got this sludge the steam siphon could not move that supposed drip oil and water. It is the water that goes through from the wash box and that drips out of the gas in the

cooling process as it goes through the condenser, but instead of that we were stopped up solid, and then we got that sludge.

Q. How long do you think that condition had existed in that connection?

A. Why, it just happened to show up at that particular point.

We may have had it through the whole system, I don't
1250 know.

Q. You do not mean to say you have it now?

A. Oh, yes; we are still making it.

Q. But you do not mean to say you have a filling in those connecting pipes of 18 inches out of the 20 inches?

A. We would be shut down if we did have.

Q. I say, how long do you think that condition had existed, the filling of the pipe to 18 inches out of this 20 inches?

A. That is what we have been trying to figure out. We do not know what it—we do not know why it settled at that point, and how long it took.

Q. Or how long it was filled to that extent?

A. Oh, yes, we know how long it was filled to that extent.

Q. How do you know?

A. We know it was a very short time. It might all shove down to that point in a few hours, or slack down in a few hours to that particular point.

Q. How long did that condition continue? It has continued, to a certain extent up to the present time?

A. We get that condition on and off all the time.

Q. Not to such a great extent?

A. No, we have been able to overcome some of it.

Mr. Moran: By condition, you mean sludge collecting in the pipes?

Mr. Jackson: I might explain further, then, what I mean. I mean for the witness to describe, if he can, briefly, just how
1251 long it was in just about that condition, whether there was a period there when the sludge was first formed, whether it was formed to a greater extent than at a later time, whether it gradually decreased, or whether it suddenly stopped, or just what has been done about that sludge.

The Witness: Well, the shutting down of the plant and the accumulation of sludge at that particular point was due partially to the momentary stopping of an exhauster which allowed the sludge to collect at that point, but the making of the sludge was an accumulation that had probably gone on from December or January. Our wash boxes would ordinarily show that accumulation up first, but we were not able to take down our machines and take them out of operation to investigate our wash boxes and see just what condition they were in, so this stuff was being made and kept on slipping through our lines. We could not tell because we could not get a machine out of operation to blow out our flues to see what the condition was.

Q. You think, then, that sludge condition had been accumulating in December, 1919?

A. Yes, the oils get heavy about that time.

Mr. Moran: You mean forming in the pipes?

Mr. Jackson: It began accumulating when it first formed
1252 in the pipes, this sludge.

Mr. Moran: No, I don't think so. I think the witness' testimony is contrary to that.

Mr. Jackson: No, I am not going to request this testimony of you just now, Mr. Moran.

Q. What do you say about that?

A. I did not hear it.

Q. You said when you discovered that sludge you could not tell how long that sludge had been accumulating at that time?

A. I could not tell, no. I could not tell you even now.

Mr. Moran: Just on that——

Mr. Jackson: I do not wish you to testify, Mr. Moran.

Mr. Moran: I do not know a thing about it except what the witness has said about it, that is all.

Mr. Jackson: That is so. I want to get what he saw about that pipe.

The Master: I think we will get through quicker, if you will let Mr. Jackson go ahead.

Mr. Jackson: I think so. The record will show, and I am willing to stand upon that.

Q. So that sludge was accumulating during this period of greatest stress in your productive capacity during the winter of 1919 and 1920?

A. It may not have been accumulating at all. We may
1253 have been getting rid of it in our exhausters.

Q. But the first evidence you had of it was when you came across this clog in the connection that was to the extent of 18 inches out of a 20 inch thickness of pipe?

A. That was the evidence we got. Our first evidence was when we could not get the gas through the exhauster.

Q. Just to point it, so there won't be any question about it, if the connections of your plant there ordinarily are insufficient to take care of the capacity of your generators and the connection at that time with its 20 inch thickness is insufficient and reduces the capacity, the total capacity of what your plant might be, it seems that the capacity of your plant in this special stress of the winter of 1919 and 1920 might have been very materially reduced by reducing the size of those connections through the filling up of the sludge?

A. Oh, no, indeed.

Q. You could not have done that?

A. No.

Q. All right, that is enough. You would say, though, at the time that the 20 inch pipe was working, that was ordinarily insuffi-

cient to take care of the capacity of your generators by gas going through the full 20 inch diameter of it, that its capacity was materially reduced at the time it had 18 inches filled with sludge and there was only a two inch aperture to go through; would you
1254 say that reduced the capacity of your plant—would you or would not?

A. Repeat the question.

Q. Have you difficulty in answering that?

A. I want to hear the question, please.

Q. (Repeated by the Reporter.)

A. I think that is axioatic, yes.

Q. Then you will answer yes under those circumstances?

A. Yes. Two inches.

Q. I hope I get yes under these circumstances. Now, then, I suppose upon the record of production that you have of your plant upon that day, that there should be a material difference in the showing between the production that you metered when it was going through *and* full and free 20 inch pipe, and a pipe that only had two inches left; it should make a difference in the showing?

A. It is the plainest thing in the world.

Q. We will see that then from the record?

A. Indeed you will.

Q. What method of measurement did you take of this sludge? Was that taken by the same process that you inventory your coal with?

Mr. Moran: I object to the question. I object to it; it has been covered once. The question is impertinent.

Mr. Jackson: No, I do not think he has told us the method
1255 of the measurement of the sludge.

The Master: Let him tell the measurement.

A. Put a stick in the pipe.

Q. What?

A. Put a stick in the pipe.

Q. Oh, I see what you mean. You measured the depth of it in the pipe to get the 18 inches?

A. Yes.

Q. What I mean is, how did you measure the total quantity of the sludge?

A. Oh, that was merely an estimate.

Q. Who made that estimate?

A. Why, I think I made it in connection with the superintendent.

Q. Well, don't you know what you estimate it?

A. Yes. I remember—I think we estimated that it represented about 150,000 gallons of tar, or something like that.

Q. I see that in the record. That is why I am asking about it. I want to recall to your mind the occasion when you were in the act of estimating that sludge, and ask you to describe it to me, what you did.

A. I was not in any occasion like that, the figures were simply brought to me and I was asked if those figures were right.

Q. What figures and where were you, by the way, when the figures were brought to you?

A. In my office.

Q. Then you estimated the amount of the sludge?

A. No, I did not do the estimating.

Q. Who did the estimating. I asked you that before?

A. I think the actual estimating was done by the engineer
1256 at the plant and I do not know whether the auditor worked on that or not.

Q. Then all you saw of the sludge so far as your estimation went was some figures that you had handed to you while you were in the office?

A. Oh, I see every bit of that sludge personally. I was at the plant 36 and 48 hours at a stretch.

Q. And you mean that you saw the sludge from day to day as it was being produced?

A. Yes, I guided the destinies of the company through that period and told them what to do.

Q. You guided the course of this sludge, too?

A. Yes, I did.

Q. And you guided the course of this sludge into this pit?

A. Yes, I told them where to throw it.

Q. During the time you were guiding the course of this sludge, as you have stated, did you take any actual measurement of it at all?

A. Yes, we had a part of the yard marked off with boards. The boards were one by twelve.

Q. Wait a minute. One inch by twelve inches?

A. Twelve inches high and they stood lengthwise, from the point of the exhauster room around to nearly the condenser and down to the generator house and across from the generator house to the boiler room to keep it from running all down the yard, and that was filled up.

1257 Q. Now, give us the size of that pen?

Mr. Moran: I object to it.

Mr. Jackson: I want the measurement of that sludge, and he is describing the way he measured it, as I understand him.

The Master: He said he did not measure it. That he had seen it. He said his engineers measured it and that it was approximately 150,000 gallons, didn't you?

The Witness: Yes, sir.

The Master: I think that is perfectly comprehensible testimony.

Mr. Jackson: I think so far as that is concerned, but I am entitled to know just what was the size of the interior by which he measured 150,000 gallons. I won't go any further than that. Just let him tell the size of this pen now where he kept the sludge.

The Master: It will approximate the size of the pen, yes. Just tell approximately the size of that pen in which you kept the sludge. He has estimated 150,000 gallons.

Q. How wide and how high was this boarded enclosure?

A. The depth would vary on account of the contour of the ground.

Q. All right.

A. From the exhaust pit to the relief holder was about, I should say, 60 feet, and probably 80 feet, I don't know. About 60
1258 or 70 feet, and from that point down to the generator house was about 40 feet, and back on another angle from that point to the boiler room I should say was about 40 feet, maybe 50, and from that point back to the hole again was about 30 feet. It ran something like that (illustrating).

Mr. Moran: You have some photographs of it, have you not?

The Witness: I have some photographs of it.

Q. How high was this?

A. I said we had boards one by 12. And we banked it up with sand.

Q. It was possibly one foot high?

A. No, General, I tell you——

Q. One board may have been on another, possibly two feet high?

A. No, we used sand. Then we put the boards on top of the sand, and I could not tell you the height of the sand to save my soul.

Q. Don't you recall how many of these foot boards you had on top of one another? Isn't it a fact that there was just one board high?

A. I presume there was just one board there, yes.

Q. That is, this area that you have mentioned, the pen, was the height of a one foot board?

A. No, I did not say that, General.

1259 Q. That is, it was one foot high from the ground?

A. No, I did not say that.

Q. What did you say?

A. I said first we put sand in it, we put a bank of sand all around it, and after that we stuck a board in the bank of sand to keep it from flowing over.

Q. How high was it?

A. I do not remember.

Q. How high was the foot board?

A. I do not remember.

Q. Was it two feet high?

A. I do not know.

Q. Was it 20 feet high?

A. I tell you I do not remember.

Q. Was it ten feet high?

A. No, indeed.

Q. Could you look over the top of it?

A. Yes, indeed.

Q. And how high are you?

A. I am pretty nearly six feet.

Q. Was it two feet, four feet or five feet?

A. I do not know, General. It was not up to my knees.

Q. All right. That is good enough. It was not up to your knees.

A. But the land contour runs all over the map there.

Q. Yes, a good deal like a heap of coal?
A. Yes.
Q. What?
A. Yes. Not as bad as that.
Q. Not as bad as that?
A. No.
Q. A heap of coal has some contour?
A. Yes.

Mr. Moran: He means the ground on which this was
1260 spread?

Mr. Jackson: Yes, he said the ground on which this was spread had a great many contours, and he said it was not quite so uneven as a heap of coal.

Q. Isn't that what you said?
A. It depends on the heap of coal, General.
Q. Now, that is as accurate as you can come to your means of estimating this 150,000 gallons, is it? That is all the measurement that was taken of it to your knowledge?
A. No, I think they took into consideration the length of pipe, the amount they took out of the wash boxes, the amount that they got out of the outlet side of the exhauster that ran into the drain.
Q. What are you telling about now, what the engineer considered?
A. The sludge.
Q. What the engineer considered?
A. Well, I am telling what I consider, some of the considerations involving this sludge.
Q. But you did not estimate this; you said the engineer estimated it?
A. I am talking about what went in to make this up.
Q. I want your personal knowledge of it.
A. I am trying to tell you.
Q. Is this your estimate of it?
A. No, I am telling you what was considered.
1261 Q. Who considered it?
A. I considered it.
Q. That is the point. Do you know how many cubic feet there are in 150,000 gallons?
A. Not off hand, no.
Q. Did you have any idea in your mind about what was the cubic feet dimensions of any space that would represent 150,000?
A. Why, it would all depend upon the pressure behind the sludge as to how much you could back into a pipe, and then when it was in a solidified form you could get a whole lot into a 20 inch pipe, and pump it out into a yard and make a whole lot of sludge. There was as high as 72 inches back pressure on those pipes. There is where we looked for our trouble, was the back pressure on our pipes, on our machines. Now, when we notice we have back pressure, then we commence to look for trouble, and we can tell when we have trouble pretty soon.

Mr. Moran: If you are through on that topic, I just want to have one point brought out. Do you mind?

Mr. Jackson: No.

By Mr. Moran:

Q. This sludge filled the pipe up except for about two inches at the top?

A. Yes.

Q. That left a pipe of a little more than two inches in diameter to carry gas?

A. On the peripheral, yes.

Q. That would not carry the amount of gas consumed in one day in your company?

1262 A. Oh, we can get less than 50,000 cubic feet of gas through that pipe.

Q. So this accumulation at the depth you found it could not be there for many hours, could it?

A. Oh, as I say, that happened in a very few hours, and the momentary shutting down of the exhauster allowed it to come down to one point.

Q. When you say it was accumulating, it was not accumulating at that one point, but rushed into that point on account of the shutting down of the exhauster; is that it?

A. Oh, yes.

Q. That is what I wanted to clear up?

A. Yes.

By Mr. Jackson:

Q. If the Master will permit these two or three questions, whether you performed your full duty on that occasion of the obstruction in your works. You said you called up the Public Service Commission?

A. I did when I——

Q. Immediately when you saw this?

A. If you will let me answer, I will tell you when I called them up.

Q. All right.

A. I called up the Public Service Commission when I arrived at a point where I thought it was impossible to keep the gas on the town, when we had depleted our holder capacity or supply, rather. All the gas that we had in our holder was gone with the exception of about half a lift, and we were sending out 50,000 cubic feet of gas, and we were getting on to a point where we were being called

1263 upon for four or five hundred thousand cubic feet per hour. That necessarily meant that we had to cut our pressures, and we cut the pressures down until we got less than one inch on the town, in some places 8 10 of an inch, and I became fearful of asphyxiations and became fearful that we would have to shut off entirely. Then we called up Commissioner Nixon and told him the position I was in, and he immediately sent over Commissioner Donnelly, Judge Ward and Mr. Merrifield.

Q. Was that before or after you had seen this accumulation of sludge?

A. Oh, no, that was after I had the pipe open.

Q. And you saw what there was?

A. And I saw what there was. No, that was before I had the pipe open, and at the time I was pumping the sludge into the yard. I did not make the tap until about one o'clock in the morning, the night.

Q. Then you saw you were pumping sludge, you saw the sludge coming?

A. Yes, sir.

Q. Then you called up the Public Service Commissioner, as you have stated?

A. Yes, sir.

Q. Did you trust to your own judgment under the circumstances, or did you call in any other consulting engineers or anything?

A. Oh, indeed I did.

1264 Q. What did you do about that?

A. I got Mr. MacBeth, the Chief Engineer of the Westchester Lighting Company, one of the best operating men I know of, and he came down and he stayed all that night and all the next day. I also got in touch with Mr. Klumpp of Philadelphia, and the next day he came over with the oil expert, I forget his name, and I got in touch with Mr. Searle, and also got in touch with Mr. Busch of the Brooklyn Union.

Q. Mr. Searle was up at Rochester?

A. Yes. I also got in touch with Mr. Busch of the Brooklyn Union.

Q. Who is he?

A. He is their chief engineer.

Q. Did he come over?

A. I think he came over. He was not there when I was there, and I do not know whether he came over or not; in fact, I know some men from the Brooklyn Union came over. Some men from the Bronx Gas Company came down.

Q. Whom did you call first, Mr. Klumpp of Philadelphia, Mr. Searle of Rochester or the Brooklyn Union man?

A. Oh, I do not know.

Mr. Moran: I object to the question. What has that got to do with it?

The Master: I will sustain the objection.

Q. May I ask what this consultation of engineers advised you to do?

A. They advised me to put in some more plant and they also advised me——

1265 Q. Did they advise you ——

Mr. Moran: Just a moment, now; let him finish.

Mr. Jackson: I will ask the question.

Mr. Moran: No, you have got a question.

A. I will tell you what they advised me to do.
Q. I will direct your attention to it.

Mr. Moran: No, you won't.
Mr. Jackson: Yes, I will.
Mr. Moran: Just a minute.
The Master: Have you finished your answer?
The Witness: No, sir.
Mr. Jackson: I want to know what they advised him first to do.
The Master: Go ahead and answer his question.
The Witness: Change the heats on the machine.

Q. Did they not advise you first to get the sludge out of your pipes?
A. Oh, no, we were doing that.
Q. By whose advice did you do that?
A. My own advice.
Q. Is it not a fact that you had to get one of those engineers in to advise you before you got the sludge out?
A. No.

Mr. Moran: Just a moment. I object.
The Witness: The men started it before I told them.
1266 Mr. Moran: Do not answer those impertinent questions.

Q. Has your company done anything towards installing a coal gas unit?
A. Yes, I have plans on my desk now for a coal gas plant.
Q. Is that as far as your company has gone with that?
A. Yes, we have been studying it for three years. I have an estimate on the cost of the installation.
Q. There has been a great deal said about relying for your estimates of coal upon an inventory at the end of the year. Now, I would like to know how you inventory the coal at the end of the year, just how you measure the coal?
A. Why, it is a survey.
Q. Describe what you mean by a survey, we have not that on the record yet.
A. The engineer surveys that. I have never surveyed the coal.
Q. Have you ever seen the engineer surveying the coal?
A. Oh, yes.
Q. Tell us what he does?
A. First it is in a bin, in a coal hopper, and they usually take the dimensions of the inside of the hopper, and if it is possible the coal is levelled off. If it is not, they will take an average height of the coal, so as to get the cubical contents. If the coal is in a pile, why, sometimes they do it by means of a level and get the
1267 cubical contents of the pile.
Q. Your coal is kept on the grounds and the greatest part of it in big heaps on the ground?
A. No, the generator coal is kept in the coal hopper entirely, which holds about 1,000 tons. The barley coal is kept on the ground, and the bituminous coal is kept on the ground.

Q. In separate heaps, I suppose?

A. In separate heaps, yes.

Q. Those heaps are made by trestle work, where there is a tra runs up and cars run up on the track and dump this coal out on the heap, is that it?

A. Yes.

Q. This is how high from the ground?

A. Well, it varies from 15 feet to——

Q. When it starts to go up until it reaches its highest point about what?

A. Over the dock I should say it was about 15 to 18 feet, and ov the hopper, that is, running into the hopper, it is about 50 feet.

Q. And at times the coal pile rises up to about the height of t trestle?

A. Oh, no.

Q. So you would say your coal pile is sometimes 50 feet high?

A. No, the pile is seldom over 20 or 25 feet.

Q. And spread out over about what area at the base?

A. I do not know, in the shape of a cone, I should imagin generally.

Q. Generally in the shape of a cone?

A. I should say generally in the shape of a cone.

1268 Q. What do your engineers do when they come to est mate the coal in that pile?

A. Why, they take the base and get the altitude, and I presum the hypothenuse, and work it out that way and get the cubical co tents of the cone or pyramid, or whatever it *prepresents*.

Q. They do it by measuring with a tape line around the base?

A. They may use a tape line or level, a surveyor's level.

Q. They use a surveyor's level for ascertaining the height?

A. They use a surveyor's level for ascertaining the height.

Q. And of course, these piles are regular?

A. They are not very irregular, no.

Q. And from the circumference of the base and the height they take it there, they estimate how much coal is in that heap; that it?

A. No, they calculate very closely, and then they estimate it.

Mr. Jackson: Now, I move to strike out the words "very closely."

The Master: Let me ask—this is what is running through m mind, Mr. Jackson—is this the usual way to measure coal?

The Witness: Yes, sir.

The Master: When it is kept in piles?

1269 The Witness: It is the only way that it is ever measured

Q. It is the only way to measure a coal pile?

A. Yes, sir, there is only one way to measure a coal pile.

Q. That is true. And it is the usual way engineers have o measuring coal piles?

A. Yes, sir.

Mr. Jackson: I did not question that at all, your Honor.

The Master: I just wanted to get if that was the general way.
Mr. Jackson: Yes.

Q. And they do as engineers usually do in estimating such a coal pile?
A. Yes, sir.
Q. And that is the basis of the amount of coal that you say is your inventory of the coal?
A. That is the basis of the amount of coal outside. They measure it differently inside.
Q. It is that basis that you accept instead of your actual weight?
A. Well, it is that basis that we use after it has been checked against the amount of coal used as per weight.
Q. So that, as a matter of fact, when you rely in the first instance upon the inventory at the beginning of the year for that amount of coal that is in heaps, the inventory at the beginning of the year is the inventory that you made at the last of — year, is it
1270 not?
A. It is the inventory at the beginning of the year, and then added to that is the——
Q. That is the same inventory. The inventory that you made at the end of the year is the inventory for the next year, is it not?
A. We try to make it on the first of the year, yes.
Q. And to that inventory amount on your books—you put that on your books, do you?
A. Why, I cannot just explain the procedure on the books.
Q. Don't you know the procedure that Mr. Moran has described?
A. Oh, yes, I know the procedure, General, but I do not run the books of the company.
Q. You know the system, though?
A. I know the system, yes, sir.
Q. And you are supposed to know whether according to the system of running of your books the inventory amount thus ascertained is placed upon your books, is that true?
A. Yes, the inventories are taken monthly.
Q. Now, the survey of the pile is taken the first of the year?
A. Yes, and every month thereafter.
Q. Do you survey it every month?
A. Oh, yes, the inventory is taken every month.
Q. You survey it every month?
A. We inventory it every month.
Q. And you inventory it by the survey every month?
1271 A. Yes, sir.
Q. That is what I am trying to get at. And when you make your entries in your books, you govern that amount of coal for one figure by the inventory thus made?
A. No, we do this: We inventory the coal at the first of the year, then we show the coal used each month, the coal as weighed, and then we make an inventory or an actual survey of the coal monthly. Now, if there are any vast discrepancies between the amount of coal on hand according to the books, as the amount of coal is used ac-

cording to weights, and that that is shown by the engineer's survey, we immediately investigate that and go back and resurvey the piles and the hoppers, and make the adjustment accordingly, but we rely entirely upon the inventory at the end of the year and the first of the year as being the actual amount of coal on hand.

Q. And as to the coal—we are going to get this before we get through, and I am not going to leave it until I do, with the Master's permission—as to the coal that is in your piles, your entries on your books that show the amount of coal in those piles are governed, so far as your book entries are concerned by your inventories and by the bills of the shippers of the coal to you, and not at all by your weights; is that not true?

A. I think the man who runs the books had better testify to actual entries in the books.

1272 Q. Don't you look—

A. I do not read the individual entries in the books.

The Master: As I recollect there was considerable testimony on that point, and I think I asked a few questions, because I was very vague on the subject, and it was explained by Mr. Hopson, wasn't it, all this matter of the inventory adjustments?

Mr. Jackson: I do not know how Mr. Hopson could explain this better than Mr. Elsman, the Vice-President of the Company, or Mr. Gonnoud. I do not know how Mr. Hopson could do this better than they could.

The Witness: General, the thing is as I explained it here, the way the book is kept, and the way the coal is used.

Q. I have not understood you to explain it, and I have asked a pretty clear question. I am ready to get it from anybody who knows.

The Master: My recollection is that that has been gone into pretty thoroughly by Mr. Hopson and Mr. Gonnoud, and I asked him to take out of the book, as I remember it, an instance, where one of these inventory adjustments was made, so as to have a very clear statement as to how it was made. I asked him to point it out from a practical standpoint, which he did. Now, I assume that
1273 the general manager has a general knowledge of that, and that if we dug into it with him, he would corroborate Mr. Hopson's testimony.

Mr. Jackson: It is perfectly clear. I do not want to waste time with it. But pardon me, I would not expect it to be quite in the order you state.

The Master: What I want to guard against is going into all the question of the inventory.

Mr. Jackson: No, I want the system of this plant, and I do not want to go to Mr. Searle or Mr. Hopson, I want it from Mr. Elsman or Mr. Gonnoud. I want it to appear on what those entries in the books are based.

The Master: We have it in Mr. Hopson's testimony. You might ask the witness whether that is true. He was here when Mr. Hopson testified. It is a complicated proposition and it will take a long time for us to go into that.

Mr. Jackson: Has your Honor the system in mind?

The Master: I have, yes. I remember one specific statement of Mr. Hopson where he summed the whole thing up. And I asked him afterwards, I think the record will show it clearly—but I asked him to pick out from the book one adjustment of inventory.

Mr. Jackson: But the point is this, that when we have tried to find out, and I asked when Mr. Gonnoud was on the stand—I
1274 am very sure it was Mr. Gonnoud—when I asked when there was an ascertainment of weight on which those books depended, whether it was a survey of the company, Mr. Moran said there was a disturbance there, the thing was not followed out. We did not get it clearly on the record. Mr. Moran stepped in with the statement, as I remember it, that Mr. Gonnoud was not competent to answer anything of that kind. Perhaps I am mistaken in that, but at any rate he said you had to follow it through, you have got to go to the end, to the end of the inventory, and I have been trying to find out what they based it on.

The Master: Well, answer the question.

The Witness: I answered the question.

The Master: Listen to the question as carefully as possible and answer it as concisely as possible.

Mr. Jackson: Now, as to the coal in the piles and what amounts——

The Master: I beg your pardon, can't you ask him this question, Mr. Jackson—I do not mean to interrupt you.

Mr. Jackson: Certainly, I am glad to have you. I have tried to ask him a good many ways, but I might try another way.

The Master: How the company in comparing its estimates
1275 of the amount of coal used for the production of gas during the year in question, and the price of such coal—how it arrives at such computations.

Mr. Jackson: I know what we will get.

The Master: Isn't that what you get?

Mr. Jackson: We will go on to the end of the year and find it in the inventory, and I am trying to find out what that amounts to. I will try to get down to a definite proposition so that we will have it clear.

The Master: Go ahead. I do not mean to interrupt you.

Q. I want the determinative amount, the determinative factor in the estimation of the amount or weight of coal that is in the piles, as those amounts or weights go into your books, and I want to know if your weights that you take of the coal in the plant have any bearing at all upon the weights or amounts that go into your books, of that amount of coal?

A. The amount of coal——

Q. Now, will you answer it *yes* or no, please.

A. Yes, I am trying to.

Q. No, start with yes or no. Do they?

A. You cannot say yes or no, there are two questions.

Q. All right, now, I will have to let you explain it according to your method. Please go ahead.

A. Yes, as to the amount of coal as per weights in the piles, and in the hopper, it is determined from the actual survey of the
1276 pile. That is the amount that is shown on our books. The amount of coal that is used as shown on our books is made up from two sources. First the amount of coal that we have on hand at the beginning of the year is made up as per the survey of the pile. The amount of the coal that we use from month to month during the year is made up of the actual weights that are turned in by the engineer of the plant, as using so much coal per month. Now, each month, however, there is an inventory—which we call inventory—a survey made of the coal piles to find out if the amounts of the coal on hand as shown by our books are correct. We therefore see if there is any vast difference between the survey at the end of the month and the amount of coal that we have on hand as per our books, which is the amount used per weight subtracted from the inventory, and if there is we immediately investigate it and have the pile resurveyed if there is a vast difference. If there is not a vast difference we accept the amount as per the weights until, however, we come along to the end of the year when we again survey our pile to get our inventory as to the amount of coal that we have on hand, so as to find out what we used over the entire period and check up the weights. Then, if there is a vast difference, we make the adjustment at that time.

Q. Now, that is just what we are after. Now, we want to
1277 know what that adjustment is, if your weights have shown a lesser amount of coal used than is shown by your inventory of the pile at the end of the year, which amount governs?

A. Oh, the inventory.

Q. Which amount goes into your books?

A. The inventory, yes.

Q. And therefore you disregard the weights at that time and accept the showing of your inventory?

A. We do not let it go that long, Mr. Jackson.

Q. Doesn't it get down to that finally?

A. Yes, we let it go——

Q. You do not let it go. I appreciate *that*, that you check it every month, but the governing check always is the inventory and not the weights; isn't that so?

A. For the purpose of showing the amount of coal used, yes.

Q. For the purpose of showing the amount of coal used as it goes into your books, that is what I am getting at?

A. Yes, sir.

Mr. Moran: Well, the other goes in, too.

Mr. Jackson: The weights go into the books, too. Yes, are you going to complicate it more by saying that? But you disregard the weights and take the amount shown by the inventory. Haven't I got that clear, and am I not entitled to it by this time?

Mr. Moran: Will you answer me? You have shoved me
1278 off to the end of the year by this inventory, and by the Gods, I didn't think I would ever come to the end of the year.

Mr. Moran: That was clearly testified on the first day of the trial.

Mr. Jackson: Well, you are not quite sure of some of your dates, I know.

Q. I think it appears, but do you mind stating briefly just when this $3,000 a year to Mr. Freeman was first started?

Mr. Hill: Six.

Mr. Jackson: What?

Mr. Hill: Six.

Q. (continued). Oh, $6,000 a year to Mr. Freeman, was first started to be incurred by your company as a regular expense?

A. Why, I think we called Mr. Freeman into consultation in 1917, it is my recollection.

Q. Does that answer the question?

A. I think 1917.

Q. That he started from then as a regular employe at $6,000 a year?

A. He is not what you might term a regular employe; he is a consulting auditor.

Q. It is a yearly expenditure, though, to him, of $6,000 a year, so far, is it?

A. It is an expenditure to the company, yes.

Q. Expenditure by the company?

A. By the company, yes, sir.

1279 Q. And you would not call that a regular expenditure?

A. Why, I would call——

Q. Do not let us take too much time about this; it had not been made by the company theretofore, had it, in that manner?

A. Oh, yes, it had been made in a different form, yes.

Q. It had been made in a different form, so it had not been made in a different manner?

A. To other persons. I think the company has always had auditors to check up their books; yes, sir.

Q. If you will confine yourself to my questions we will get along quickly?

A. I am trying to.

Q. Had Mr. Freeman or anybody in that capacity been employed on a yearly salary at any time prior to this occasion?

A. Yes, sir, there were.

Q. Who?

A. I think it was the firm of Williamson & Meade.

Q. They were retained yearly?

A. I could not say offhand. That is before my time.

Q. Within your time?

A. No, that is before my time.

Q. Did you have also an expert accountant prior to that in the place of Mr. Gonnoud?

A. No, Mr. Gonnoud was Mr. Freeman's representative. We did not pay Mr. Gonnoud.

Q. But prior to the employment of Freeman and Gonmond
1280 in 1917, you had relied for your bookkeeping upon your regular bookkeeping force, with periodic audits, had you not, as is ordinary and——

A. No, monthly audits, I believe.

Q. Well, I said periodic, that was monthly, I should say, was it?

A. I just have to read a telegram, General, if you please. Thank you. May I have the question?

Q. That was monthly, as you say, was it?

A. Well, I did not come with the company before 1917, Mr. Jackson. I only know from hearsay and from my observation.

Q. Well, is it not your general information that that was an innovation in the company's practice at that time to take on two expert accountants?

A. Oh, no.

Q. I had not finished yet. To take on two expert accountants upon the regular payroll in addition to all the bookkeepers and bookkeeping force they had?

A. We did not take on two expert accountants.

Q. You took on Mr. Gonmond?

A. Mr. Gonmond was not in our employ. He was in the employ of Mr. Freeman.

Q. When did he come regularly into your employ?

A. In January, 1919.

Q. And prior to that time he had been engaged with Mr. Freeman how long upon your books?

A. Why, we paid Mr. Freeman and Mr. Freeman paid Mr. Gonmond out of the money given by us.

Q. How long has Mr. Gonmond been working for Mr. Free-
1281 man on your books?

Mr. Moran: Oh, he testified about six months.

Mr. Jackson: I want it.

A. I do not remember, Mr. Jackson.

Mr. Moran: Why do you want it again?

Mr. Jackson: Because I did not remember it. I thought somebody remembered it and could tell me quickly, and had it at hand.

The Witness: You are asking me dates, and I do not carry them in my head.

Mr. Jackson: Mr. Moran, perhaps you can give me the information, what I am getting at is had it been the custom of the company before the employment of Mr. Gonmond and Mr. Freeman in 1919 to employ in addition to the regular bookkeeping force, expert accountants upon the regular yearly payroll?

Mr. Moran: Yes.

Mr. Jackson: It had?

Mr. Moran: Now, let me say about that. Mr. Gonmond entered the employ of the company on January 1, 1919, as a regular employe, succeeding Mr. John Blanchfield, who had for years worked for the company.

Mr. Jackson: As a bookkeeper?

Mr. Moran: As a bookkeeper and accountant, and then there were others besides him, there was Mr. Fitch was a regular
1282 employe of the company over Mr. Blanchfield. Mr. Fitch, it might be said, held the position that is now held by Mr. Gonnoud. And Mr. Freeman came in in 1918 and made an audit of the books, and then in 1919——

Mr. Jackson: Those were periodic audits?

Mr. Moran: Wait a moment, now, no.

Mr. Jackson: And not yearly audits?

Mr. Moran: He came in in 1918 and made an audit of the books.

Mr. Jackson: But you were then in rate litigation in the State Court.

Mr. Moran: He came in then and he received in 1918 1919 and 1920, this compensation which he is now receiving. Prior to Mr. Freeman, though, in 1917, 1916, 1915 and 1914, and back in those days, other accountants did the same work that Mr. Freeman is now doing, they audited the books monthly, yearly and so forth, and received regular compensation for it.

Mr. Jackson: Oh, yes, but they were not engaged continuously at the plant as regular employes or as a super-bookkeeping force, were they?

Mr. Moran: Yes. They cannot audit a set of books by going in one day, they have to have some one there to go through them all the time.

Mr. Jackson: Every day?

1283 Mr. Moran: I think so.

Mr. Jackson: Every year.

Mr. Moran: Yes.

Q. Then, tell me what do you expect of the requirement of the Public ervice Commission?

A. I would like to tell you why Mr. Freeman came over there, Mr. Jackson.

Q. Go ahead.

A. What Mr. Freeman did other than the auditing of the books.

Q. Go ahead.

A. In the first place, Mr. Freeman is put over there to check up Mr. Gonnoud and myself and everybody else. He is independent of everybody. At the same time in 1917, when I took hold of the company, I realized that its business was increasing by leaps and bounds and that our present commercial department and our present organization was not flexible enough to take care of the growing business, and I asked that Mr. Freeman install a more flexible system which would allow the company to grow and at the same time take care of all the increased business that we contemplated, and he installed the new system of books which we have been using since Mr. Gonnoud has been there, and a whole new system of accounting. It does not mean any difference—it is a difference in the system of accounting, but it means our departments are reorganized and definite lines of demarcation made

between different departments, so that we had control.
1284 There were control systems put in so that the man who did the purchasing, for instance, never did the paying, and all those systems of checks and counterchecks were put in so that the company is now on the basis of a large gas company and not of a grocery store company as it was in 1916.

Q. And your reorganizations in the respect that you mentioned were contemporaneous with the beginning of your rate litigation?

A. Oh, no, indeed, it was something that the company was ready to do at that time.

Q. Did you under-stand my term? It was done at the same time that you started your rate litigation?

A. Oh, no, it was done before that. We had no thought of the rate litigation. I had not at that time.

Q. The fact is it was done before your rate litigation?

A. We had no idea of the rate litigation.

Q. Mr. Moran: The rate litigation has been going on since 1910, General.

Mr. Jackson: Then you do not quite agree with the witness. You had it in mind, but he did not have it in mind. You will not concede that this super accounting force on the regular payroll should be deducted as an expense of rate litigation?

The Witness: No.

Mr. Moran: No, and I want to ask the witness about that.
1285 That putting in of the new system has been completed and finished?

The Witness: Oh, yes, indeed.

Mr. Moran: Finished by January, 1919?

The Witness: Yes.

Mr. Moran: Now, wait a moment. Do not get a false idea on the record. Since that time Mr. Freeman has not been putting in a new system?

The Witness: Oh, no, but in our business he has been helping us, and it has always been necessary to change a business like ours from time to time.

Q. But you kept Mr. Freeman there?

A. Mr. Freeman is still there as general auditor.

Q. And Mr. Gonnoud?

A. Mr. Gonnoud has nothing to do with Mr. Freeman.

Q. I say he is with your company?

A. Oh, yes.

Q. And you are using him as assistant?

A. As assistant secretary, yes.

Mr. Moran: Prior to Mr. Freeman coming in and putting in a new system of accounting, the books were audited by outside firms always?

The Witness: Yes.

Mr. Moran: Always?

The Witness: Yes, sir.

Q. Mr. Hopson did that for you?

A. No, he did not. Mr. Hopson was just retained by us
1286 for this case, and to go over Mr. Gonnoud's figures. His expense is—I do not know what it is, I have not had any bills from him.

Q. Have you been refused coal because of your inability to pay?

A. No, sir.

Q. Have you made quite a study of this proposition of the unaccounted for gas?

A. Yes, sir.

Q. Have you thought of it from the standpoint of judging or giving an opinion as to whether the greater the production of the gas, the percentage of unaccounted for would be smaller or greater?

A. I don't think it would depend on production as much as it will on consumption. Your question would be easier answered if it was on the basis of consumption.

Q. Well, you figure your percentage of unaccounted gas upon which?

A. On both the consumption and the production. It is the difference between the amount made and that sold as per the consumers' meters, together with that estimated for street lighting and used by the company, and that on hand in the holders.

Q. Then let us take it from the standpoint of the production. Have you any idea as to that, as to whether the greater the production the smaller or larger would be the percentage of unaccounted for gas?

A. It would depend. It cannot be depended entirely upon production without taking into consideration the consumption.
1287 There must be two factors, made and used.

Q. Of course, that must be so, the gas must be going through the mains to meters.

The Master: He just wants to know whether if you increase the production of gas at this plant by 50 per cent, whether you get a lower percentage unaccounted for?

The Witness: Unless we had a light percentage in the increase in consumption, we would, yes.

Q. Well, what is the answer, you would what?

A. I say if we increased the production at the plant 50 per cent, and we did not have a 50 per cent increase in the consumption we would have a greater unaccounted for.

Mr. Hill: You would have to throw away the gas, then.

The Master: If the consumption kept pace with the production?

The Witness: Then the unaccounted for would remain approximately the same.

The Master: Then that is the answer.

Q. Always, no matter how you increase your production?

A. If the production was only in the same ration as the consumption, yes, but if we install—for instance, on our system if we got in one large consumer who would use a million cubic feet of

gas every day, our unaccounted for would be cut down
1288 one-third on a three million day.

Q. Of course. Then I will pass that. Differences in temperature would be what, less per cent, the larger the volume of the gas ordinarily, would they not?

A. I do not just know what you mean.

Q. In other words, a small amount of gas would be more susceptible to greater variations of temperature in a given time than a large amount of gas, isn't that so?

A. Not necessarily.

Q. What?

A. Not necessarily. I should say it would be the other way around.

Q. All right, we won't follow that with you any longer.

A. I could tell you why, if you want to know.

Q. Well, then perhaps you could tell me why I could not heat the small room quicker than I could heat the large room?

A. Oh, I thought you were speaking of gas.

Q. Well, it is the same thing, solid or sludge?

A. No, temperature and heat of gas are entirely different things.

Q. What is the tendency of a new meter, to run fast or slow, other things being equal?

A. It is the tendency of all gas meters to run slow, of new meters also.

Q. It is not all my fault that time is being taken up here; I want to call it to your attention, to Mr. Elsman. What is the tendency of the new meter, as distinguished from the old
1289 meter, whether it has the tendency to run fast or slow?

A. It is to run slow.

Q. And slower than an old meter?

A. No.

Q. What did I hear, a voice here?

A. No.

Q. The tendency of the new meter is to run slow?

A. Yes, sir.

Q. And as the meter is used and grows older in service, what is the tendency of it?

A. To run slower.

Q. To run still slower?

A. Yes, sir.

Q. And does that keep on during the life of the meter, and the tendency increases to run slower?

A. That is the general tendency, yes, sir.

Q. And when it runs slower it cheats the company?

A. Yes, sir.

Q. And the consumer profits by it?

A. Yes, sir.

Q. Then what is the reason that the Public Service Commission requires you to bring in those meters and test them after seven years, for the protection of the company or for the protection of the consumer?

A. Why, for the protection of both.

Q. I see you have got an idea as clear as sludge, to my way of thinking of it.

A. Well, now, I don't think that is——

Mr. Moran: Now, I think that is not fair. I want to stay on the record, and I want my protest entered against it, too.

1290 Mr. Jackson: Leave it there, then. I would just as soon, because I sincerely think so, and you want it on there, I am perfectly willing to have it there, because I think there is a fair illustration of it. I might demonstrate it more completely if you really desire it. I am going to take time to.

Q. Isn't it a fact, as far as your information goes that the requirement of the Public Service Commission that meters shall be brought in every seven years, that was a prior requirement, and that a more recent requirement was that they were to be brought in every five years?

A. The first was correct, and the latter is incorrect.

Q. It is every seven years?

A. Yes, sir.

Q. And it is a change that your company has made, that they bring them in every five years?

A. I inaugurated that change, yes, sir.

Q. And is it not a fact that the Public Service Commission then requires the bringing in of those meters every seven years because the tendency of the meter is in use to run faster and faster?

A. I do not know why the Public Service Commission made the ruling of seven years.

Q. All right, that is a fair answer. Have you had any experience with machinery besides meters?

A. Oh, a great deal, General, all my life.

Q. And you also have had some experience with the ma-

1291 chinery there in the gas making business?

A. Yes, sir.

Q. Don't you know that the tendency of every piece of machinery is to run with greater friction and therefore slower at the start until it is smooth with use and friction is eliminated; isn't that true?

A. A gas meter is not a machine.

Q. And it is different from other pieces of machinery in that respect?

A. Yes.

Q. Let me find out—I am not going to spend too much time, I hope—all the meters that were brought in for repairs from 1917 to and including 1920, you found, I think it was stated, that with an infinitesimal exception the meters were running slow?

A. I think I made that statement, General, from meters that were brought in over a period of ten down—over a period from 1910 down to date.

Q. You have increased the period; all right, I will accept that. The meters were running slow?

A. No, I did not say they were running slow.

Q. They were running slow with an infinitesimal exception. I got your language, I think.

A. I will tell you what I said. They were running with four per cent slow.

Q. Did Mr. Gonnoud say the difference was infinitesimal?

A. No, I testified to that before, General.

Q. Then from 1910 down to 1920, let us get at it, of all meters brought in for repairs, 96 per cent ran slow, and four per
1292 cent were what, just right?

A. No, I said the meters that were brought in over that period showed an average of four per cent slow—all the meters that were brought in. Now, I cannot tell you just the number of meters that ran slow, or the number that ran fast, but that was the average of the aggregate number of meters that were brought in.

Q. Let us find out. All right, but do you mean to say that the meters were slow to the extent of four per cent slowness?

A. Yes, on the test, the aggregate.

Q. I see. But you did not mean to say that 96 per cent of the number of meters ran slow?

A. Oh, not necessarily, no.

Mr. Moran: It has nothing to do with the number at all.

The Witness: I would not say that at all, no.

Mr. Moran: It has nothing to do with the number of meters at all.

Q. It has nothing to do with the number of meters at all?

A. No.

Mr. Moran: I understand not. That is, take all the meters brought in and take the gas that went through them, there were four per cent slow gas. There might be 20 running slow and all that sort of thing.

Q. That is the explanation of your figure four per cent?
1293 And I want to get that clearly on the record?

A. I say of the aggregate number of all those meters that were brought in—that is, you take all the meters that were brought in.

Q. I understand, you take an average and their slowness for four per cent?

A. That is the average, yes.

Q. Four per cent in registration?

A. Four per cent in registration.

Mr. Moran: Not in number.

The Witness: Oh, no, it has nothing to do with the number.

Q. 40 feet in a thousand minus?

A. Yes.

Q. Do you know how far below the surface of the ground your services ordinarily are laid?

A. Yes, they will average about 2½ feet or 33 feet.

Q. That is the horizontal pipe leading from the main into the house?

A. Well, the depth of the service, it would be governed by the depth of the main.

Q. Of course.

A. We have to start at the main and then go into the house, and we endeavor to drain towards the main. In that 60 feet, which is the average length of the service, it would be about two and a half feet.

Q. And of course there is the condensing moisture in these pipes that turn into water, and then sometimes there is the settlement of water in the el where the service turns into the riser that
1294 goes into the house?

A. Not in the el. The top is always made at the top of the main. Condensation falls to the bottom of the main.

Q. That is as far as your main connection is concerned?

A. Yes.

Q. But then your service goes on to the pipe, goes on from the main and meets the front wall of the house?

A. But we endeavor to have that drain back to the main, so it is laid on an incline.

Q. It may not always be so, possibly?

A. I would say 999 times out of a thousand. There may be a case where the pipe cannot be put in that way, but very, very seldom.

Q. I see. Then the service goes in through the wall beneath the level of the ground outside, does it not?

A. Yes, sir.

Q. And then rises vertically inside?

A. Yes, sir.

Q. What do you do when a meter is frozen, what work is necessitated?

A. The meter has to be disconnected. We use alcohol to take care of frozen meters, principally.

Q. Don't you dig up the pipes outside?

A. Oh, we put alcohol through with a force pump.

Q. Will that wood alcohol be forced through the service pipe right out to the main so as to open up the service pipe?

A. If the service is frozen. We have very little trouble with service pipes?

1295 Q. You have service pipes frozen, though; is that the way you thaw them out?

A. We do that, yes.

Q. With wood alcohol?

A. Yes.

Q. That eliminates digging up the soil outside and uncovering the service pipe.

A. Yes, sir.

Q. You put this wood alcohol through by disconnecting the meter and putting the alcohol through from the inside and forcing it through to the main; is that it?

A. Yes, sir.

Q. Of course, two and a half feet depth of service pipe is not below the freezing line on Long Island by considerable, is it?

A. Why, it is considered the safe depth, yes. That is generally used throughout Long Island and in this section of the country, that depth of service pipe. You do not depend on the depth of the pipe to keep the pipe from freezing, you know.

Q. You know that every winter on Long Island it freezes beyond two and a half feet, don't you?

A. Oh, yes, we had as high as eight feet last winter, but still our service pipes were not frozen.

Q. Can you tell me when the 1,500 of the 5,000 lamps of the City lighting system were removed?

A. I think in—I cannot give you the exact date but I think they were in 1917, most of those were removed. In 1917, before the war, before our entry into the war.

Mr. Moran: Right there. The street lighting contract ter-
1296 minated September 2, 1916.

The Witness: 1916.

Mr. Moran: And they were taken out after that?

The Witness: They were taken out after the termination of that contract; yes, sir.

Mr. Jackson: I think that that is all that occurs to me, now.

The Master: Have you anything further, Judge?

Mr. Hill: I have not, assuming that I am going to get from the Public Service records the amount of dividends.

Mr. Moran: They are right on that paper there.

Mr. Hill: But that has been excluded.

Mr. Moran: But it is correct.

Mr. Hill: But I want the amount of interest that is paid, and the amount of surplus.

The Witness: We can give you that if the Public Service Commission cannot. The Public Service Commission have it all.

Mr. Hill: I have nothing.

The Master: You are through with this witness, then, Mr. Jackson?

Mr. Jackson: I think so.

Redirect examination.

By Mr. Moran:

Q. Mr. Elsman, when you were on the stand in your direct
1297 examination, you spoke about the prices, some increase in wages that you were considering?

A. Yes, sir.

Q. Have they been put into effect?

A. Yes, sir.

Q. When did they go into effect?

A. They went in last week.

Q. And I think you were also speaking about coal prices, you were getting coal under what might be called local contract, no firm price?

A. No, sir.

Q. Is that right?

A. Yes, sir.

Q. Has there been an increase in the price of coal since you have been on the stand?

A. Yes, sir.

Q. What is the price now?

A. Why, the price was increased yesterday 76 cents a ton on the railroad freight for anthracite coal, and 3 cents a ton on tax, making a total of 79 cents a ton, which makes the cost of our coal, our anthracite coal alongside our dock, $10.724. That is without the handling charges or the cost of handling into the hopper. On barley coal there was a slight increase, there was an increase of 77 cents on our barley coal and three cents for tax, making the cost $5.07 alongside for our barley coal, without handling charges.

Q. The handling charge referred to is the expense that the company is put to to take the coal from the barge?

A. It is the cost of unloading it, taking it up over the trestle work into the hoppers, yes, sir.

1298 Q. Inquiry was made of you if coal dealers had notified you of unwillingness to deliver coal on account of the nonpayment of the bills?

A. Not the coal dealers; no, sir.

Q. Have any dealers made any comment with respect to it?

A. Why, we owe a very large oil bill. I won't say a very large oil bill, we consider it a very small oil bill, but the company were holding our contract and have demanded of me that I pay that oil bill in full within 30 days, stating that if the oil was not paid for within 30 days we would have to buy oil and pay for it in cash as we received it. I am unable at the present time to give—to meet the terms demanded by the oil company.

Q. You mean to say in 30 days?

A. Yes, sir. I am also in a position on the coal where we bought our bituminous coal, we have to pay for that in cash alongside of the dock. We have a boat now coming in that costs us $5,000, and as soon as it lands alongside the dock we have to have available cash to pay for that.

Q. Have you the available cash to pay for that barge?

A. No, sir.

Q. How much have you in?

A. I have enough to run now until Saturday night or Sunday morning.

Q. Is there more to come?

A. I do not know whether they will ship it. I was to answer today and say whether I can meet their terms, but I have an

1299 excuse, I have been in court and held it over until tomorrow.

Q. Do I understand they have given you an extension of 30 days on all your bills for oil, now?

A. We pay our——

Q. No, since you have been on the stand, have they given you an extension of 30 days on all you owe?

A. Oh, yes.

Q. You have said that?
A. Oh, yes.
Q. I do not understand you to say that was the fact.
A. We paid our July——
Q. That is not the point. Back on the record they asked you to pay in 30 days your bills?
A. No, you misunderstood. The bills we owe now must be paid in 30 days.
Q. That makes 30 days you have to pay them?
A. I have 15 days to pay $20,000 of the bill I owe, and the balance must be cleaned up within 15 days of that, making the total of the back bills we owe cleaned up inside 30 days.
Q. Have you made such terms with the company?
A. No, the terms must be made in the form of notes, and the notes will be discounted at once, and I cannot meet those notes.
Q. Have they served an ultimatum on you if you do not do this?
A. As I have outlined, that they were going to serve us oil as fast as they could and we must pay in cash as we received it. The smallest boat load we get is about $10,000. We owe about $50,000 now on oil.

By Mr. Jackson:

Q. You owe about how much for oil?
1300 A. About $50,000 in round numbers.
Q. How much for coal?
A. I could not tell you offhand.
Q. In the neighborhood?
A. I could not tell you offhand.
Q. As much as that?
A. No, I do not think it is as much as that.

Mr. Moran: It appears on the exhibit there how much we owe for material and supplies.
Mr. Jackson: I did not remember it.

Q. But not especially for coal?
A. It does not tell the coal itself.

Mr. Jackson: Have you that in mind, Mr. Gonnoud? How much for coal?
Mr. Gonnoud: No, you cannot tell unless you pick out the bills now.

Q. You have not had any such trouble as you mention in the nature of an ultimatum from your coal creditors, have you? Yes or no.
A. They do not know us as well as the oil people.
Q. Yes or no.
A. No. They have—well, you said yes or no. I won't answer. I could tell you what they have done.
Q. I would like to have you state the names of the beneficial stockholders of your company?

A. I do not know what you mean by beneficial. There are none of them beneficial.

Q. That is, the actual owners of the stock, who get the —t
1301 of it, as distinguished from any possible dummies?

A. Well, I do not know as there are any dummies.

Q. Then, the stockholders that you would name would be beneficial and actual owners of the stock?

A. Why, I presume so. I cannot give them to you all; there are about 25 or 30.

Q. Can you give us a statement of that very easily for the record?

A. I can give you a statement of the stockholders of the company, yes, sir.

Q. Will you do that?

A. Yes, sir.

Q. You have already stated the directors?

A. Yes, sir.

Q. Your stockholding in the main is owned or controlled by the Anthony N. Brady Estate, is it not?

A. No, sir.

Mr. Moran: Just a moment, I object to that.

The Master: What is that question? Read it.

(The Reporter read the question.)

Mr. Moran: Objected to as incompetent and irrelevant.

The Master: What is the purpose of the investigation into the stock holdings?

Mr. Jackson: The purpose of the investigation is to inquire as to any relationship between the control of the plaintiff and the Standard Oil Company with the idea of explaining any pinching at the present time by the Standard Oil Company of this plaintiff
1302 on its oil bill, at a time when this rate litigation is under way, as bearing upon what influence the Standard Oil Company may be exercising to induce the acquisition by this company of a higher rate upon its production. I would like to know what connection there is between the control of this plaintiff company and the Standard Oil Company.

The Master: Well, I suppose this is along the same line as the testimony in the Consolidated case, about the director in the Consolidated and the director in the Standard Oil.

Mr. Jackson: If there is any such relationship I should like to show it.

The Master: Well, is there?

Mr. Jackson: I am trying to find out.

The Master: Are any of your directors directors of an oil company?

The Witness: None of my directors, no, sir, not of any company.

The Master: Or that you purchase from? You know that of your own knowledge?

The Witness: I know that of my own knowledge.

Mr. Jackson: Now, I am asking about——

The Master: The stockholders?

Mr. Jackson: The amount of stock that is in the control
1303 or ownership of the Anthony N. Brady Estate, and I think, Mr. Moran, I do not know whether you want to concede on this—I will state the connection.

My understanding is that Anthony N. Brady in his lifetime occupied the same position towards the territory of Brooklyn generally and Long Island as to the control of public utilities, such as gas companies and traction, that the two Rockefellers, John and William, do in Manhattan, as the controlling factors of Standard Oil, in those separate localities. That was the general situation.

The Master: Has the Brady Estate any interest in these oil companies?

Mr. Jackson: That I would like to show. That they are the controlling interest in the Kings County and they are also interested in the Standard Oil. I would like to show that.

Mr. Moran: Are you prepared to show that they are interested in the Standard Oil?

Mr. Jackson: I was going to ask this witness and find out, as far as I could find out from this witness, bearing upon this pressure that the Standard Oil is putting upon this company at the present time, concerning an ultimatum when the coal companies are not doing it. And I would like to inquire further, directed to
1304 the situation that the Standard Oil Company being in a position to fix the price of oil, is raising the price of oil with the idea that simultaneously practically all the gas companies in this district are in litigation asking that the legislative rate be declared unconstitutional because the price of oil is going up.

The Master: That is too big a conspiracy for me to look into at the present time. Of course, if there is any fraud or undue pressure in these contracts, I will let you look into it. I will let him ask the question what is the Brady Estate's interest, and you can answer the question.

Mr. Moran: What is the Brady Estate's interest in the oil companies.

The Master: I think it is all right to let him give the stockholders.

The Witness: There are about 25 or 30. I cannot give them all.

Mr. Jackson: He said he would give us a statement.

Mr. Moran: We will give them all.

Mr. Jackson: What is the last question? We want some sketch of it on the record, you know.

Mr. Moran: No, we are going to have a complete list now, and not just a sketch. We are not going to give Mr. Brady separate and apart from the others, but as one of them. You want
1305 to sketch Mr. Brady, but you are not equal to the task.

Mr. Jackson: Of course, I mean to say on that that I was interested in the stock owners, the beneficial owners of the stock.

Mr. Moran: All the officers own is the stock, they hold the stock.

Mr. Jackson: I want the beneficial owners of the stock so far as these officers can give it to me.

The Witness: I will be very glad to give it to you, General, so far as I know.

Mr. Jackson: And I said what I wanted was not dummies, but the beneficial owners so far as he can give it to me.

The Master: That is as far as he knows, if he will give you that.

Mr. Moran: Just for the purpose of showing a connection between this company and the oil company.

Mr. Jackson: And the thing of that kind can appear. I have no other motive, Mr. Moran.

The Master: I am not going into an investigation as to whether the Standard Oil Company is ripping the throats of the gas companies and all that sort of thing; I cannot do it. We have to have another trial for that. Direct yourself to this particular matter.

1306 Mr. Jackson: Yes, it is a special inquiry which I think very important to be undertaken. What is the question?

(The Reporter read the question.)

The Master: Please confine your question to the men of his own company, and do not let him get afield into what the various stockholders of this company do in other companies. He does not know about it, and is not supposed to know about it.

Mr. Moran: Do you want a list of bondholders, too, General?

Mr. Jackson: We will leave the answer to the last question that he will furnish a statement of that stockholding.

The Master: Yes, he will furnish it.

Mr. Jackson: I think that is all.

The Master: Nothing further, Mr. Moran, from this witness?

Mr. Moran: No, sir.

The Master: That completes the cross examination of your witnesses, as I understand it.

Mr. Moran: All but myself. They have not cross examined me, yet.

The Master: You rest, then?

Mr. Moran: Oh, I rested the other day.

1307 The Master: You have not any other witnesses?

Mr. Moran: No.

The Master: Has the defense any witnesses?

Mr. Jackson: Very brief.

The Master: Can you call them now?

Mr. Jackson: We can do something to that effect, if you want to call them now.

The Master: Start them.

Mr. Jackson: Yes.

1308 DEFENDANTS' CASE.

Mr. Jackson: With special reference to Plaintiff's Exhibit 44, which, as I recall, is a statement of unaccounted for gas of certain companies purporting or claimed by the witness Hopson to have been compiled by him from the Public Service Commission report of the

Second District for 1917, that exhibit specified or named 11 companies, and in order to contest the fairness of that showing I desire to offer in evidence a compilation from the same report for 1917 that is somewhat more extensive a showing of those companies, and it has been prepared by the Accounting Department of the Public Service Commission of this District. We have not had a chance to have it written out, but if I may have this original writing of the accountant put in evidence, if it is satisfactory, I will have copies made of it and put in the record in typewritten form.

The Master: Is there any objection to it, Mr. Moran?

Mr. Moran: This has all the companies on. It includes the one we got.

Mr. Hill: Yes.

Mr. Moran: It is just more comprehensive. Of course it is subject to check.

Mr. Jackson: We can take that, then, and have copies
1309 made. We will accept any corrections on it that you call to our attention.

(The paper was received in evidence and marked Defendants' Exhibit D-6.)

Mr. Jackson: We desire to offer in evidence the laws of the State of New York.

The Master: I tell you we take judicial notice of the State of New York laws in Federal Court.

Mr. Jackson: I will call particular attention to these statutes.

The Master: Just call attention to them, but do not offer them in evidence. The Court will always take judicial notice of them.

Mr. Jackson: We desire to call particular attention to the laws of the State of New York, Chapter 604 of the Laws of 1916, with amendments and supplements to date.

Mr. Moran: Those are long amendments.

Mr. Hill: That amends Chapter 125 of the Laws of 1906.

Mr. Moran: That is different.

Mr. Hill: That is 604 made this applicable to this company.

Mr. Jackson: Yes, let me straighten it out. I have the
1310 date wrong. Chapter 125 of the Laws of 1906, also Chapter 604 of the Laws of 1916, also Chapter 736 of the Laws of 1905, also the Public Service Commission's Law, Chapter 480, Laws of 1910, being Chapter 48 of the Consolidated Laws, with amendments and supplements to date.

I had in mind calling special attention to subdivision 3 of Section 66 of the Consolidated Laws, Chapter 48.

The Master: Subdivision what?

Mr. Jackson: Subdivision 3 of Section 66 of Chapter 48 of the Consolidated Laws. I had in mind to read it into the record.

The Master: I do not think it is necessary to read it into the record; give me a memorandum of it, if you want particular attention called to it.

Mr. Jackson: Now, in reference to the history and tradition of the company, that Mr. Moran has gone into, and as bearing upon the

securities issues and their relation to the property upon which they were issued, and in their relation to all the issues of this case, which I will specify further, if your Honor deems it necessary, I desire to put in evidence further facts which were proven upon the trial in the State Court before Justice Greenbaum. We are prepared to offer the proof sustaining the facts we have in mind, and
1311 those facts are found, certain of the facts, in Justice Greenbaum's findings on that former trial. It is a clear and concise statement of these facts in the findings. They were based, as claimed by us, upon evidence in that case, which we can duplicate in this case. It will save the calling of witnesses and the going through the process of examination, which will be somewhat lengthy, and for that purpose——

The Master: What is the evidence about?

Mr. Jackson: I have the findings marked. And they are specific facts regarding the history of the company, and its property value—that is, the nature of its property and the value of it, upon which these securities were issued, according to the contentions and belief of the defendants. Not for the purpose of any valuation of the property in this case, because that is stipulated, but simply as showing the relation between the securities that are outstanding of this company, to the property upon which it was issued at the time it was issued, and those facts as to the organization—it may be different. I have not examined Mr. Moran's statement of it, as he has stated it on the record, the history of it and tradition. I have not examined it, to see whether it jibes with these statements—but these may be somewhat supplemental, it is our contention these are
1312 & 1313 the facts concerning its history, and we would like to put it in evidence on our side, as our facts in regard to this contention. We can put it in by witnesses, and can proceed subject to counsel's objection to materiality, but if he will concede that we have proven affirmatively these facts in this case, I can read the facts into the record from Justice Greenbaum's findings.

The Master: Show me the facts.

Mr. Moran: You need not show them. I won't concede anything that is there. There is nearly 99 per cent of it error.

Mr. Jackson: Didn't we mark these findings and Mr. Deegan call them to your attention?

Mr. Moran: No, he did not call them to my attention.

Mr. Jackson: He said he was going to.

Mr. Moran: We spent a lot of time getting out of this case the question of valuation, and I thought we had it out of it.

Mr. Jackson: I told you I did not offer this on the question of valuation, as the question would enter into the consideration of this Court for the purpose of fixing a rate, the valuation of the property, the so-called rate base. But that does not eliminate the question as to the history of this company and the process by which it has,
1314 we claim, increased over night in security valuation, without any property behind it. That will follow this company

to the end, so far as I can tell, and ascertain, and it is Mr. Moran's contention——

The Master: What is the purpose of this? Is it to support any application you might make in the event the Court grants an injunction—to grant it only on such terms as you might suggest?

Mr. Jackson: That would be part of it. There are several grounds. I think that I might think of several. Another is the plaintiff has seen fit to offer in evidence, and the Master has deemed that it was of sufficient value to accept it, evidence as to the proper rate of interest that this company will have to pay at the present upon its securities. According to Mr. Gardner, the plaintiff's witness upon that question, there is not any more valuable nor determining factor upon that question than just this reference I am about to offer. It determines that question. That question cannot be determined fairly or truthfully without the evidence that I am going to offer.

Here is another viewpoint. Plaintiff's counsel may wish to confine this inquiry to 1919 and 1916, but of course, that is a
1315 physical impossibility. You must, in determining that situation as to the present condition of this company—you must go back into the history of this company long ago. Now, how far those matters will bear upon the decision of this Court it is for the Court to say, but for the information of the Court it must have before it before it can fairly decide that, the situation as to whether this company has been efficiently operated in the past and has the opportunity to provide this certain period that is picked out as showing a failure to meet operating expenses. Now, that cannot be taken out of this case, that is, so far as eliminating it from the consideration of the Court. The Court may decide that under all the special circumstances it can do so and so in this case, but as far as the relevancy and competency of this evidence to be before the Court for its consideration goes, I think it is impossible to eliminate it, and the Court should have it without any question. The Court—for instance, this company has been carrying a great load of watered securities, and otherwise it might have had a surplus if it did not choose to declare dividends, and that surplus would have made it in first class financial condition in the beginning of this period, sufficient to carry it through——

1316 The Master: Perhaps I can answer your question stating what my present views on this situation are. — am determined that if it possibly can be done in any report that I make the Court will not have to consider i- any way, the capital investment, either through stock or by borrowed money of this company. If necessary, I will refuse to find on the question of rate of return any fact except those that will establish the current rate of interest, and not necessarily a specific sum, a specific rate they would have to pay if it went into the market for money. I am so determined to keep out of the findings of this case all consideration of capital investment, so that it cannot influence the Court in any way except as it may be presented to it through the stipulation which you have entered into. That is my present idea until counsel are able to argue

me out of it. But that idea is induced by the instructions I received from Judge Knox when you were all present, and by his earnest desire that the issues here should be tried under this stipulation, and should be presented to him as promptly as possible, and by his evident willingness to preserve the rights of all parties, to modify or to seek other relief under any injunction that he might give, in the event that the plaintiff succeeds in establishing his case. So that
1317 if it ever becomes necessary to go into the past of this company, it can be on a secondary proceeding or a supplemental proceeding, taken after the case has been acted on in the first instance by the District Judge. I recognize the strength of your position and your desire to offer evidence of this sort at this time, but I am going to frame my findings in such a way that none of that will come before the Court or before the District Judge.

Mr. Jackson: Of course, we had in mind that the situation the Court intended to avoid and that counsel had in mind intending to avoid by that stipulation was the length of time both in the preliminary stages and in the giving of testimony that a valuation of the plant would take necessarily and the going down and appraising and swearing experts for and against each item that went to make up the plaintiff company. Now, this is entirely a different question to my mind than that question.

The Master: I know.

Mr. Jackson: The valuation of property. The question, of course, will come up as to whether we shall take the valuation of the property at such a time, or the cost of it, or take into consideration
1318 the present valuation or what. Those considerations will be had in mind if the valuation of the plant, the physical properties were being under way. And I had in mind that is what we were intending to eliminate. But as far as the history of the security issues and their relationship to the valuation at the time, as we could show it for that purpose—that is, for instance, if we can show that a certain property was on the books of the company at so much, and presumably so much, and that over night there was an increase in securities that manifestly had no basis whatever except to be issued, that is all, and that the creation of securities at that time has been carried through to the present, and that that is one of the burdens, the false security basis of this company that has been bothering it in these times of greatest stress, that people paid upon that in former times, and they paid dividends out of the people upon that—now, here comes a time when the expenses mount up a little higher, and those questions—I do not say to determine it. I do not say it might not be possible *the* the Court, in view of all these things, should say there is a situation arises that the present condition must be taken care of in some way or another—but for the information of the Court it seems to me that when you say
1319 here is a company that paid so much interest we can issue so many more bonds and we have to do so and so, why, you would think when you put a bond out for the information of the Court, the Court is entitled to know what is behind it.

The Master: But for the consideration of the case as it comes to

me, I am going to dodge all of that, every bit of it. I may be wrong, you may send it back to somebody else or to me, or to go ahead with other findings, if I am wrong, but I am going to dodge it in the first instance.

Mr. Jackson: What we feel in the first instance for the defendants is that we desire to offer all the evidence that it seems to us competent and material to the issues. If we offer it and it is ruled out——

The Master: You see I am not going to let them get any advantage or you any advantage one way or the other.

Mr. Jackson: Yes, I appreciate your position entirely, your Honor.

The Master: I am just going to throw it out and go at it in an entirely different way, even though my findings will take some other form. The offer is rejected and an exception given.

Mr. Jackson: I think I would want to make it a little more
1320 specific.

The Master: You can frame it any way you want.

Mr. Jackson: I think I would like to offer to produce evidence.

The Master: You are making an offer of proof now.

Mr. Jackson: In a formal way, and then it could be on the record at any rate, although there would not be, perhaps any proof of it offered by us—that is, any evidence by us except the judgment in the other case.

The Master: It is an offer of proof which the Court declines to receive.

Mr. Jackson: All I had in mind was by specifying or calling particular attention to these findings that are already in the case, that we offer to prove, sustaining those findings or those facts—we offer to establish those facts by affirmative proof and specify what we have particularly in mind.

The Master: But I understand the proof that you offer—it is rather indefinite, the way you phrase it.

Mr. Jackson: No, I am not phrasing it. I say I wish to call attention specifically to the findings that I intend to——

The Master: I understand those findings relate to what we have been talking about?

1321 Mr. Jackson: Yes.

The Master: They relate to the capitalization of this company?

Mr. Jackson: Yes.

The Master: And the offer is rejected and an exception given. You can specify the numbers, but I understand it relates to the capitalization of the company.

Mr. Jackson: Well, I did not want that expression to exclude some others that I had in mind.

The Master: If there are some others, let me know, because I do not mean to exclude something and do not want to exclude something that does not come within that general theory of mine.

Mr. Jackson: My offer—shall I specify them, now, Judge?

The Master: Specify them now. Then we will adjourn after you specify them.

Mr. Jackson: Or I will specify them in — morning.

The Master: Specify them now so I can look at them. I will look at them and rule on them in the morning.

Mr. Jackson: It is particularly as to the facts stated in the findings of Justice Greenbaum in the former litigation of this question in the Supreme Court of New York State, County of New
1322 York, entitled Kings County Lighting Company, plaintiff against Morton E. Lewis, as Attorney General of State of New York and others, defendants. The numbers of the paragraphs of the findings of fact, which are in evidence in this case are the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth and twenty-fifth, and thirty-first.

The Master: These findings, I understand relate entirely to the prior history of the company?

Mr. Hill: Yes, and financial history.

The Master: That is, they do not relate to anything that happened during the years 1919 and 1920.

Mr. Jackson: And Paragraph fifty-two.

The Master: The offer is made, and I will rule on it in the morning. We adjourn now until tomorrow morning at 11:00 *a. m.*

(Further hearing adjourned to Wednesday, September 1, 1920, at 11:00 o'clock a. m.)

1322¼ [Endorsed:] Public Service Commission, First District, Sep. 1, 1920, Bureau of Statistics & Accounts.

1322½ United States District Court, Southern District of New York.

Before Hon. Gordon Auchincloss, Special Master.

KINGS COUNTY LIGHTING COMPANY, Complainant,

vs.

CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Transcript of Reporter's Minutes.

Alfred J. Price,

Certified Shorthand Reporter,

15 Park Row,

New York.

Barclay, 8477.

1323 KINGS COUNTY LIGHTING CO.

VS.

NEWTON et al.

61 Broadway, New York,
September 1, 1920—11.00 o'clock a. m.

Met pursuant to adjournment.

Present:

The Master.
Mr. Moran.
Mr. Chambers.
Mr. Hill.
Mr. Jackson.

Mr. Jackson: I think I would like to extend the offer that I made yesterday regarding Justice Greenbaum's findings, and for all the purposes that I mentioned then, as reasons for offering the findings specified then, I would like to extend my offer, and offer to prove facts which sustain each and every one of Justice Greenbaum's findings that are in evidence in this case.

The Master: Of course, I have not examined Judge Greenbaum's findings in toto, or carefully, but so far as his findings have anything whatever to do with capital investment account or the financial history of this company prior to 1919, the offer of proof is re-

1324 jected.

Mr. Jackson: I would like to take an exception to that. So far as the findings bear upon any other issues in the case, the issues involved in the questions of the operating expenses of 1919 and 1920—may they be allowed? That is, may we offer proof to sustain those findings?

The Master: Well, which one has anything to do with 1919 and 1920?

Mr. Jackson: I will take that up later, if your Honor prefers and specify the numbers. I haven't the findings before me. I went over them last night.

The Master: As I understand, Justice Greenbaum's decision referred to an application which dealt with years prior to 1919?

Mr. Jackson: Yes, as those years always have to come into consideration.

The Master: There is some evidence in, what the operating expenses were in this case; it already has been offered prior to 1919.

Mr. Jackson: I had in mind——

The Master (continuing): If you want to attack that evidence that is in, you have a right to do so, I suppose.

Mr. Jackson: I had not in mind attacking any evidence the de-

fense has put in; I had in mind, of course, establishing—or
1325 rather, not establishing, but—establishing the defense, but attacking the evidence of the plaintiff by whatever is shown and whatever is established by those findings to the contrary.

The Master: I am not disposed to rule on the question in that way, on the offer of proof in that way. If you have proof to offer to contradict plaintiff's proof, I think you should offer it in the usual course, and I don't want to be put in the position of ruling generally on an offer of proof of this sort, which you make.

Mr. Jackson: My offer is made in this form—made in the form it was yesterday—just in view of the plaintiff's contention that the necessities required a speedy determination of this trial, and decision of the question one way or the other at the earliest moment. I had in mind that as long as there was evidence in the former trial, adduced by the defense, to sustain the findings of Justice Greenbaum in that case, that instead of putting in this case the same evidence and further evidence, perhaps to sustain facts found by him, that we might save time by having counsel concede that we pro-
1326 duced upon this trial, evidence, affirmative proof, to sustain those findings; otherwise, I thought it might take some time to go into that and produce witnesses and schedules and all that sort of thing that were offered upon the other trials. I wanted to perhaps keep some of those schedules out of lumbering up the record in this case, and not go into the calling of the witnesses.

The Master: Counsel for the plaintiff has not been willing to concede any of the facts found by Mr. Justice Greenbaum in this prior trial, and so far as you offer at this time evidence referring to the capitalization of the company, I will refuse to permit you to introduce that evidence. What other evidence you have I would prefer to have you call in the usual course, and have it ruled on as it is presented.

Mr. Jackson: Then you have in mind that as to the offer, and referring to the specific exceptions that I mentioned yesterday that your ruling stand as of yesterday, and that you will——

The Master: My ruling stands——

Mr. Jackson (continuing): Without any further specification or any further direct offering of the proof than I offered it yesterday?

The Master: My ruling stands that I will not at this
1326½ time permit any evidence to be introduced which refers to the capitalization of this company.

Mr. Jackson: But what I mean is that you do not require me—that is not upon the ground that I am not offering the evidence in the proper form, I mean, specifically bringing forward the evidence?

The Master: So far as it relates to the capitalization of the company, even if you did bring it forward, I would not admit it.

Mr. Jackson: So it is not upon that ground. Your ground as to bringing forward the specific proof, or making the offer specifically, refers to my increased offer as of today; that is what I mean—to separate them, if we can.

The Master: As I said, I have not examined all these findings of fact, and I don't know whether any of them are material, or what

are material to this issue framed in this court. Now, if you propose to introduce evidence referring to the capitalization of this company, I shall exclude it, just as I shall exclude any evidence that the plaintiff brings relating to the capitalization of this company; and I shall frame my findings of fact, so far as any question of current rate of return and money borrowed, so that the prior financial history of this company in relation to its issuance of stocks or bonds
1327 shall not be drawn in question. Inasmuch as there has been a stipulation filed in this case agreeing for the purpose of this trial on a rate base.

Mr. Jackson: And your Honor has taken into consideration also, the other considerations besides the considerations of the rate base, which I called your attention to—that this evidence, in our opinion, would be material?

The Master: As I understand it, you say it is material, because in your opinion, it will establish the fact that this company, in applying for funds to bankers would be required to pay a higher rate of return than would have been the case if the company's finances had been conducted in some different way.

Mr. Jackson: We contend that, of course, also that bearing upon the present financial condition of the company, the burden that it has had to carry by reason of an over issue of securities is vitally material. As to the equity—the people, the gas consumers, having in the past been assessed and having to pay to carry this over burden, bears upon the equities that are before this court, as to whether they should be assessed continually now and in the future to carry that burden and assessed at a greater rate, at a greater price, as the
1328 plaintiff is now contending for by reason of that burden. The very fact of the overissue that we claim is the main discrediting fact in the efforts of this company to obtain more money. That has clearly appeared from Mr. Gardner's testimony, as we claim, and we shall argue.

The Master: If there had not been a rate base agreed upon in this case, it might be necessary for the Court to go into all those questions that you outline. The rate base having been agreed upon for the purposes of this trial, the subject matter of the investigation becomes a question of the expense of making gas.

Mr. Jackson: May I just——

The Master (continuing): And under that issue, as to whether during the years 1919 and the years in question, that is, 1919 and the first six months of 1920, the plaintiff has made gas at a reasonable cost, does not make material the character of the evidence you wish to offer.

Mr. Jackson: May I just mention one fact to point my argument in that respect? Just to point my argument in that respect, the outstanding bonds of this company, I understand, are $3,178,000. The stipulated rate base is $3,300,000. Mr. Gardner testified generally to the effect that a company at the present time to market its
1329 securities at the rate that good securities may be marketable at the present time, should make a showing of earnings at least twice the interest of the outstanding bonds. Now, that means

just one thing, and there is another and a better way of stating it, and that is the reverse: And that is that it is not a safe financing proposition, and that a company is not in a position at the present time to offer a good security upon the present market, when their outstanding bonds exceed one half of the fair valuation of their property. This company's outstanding bonds are $3,178,000. The stipulated rate base is $3,300,000.

The Master: You will remember that as soon as questions were asked respecting the capitalization and bonded indebtedness of this company, I at once stated that I wished further instructions from the District Court before going into that question, before permitting questions to be asked respecting them. The District Court instructed me that if a stipulation as to the rate base was presented, my duty was then to receive and ascertain the expenses of the company in the manufacture of gas and a fair rate of return on money borrowed, or a fair rate of return rather on the investment which was stipulated had been made in the company, and that if a rate base was
1330 not stipulated that I would then proceed with the case in the regular course and take evidence to establish the valuation of the company's property. It is my opinion, on the instructions of the District Court that a rate base having been stipulated, all questions as to the capitalization of this company became immaterial at this inquiry, for whatever purposes offered by the plaintiff or by the defendant; and in making my findings, I shall be guided entirely by my understanding, as stated, of the District Court's position.

Mr. Jackson: I did not intend to argue it any further, your Honor, if I may understand that I may have an exception at this time, and if I may understand that your ruling upon that point is not in view of the manner of my offer of proof.

The Master: No. The findings of fact of Mr. Justice Greenbaum that you have made an offer of proof of, some of them, contain minor things, one thing and another that might be pertinent to this inquiry; but so far as they relate to the capitalization of this company, I reject them. Now, if they contain other matters which do not relate to the capitalization of this company, which you believe are pertinent to this inquiry, inasmuch as the counsel for the plaintiff refuses to concede any of the facts, I wish you would
1331 proceed in the usual course to prove such facts and take the rulings as they occur.

Mr. Jackson: I will go into that, then, a little more in detail, further; and may I have an exception to your Honor's ruling, so far as it is made?

The Master: Yes.

Mr. Jackson: Mr. Gonnoud, did you bring up the stationery we asked for?

Mr. Gonnoud: They are getting it up over there.

Mr. Jackson: It is not ready yet?

Mr. Gonnoud: It is not completed yet.

Mr. Moran: I would like to inquire what is the purpose of having produced here the blank forms numbering something over a hundred, used by the company in its business. It seems to be a con-

siderable task to do it, and it may result in nothing. It is so out of the ordinary that I am entitled to know what is the materiality—what use is intended to be made of it, so that we might have a ruling of the Court upon it.

Mr. Jackson: No, I think that we ought not to have a ruling of the Court upon that. Counsel states it is a task, and the witness stated yesterday that it was not a task; and I am not quite sure, in view of his failure after 24 hours' notice to produce those blanks, that they are using every day in their plant down there, and
1332 can be picked, easily picked up, to my mind, with this big accounting force that they have down there, that they can produce these blanks. They can —— over the books and put their bookkeepers on to a schedule of figures but here I ask for a set of blanks without a figure on them, and defendant's counsel comes in, after their failure to produce them, and wants to know why they are offered. I don't propose to tell him why they are offered, or why they are asked for. It is cross-examination. I would wish the Master not to require anything further in that respect, because I think we are entitled to see the forms on which they make these entries; just the same as, when they proceeded in the first place, to put some books in here, they said we could examine anything they had, and they would bring it up, and now the first thing we ask, that they have not foreseen, or that they think is new to them, they ask my purpose first. It is not my custom to give counsel the benefit of all that before I start to cross-examine witnesses; it is not usually required, and it is not usually asked by counsel.

Mr. Moran: The witness' cross-examination is finished.

Mr. Jackson: I would take a chance on putting in those blanks if I were you, without asking the Court to protect you from voluntarily complying with our request although I do not presume
1333 to offer any suggestions on how to handle a rate case—I know I have not the qualifications.

Mr. Moran: I think in the interest of expedition, I would respectfully ask if I might be informed of the materiality of them.

The Master: Well, I will have to assume that the request is not idle and that counsel has some purpose in mind, to test the accuracy of the accounts. There has been some evidence here to the effect, I understand, that accounts were kept in the form prescribed by the Public Service Commission. It may be that counsel has in mind testing the accuracy of that statement. With Mr. Jackson's assurance that the request is not idle, that he has some definite purpose in mind——

Mr. Jackson: I thank the Master for that evidence of confidence. I assure you that it is not idle, because I don't care to take up my time any more than the Master's time or anyone else's time in this case, any more than necessary; I would rather be doing something else.

Mr. Moran: I understand that the papers are required for the purpose of showing, having them here and exhibiting them, and showing them by the Public Service Commission's accountants, that they have not had time to audit our books requiring——

1334 Mr. Jackson: You don't understand from anything that I have said, as to any limitation of our purpose or my demand. I simply asked to see the accounting system of this company, that can be easily produced here, and I do not intend to be limited as to the purpose of my request at all.

Mr. Moran: I intend to finish my sentence unless the Court——

Mr. Jackson: Pardon any interruption.

Mr. Moran: Well, I won't pardon the interruption, because it is studied.

Mr. Jackson: Well, then— it is not, it was entirely upon the spur of the moment.

Mr. Moran: They want these here to show that in order to audit and examine our books it will be necessary to check up all the entries in the books that are made from these numerous slips, tally slips, about a hundred or more in number, that are used from day to day; and by having these brought in and putting their accountant on the stand, they intend to show that they could not have audited and checked up our books. So, I don't know why any such proof is to be offered; but I am reliably informed that that is the purpose of it. I have been informed, I say, and I think reliably informed, that that is the purpose of it.

1335 Mr. Jackson: Who informed you, I should like to know now, in view of that statement?

Mr. Moran: Never mind.

The Master: Well, we can see when it——

Mr. Jackson: Well, I did not inform you, anyway.

The Master: I think we are wasting time on this.

Mr. Jackson: I think so, too.

The Master: Let us get ahead. Now, have you got any other cross-examination?

Mr. Jackson: Well, the ruling is, I suppose, that they are——

Mr. Moran: They are getting them together, I think. Now, let us be sure that they are.

Mr. Elsman: Yes.

Mr. Moran: I quite agree with Mr. Jackson that they ought to have been here before this time. Mr. Weeks, as I remember it, yesterday afternoon at two or three o'clock was to telephone to the office to get them.

Mr. Gonnoud: Yes, but they have to go to the works and branch offices to get these things.

Mr. Moran: I see; you do not confine them to the ones in the commercial office?

Mr. Gonnoud: No, they want every statistical and accounting record.

1336 The Master: Let us proceed, now, and see what we have got.

Mr. Jackson: There is a question in my mind as to whether the actual condition relating to candle power and heat units is shown by the record, and without taking up too much time there are one or two points about that that I would like to have clearly appear. Now, Mr. Searle or Mr. Klumpp doubtless would be qualified to

answer the questions, according to the plaintiff's contentions. Will Mr. Elsman also, upon that proposition, be qualified to answer?

Mr. Moran: Well, it depends.

The Master: Ask him.

Mr. Jackson: Relating to the candle power against heat units?

The Master: Let us ask him and see whether he is.

Mr. Jackson: I would ask Mr. Moran that, because it seems that he is the Governor upon the question of the competency of his witnesses to answer upon the different lines of questioning.

Mr. Moran: Well, I have to assume that responsibility, whether I am competent to do it or not.

Mr. Jackson: I did not question your competency.

The Master: Well, let us get Mr. Elsman on the stand,
1337 and ask him. He can say whether he can or not.

Mr. Moran: I do not know whether Mr. Elsman is qualified.

Mr. Jackson: I thought we might get a question after I had asked him a few questions counsel might tell him he was not qualified, therefore, I thought I would not start him.

The Master: Take the stand, Mr. Elsman, and let us get the proof as quickly as we can.

Mr. Jackson: Of course, Mr. Elsman may think he is qualified, but Mr. Moran may think he is not qualified.

The Master: Well, that will develop as it goes on.

Mr. Moran: Probably I could testify myself.

Mr. Jackson: Haven't you got enough testimony in without going on the stand?

Mr. Moran: I have, but I don't believe you understand it all.

RALPH ELSMAN, recalled for further cross-examination, testified as follows:

By Mr. Jackson:

Q. The points that did not seem to be quite clear, as I
1338 understood it, were in this respect. The witnesses have all talked a great deal about matters of adjustment and variation, and I think it does not appear yet upon the record clearly as to what is meant by the word "adjustment"—what you refer to. Now, let me help direct you just to the point I have in mind. The adjustment, so far as the consumer is concerned, an ordinary stove burner—the adjusting apparatus, there is an apparatus there by which he adjusts his supply of gas, is there not?

A. There is.

Q. I am calling it an apparatus. If my meaning is not perfectly apparent——

A. You are speaking of the air shutter——

Q. I am saying that, in view of counsel Moran's shaking his head. Now, confining my attention to Mr. Elsman, you know what I mean by "apparatus," don't you?

Mr. Moran: A Bunsen burner——

Q. (Continuing:) And that is, there is a little—before you come to the actual burner, there is a little place on the pipe where there is an adjustable opening that can be made larger or smaller, by which air is let into the pipe to mix with the gas before it comes to the burner; is that right?

A. You are speaking now of the air shutter of a burner.

Q. Well, would you say that was the air shutter?

A. That is the term that I would call it.

1339 Q. And is that where the gas is adjusted?

A. That is where the burner is adjusted.

Q. Yes; and what do you call that—an air shutter?

A. Air shutter, I term it—on a Bunsen burner, I am speaking of now.

Q. That is really a part of the stove?

A. That is part of the gas range.

Q. Part of the gas range, and is on the gas range just within a few inches of the burner proper?

A. It is on the front of the gas range.

Q. Yes.

A. It is below the cocks, between the cocks.

Q. And that is all that adjustment amounts to, it is an enlargement of the pipe with a shutter that turns about an axis and opens or closes holes to a greater extent, admitting air from the outside into the pipe to mix with the gas that you furnish; is that about the idea?

A. That is about right.

Q. And that is the only instrument or means by which the consumer at his burner adjusts his gas, so that when you have used the word "adjustment" as an adjustment made by the consumer, that is the only way he has of adjusting his gas, isn't it? If there is any other way, state it.

A. That, and the possibility of reaming out of orifices of the burner.

Q. You mean that the burner itself——

A. (Interrupting.) Or changing the orifice of the burner.

1340 Q. The burner itself is designed to spread the orifice of the gas pipe into a large number of small orifices, so as to spread the flame; is that true?

A. To radiate the heat.

Q. What?

A. Made to radiate the heat, yes.

Q. Now, we are just going to duplicate this record——

A. I am trying to explain it

Q. It radiates the heat, and it radiates the heat by spreading the flame, doesn't it?

A. It spreads the gas first.

Q. Spreads the flame. Spreads the gas first?

A. First, yes.

Q. And in spreading the gas it spreads the flame?

A. Yes.

Q. And spreading the flame radiates the heat?

A. Yes, technically correct.

Mr. Jackson: He is more of an expert than we thought, isn't he, Mr. Moran?

Mr. Moran: I think you used the word "radiate" there incorrectly.

Mr. Jackson: How would you? I would like to have——

Mr. Moran: It is direct contact, combustion in direct contact with the vessel; there is no radiation about it.

1341 The Witness: Well, he means spread.

Mr. Moran: No, he did not, he meant something else. If you meant "radiate" for "spread," they are not synonymous terms at all.

Mr. Jackson: Doesn't the heat radiate when it strikes the vessel?

The Master: Let us get right to the point of this examination.

Mr. Moran: It may radiate when it strikes the vessel.

Mr. Jackson: It radiates when it strikes the vessel.

Mr. Moran: No, I don't think so.

Mr. Jackson: I think your witness is right, and I am going to stand for it. It radiates heat into the vessel, because if we did not have that heat radiate there would not be any reason for getting your vessel to the flame. I think Mr. Elsman is right about this.

Q. Now, these smaller orifices of the burner, through which the flame comes in a smaller space for the purpose of separating the flame and extending it over a larger space—of course, they get clogged up with use, for different reasons?

A. Sometimes, yes, sir.

Q. And that is why you speak of reaming out those little holes?

A. No, I am not speaking of that orifice, General. I am

1342 speaking of the orifice where the gas passes in through the—from the cock through the shutter into that burner.

Q. I see.

A. There is an orifice in there——

Mr. Moran: Just a moment. I think he said gas when he meant air.

The Witness: Well, both gas and air.

Mr. Moran: Well, the air don't—the gas doesn't pass through those shutters.

The Witness: The shutter——

Mr. Jackson: State whatever the fact is. I want a clear explanation of it upon the record, because we have been referring to adjustments, and we have not got it, don't you see? It may be that the Supreme Court of the United States does not burn gas. That is all. Well, have you explained it?

The Witness: I think so, General.

Q. That hole that you are talking about reaming out now, is a hole of about what diameter?

A. Oh, it varies with the size of the appliance; sometimes ⅜, sometimes an inch—up to an inch.

Q. Well, now——

Mr. Moran: Oh, now, gentlemen, I must interrupt. One man is talking about one thing and one man about another. General Jackson is——

Mr. Jackson: I am perfectly willing to have you
1342¼ straighten this out.

Mr. Moran: General Jackson is talking about the small orifice where the gas comes out and is burned.

Mr. Jackson: We passed that. He said he referred to another orifice, and I am now referring to the other orifice.

Mr. Moran: You spoke of reaming out.

Mr. Jackson: I did.

Mr. Moran: What do you mean by that?

Mr. Jackson: He spoke of reaming out, and I thought he meant the small orifice, and when he said he did not mean that, I immediately understood him, and I now turn my attention to him. I don't want to go so fast that you can't keep up.

Mr. Moran: I thought when you spoke of reaming out, you meant cleaning out that little orifice where the gas comes out.

Mr. Jackson: I don't mean that. I saw that he did not mean that, and now we are talking about the gas pipe at the point he means, ⅜ to an inch.

The Witness: Oh, they run all sizes.

Mr. Moran: What do you mean by reaming that out?

Mr. Jackson: Well, you know what a reamer is.

Mr. Moran: Well, no.

Mr. Jackson: Well, a reamer is a tool by which they
1342½ enlarge holes.

Mr. Moran: Well, there is no such thing used on those shutters at all now. That is what I thought, a reamer was something that they put into this little thing and wriggle it around and cleared out out of there.

Mr. Jackson: By the gods, Mr. Moran, you are not using technical language. I am surprised. Wriggling a reamer around is very far from technical.

Mr. Moran: Well, they don't go and punch those holes larger.

Mr. Jackson: No; I will tell you what I think he means
1343 that he puts in the reamer to clean out the pipes from any clogging, if the sludge gets up as far as that, or anything of that kind.

The Witness: No, I do not mean that at all, General.

Q. No, you mean you ream out the pipe to clear it out—is that it—from any obstruction that may get in there?

A. No; sometimes the appliance, even standard appliances, have the orifice—it is not the size of an opening that you would expect from the out-side diameter of the pipe, and it is necessary sometimes to make that orifice larger to allow sufficient quantity of gas to flow through to the appliance.

Q. Well, that you all adjust yourself, the company adjusts it when it puts in the stove, the appliance, doesn't it?

A. Oh, no, that is——

Q. You should do it, shouldn't you?

A. No, we should not do it.

Q. How often do you have to go up and ream out these?

A. Not very often.

Q. What degree of temperature, what change of degree of temperature requires that you go up and ream out those orifices?

A. Temperature would not have anything to do with it.

Q. And candle power and heat power would not have anything to do with reaming out those orifices? For instance, if you had a certain candle power, say 22 candle power today, and only 15 candle power tomorrow, you would not have to go up and ream out those orifices, would you?

1344

A. I do not think candle power or b. t. u.'s would have anything to do with it.

Q. That is what I thought.

A. It is a matter of pressure.

Q. And as your pressures vary ordinarily, you don't have to ream out those orifices as your pressures vary, do you?

A. Sometimes the consumer overloads his own house pipe, and it is necessary to change the orifices.

Q. Well, if the orifice is reamed out once, so that it is large enough, it does not have to be reamed out again, does it?

A. No.

Q. Unless perhaps to make it larger?

A. No.

Q. And you don't have to go and reduce the size of it for any purpose?

A. That would be impossible.

Q. So that then, what you have spoken about as the difficulty that the consumer might have with adjusting, or making any adjustments at the burner, referred to the adjustment of this shutter—is that what you call it, air shutter?

A. Air shutter, yes.

Q. Air shutter, by which he regulates the amount of air?

A. Yes.

Q. That he mixes with the gas before it is burned?

A. To get the proper product of combustion, that is correct.

1345

Q. So that that is the little apparatus that the consumer has to adjust?

A. Principally.

Q. No, no; if you insist upon saying——

A. Yes.

Q. (Continuing.) —Practically, I have got to stay days here and find out just what it is.

A. I was starting to finish it.

Q. Isn't that all the consumer has to do then, that air shutter?

A. If he would do that he would take care of his appliance, yes.

Q. Isn't that what you have been referring to, and the expert witnesses have been referring to, when you talk about the trouble that a consumer had at his burner in making adjustments?

A. Yes.

Q. That is all I wanted. Now, it has taken us ten pages of evi-

dence to get it. Now, what your experts have been testifying to here is the difficulties in variations and suiting adjustments to variations, when the consumer has to do that work, and the work and trouble and all that sort of thing that you save to the consumer by reason of avoiding so much difficulty in adjusting on account of the variations, as they have testified to here in their general—in explaining their general theory that the substitution of heat units and of a low number of heat units is better for the consumer than candle power—
1346 directing your attention to that phase of your experts' testimony, the variation they mentioned related to the variation in the number of heat units that would be supplied to the consumer and would necessitate a greater or less attention to this adjustment apparatus this air shutter at his burner did it not?

A. What is the question, General? I could not hear it.

Mr. Jackson. Now, read the last part. You had the first part of my question, directing your attention to what I had in mind. Now, read the question.

(The question was read by the reporter as above recorded.)

A. I think the variation that they related to was the variation in heat units and in candle power.

Q. Well, now, I think we can get your mind right?

A. I am not clear on what you wanted me to do.

Q. I think I can get your mind to see what I had in mind. Didn't your experts intend to testify here, as you understood it, that it is better for the consumer that he gets a gas that is better for his purposes, more suitable for his domestic uses, better all around for his purposes, if a gas of a lower number—without specifying the number of heat unit—is furnished him than gas of a higher number of heat units?

Mr. Moran. I object to the question now. It is predicated upon
1347 the testimony of the witnesses called on that subject, and their testimony should stand subject to such inferences as may be properly drawn from it on argument of counsel, and so forth. I do not think it is proper to put a layman on the stand and ask him what his understanding of the testimony of witnesses is.

Mr. Jackson. Well, now, I thought we would come to that, your Honor.

The Master. Objection overruled.

Mr. Jackson. That they would call Mr. Elsman a layman.

The Master. The witness is not a layman. I do not think.

A. I think that the experts wanted to convey the fact that it was easier and more possible to maintain a flow of gas containing a lower b. t. u. value, or to convey—I would like to change that—convey the impression that it would be more possible and easier to convey, to put out a b. t. u. gas of a low heating value than it is to put out a gas of a high heat value, for the reason that it is easier to maintain uniformity at a low b. t. u. than it is at an extremely high b. t. u. or candle power.

Q. And that, you understood them to say, was for the consumers' benefit?

A. Oh, for the consumers' benefit absolutely; and the company's benefit.

Q. Well, I did not ask you about the company just now.

A. Yes.

1348 Q. You understand them to say that that was for the consumers' benefit?

A. Oh, yes.

Q. And that brings it to what I want to get at. You say that the lower heat units will furnish a more uniform flow.

Mr. Moran: I object to that. Just one moment. I object to the question now.

Mr. Jackson: Well, didn't he say that?

Mr. Moran: No, he did not say anything approaching it at all. He did not say anything approaching it.

Mr. Jackson: I am ready to examine the most expert men you have got on this.

Mr. Moran: Well, they were here.

Mr. Jackson: What?

Mr. Moran: They were here now. If you want to get this witness's opinion—

Mr. Jackson: I do not want him to change a word they said.

Mr. Moran: Then why ask him anything about it?

Mr. Jackson: Because I want it further explained on the record.

Mr. Moran: One man can't explain another man's testimony.

Mr. Jackson: I am ready to have the bunch here.

Mr. Moran: How?

1349 Mr. Jackson: I am ready to examine the bunch of them.

Mr. Moran: They were here for examination.

Mr. Jackson: I know; but in looking over this record, I say that to my mind they have not made it clear.

Mr. Moran: But they were the ones to make their testimony clear.

Mr. Jackson: I thought it would avoid, as long as we entered into this in a hurry and under the stipulation that our cross-examination was reserved until such time as we had an opportunity to go over this case—I thought instead of asking you to produce either one or all of these experts, that I would examine anybody that you produced upon this question, to have the record clear; and I will take your testimony or take Mr. Elsman's, or anybody you suggest.

Mr. Moran: Confine it to Mr. Elsman, let him say what his views are. I object, I seriously object. I rely upon their testimony on this thing. If you want Mr. Elsman,—I have not offered him as an expert on candle power or b. t. u.'s either one.

Mr. Jackson: All right, but I shall want the subject of variation or uniformity explained by Mr. Elsman or some expert, without explaining what they said here at all. I except to explaining

1350 it.

The Master: Let us proceed with Mr. Elsman. He has had a considerable amount of experience as manager of this company.

Mr. Jackson: I think he understands the theory perfectly.

The Master: And ask him just as direct questions as you can about the points you have in mind.

Mr. Jackson: I will try to.

The Master: And if he does not agree with the experts well and good.

Mr. Jackson: All right.

Q. The point is this, Mr. Elsman: Given a certain adjustment on this air shutter, so that the holes through which the air is coming into the pipe to mix with the gas are of a certain size, if you furnish a very rich gas in heat units, a very slight difference in that adjustment, or a slight shifting of the shutter so that the holes are made only to a small degree larger or smaller, makes a greater difference with the amount of heat that the man gets at his furnace than if the gas that you had furnished were not so high in heat units?"

A. I do not agree with you.

Mr. Moran: In my requests filed with the Master,—what I contend for the testimony given?

1351 Mr. Jackson: I am perfectly willing to. I told you I would take your testimony on it.

Mr. Moran: I don't want to give testimony.

Mr. Jackson: I will examine you on it. I want it clear.

Mr. Moran: I don't want to give testimony. I am utterly incompetent. I only want to say what the testimony means as I understand it.

Mr. Jackson: I am perfectly willing for you to state it. I want the situation perfectly clear on the record.

Mr. Moran: Gas of a low b. t. u.—well I will say 500 b. t. u.—can be furnished at a more uniform heat content than a gas of 600 b. t. u. They testified to that. It can be kept more nearly uniform, that is, the variation between the number of b. t. u.'s in it won't be so great when they are running on a lower b. t. u. than if they are running on a higher. Now, they said that

Mr. Jackson: It is perfectly simple.

Mr. Moran: That is simple. Now, whenever there is a change in b. t. u. the appliances should be adjusted, that is, the amount of air that gets in to make a perfect mixture to bring about perfect combustion should be different with a high b. t. u. gas than what it is with a low b. t. u. gas. Whether it is more air or less air, I

1352 don't know, but it has got to be different, according to the testimony of the witnesses. And the witnesses have not intimated at all the amount of adjustment necessary, how much larger those orifices——

Mr. Jackson: That is what I am trying to get.

Mr. Moran: I know, but they have not intimated it at all, any of them.

Mr. Jackson: I am trying to make it clear.

Mr. Moran: No, they have not intimated it at all.

Mr. Jackson: It doesn't make any difference whether you wanted them to intimate it or not, because I want it clear. We are not going

to have a generality in the pretty technical way you state. We want the plain facts. I want to get some of the sludge out of the technical language in this case, and to get it clear; and it is a perfectly simple proposition.

Mr. Moran. Yes. They have not said anything about it—you are right, they have not said anything about adjustment.

Mr. Jackson. I will state the proposition to you if you don't mind my stating it.

Mr. Moran. All right, state it.

Mr. Jackson. And show you how simple it is. The proposition is just this. That if you take a concentrated extract of anything——

1353 Mr. Moran. Witch hazel for instance.

Mr. Jackson. Castor oil I suggest. Just keeping as close to the question of oil and gas as we can. If you have a concentrated extract of castor oil, the size of the dose makes a whole lot more difference to you than if you have a larger diluted extract of castor oil.

Mr. Moran. Well, I am not an expert on castor oil.

Mr. Jackson. I know, but I am trying to illustrate to you how simple this proposition is of the variation in your adjustment, and everything. If you will take a table spoonful as a dose of concentrated castor oil and call that a high b. t. u. gas, for comparison, it will make a whole lot more difference to you than if you take a table spoonful of a castor oil solution that has 99 per cent castor oil—99 per cent inert material, to speak technically as the druggists put it out now, as they are required to under the law, and which the attorney general knows well about in his prosecutions—inert material and one per cent of castor oil; and that is the whole theory of your higher and lower b. t. u. as it makes a difference to your consumer at his burner and requires his adjustment. Because if you are giving a concentrated extract he would have to adjust it con-

1354 stantly to provide for the greater degree of heat that is going through with the variation whatever variation, and if you give a lower degree of extract and a greater degree of dilution, why you can leave your burner wide open and it doesn't make much difference because he is not getting much gas anyway, he is getting all air and he is not getting much heat units anyway it does not make much difference how. Now, I would like to have this clearly appear, and not have it all built up in those beautiful technical terms. If you take my statement against your statement on that, I won't ask anything more of the witness.

Mr. Moran. Just a moment now.

The Master. Let us proceed with the witness and leave those arguments for later, General.

Mr. Jackson. I don't want the proposition of——

The Master. If this witness can't answer the questions he can say so. If he can, let him answer them. If he agrees with you, he will say so, and if he disagrees with you he will say so, and we will get somewhere in the ordinary usual procedure.

Mr. Jackson. Yes. I think I have not enough really from him

when we have got the description of the adjusting apparatus, because I think the rest is all perfectly apparent. So long as it is explained some place and so long as Mr. Moran explained it—and Mr.
1355 Moran explained it, I think—we have our contending theories explained. I think, in a way, castor oil on this question is about as illuminating as some gas they furnish, perhaps more so. I like that castor oil suggestion.

Mr. Moran: Well, you may be right about the castor oil, but on the gas you are entirely wrong, absolutely wrong. You haven't got within 10 rods of any place, as they say.

Mr. Jackson: I did not intend to suggest castor oil in the final inventory. I am getting to talk in technical language so much since I got into this case that I am afraid that it will leak into my ordinary discourse.

Mr. Chambers: Isn't the question of b. t. u.'s all immaterial? The statute says 22 candle power.

Mr. Moran: Oh, surely, it is all immaterial.

Mr. Jackson: Well, that is enough. I think there was something else.

Q. Oh, did you bring up your correspondence?

A. That is on the way over. No, General, it will be here in a short while.

Q. Do you think it will arrive safely?

A. Yes, sir.

Q. And intact?

A. Yes, sir.

Q. Did you bring your list of stockholders?

A. Yes, sir.

Q. Have you got it here?

A. Yes, sir.

1356 Q. Would you produce them, please?

A. (Witness produces paper.)

Mr. Moran: I object to producing a list of stockholders of this company; it is wholly immaterial and irrelevant.

The Master: Objection overruled and exception.

Mr. Moran: Exception.

The Master: I will entertain a motion to strike it out later on, if it is not proved——

Mr. Moran: That is, if it is not connected?

The Master: Relevant.

Mr. Moran: All right.

Mr. Jackson: May we consider this saved till after recess, to see if we want to say anything more about it? Do you mind that? I will mark it for identification, if you like.

Mr. Hill: It is in evidence, subject to being stricken out.

The Master: It is in evidence, but I will entertain a motion to strike it out later on if it is not proved relevant.

(Paper received in evidence and marked "Defendants' Exhibit D-7.")

Mr. Jackson. Perhaps I had better reserve any questions on that until after recess.

1357 The Master. I don't think you ought to go into that unless you have some pretty definite proof.

By Mr. Hill

Q. What is the number of hours per year that you burned street lights, or that you are paid for?

A. I gave you a slip this morning.

Q. 3950?

A. Yes, sir.

Q. And you figure that you consume in that light three and a half cubic feet of gas each hour?

Mr. Jackson. Per light.

Q. (Continuing.) Per lamp.

A. That is the amount that we use in estimating, yes, sir.

Mr. Moran. That is what the city estimates.

The Witness. Yes, sir, and we use it.

Q. And did you state on your direct or in some previous testimony that in your opinion you used about four and a half feet actually?

A. Yes, sir.

Q. You think there is a loss of about a foot an hour?

A. Yes, sir, that is what my estimate is.

Q. In 1916, did you pay as dividends on capital stock $20,000 and in 1915, $120,000, in 1914 $125,000, in 1913 $115,000, in 1912 $120,000, in 1911 $120,000, in 1910, $120,000, and in 1909, $120,000?

Mr. Moran. Now, I object to that.

The Master. Objection sustained.

Mr. Moran. As wholly immaterial and irrelevant.

1358 Mr. Hill. Exception.

Q. I will ask you if you paid as interest on the funded debt in 1920—

Mr. Moran. Well, plaintiff will concede that it has never defaulted in its bond interest.

Mr. Hill. Then the figures—I want to ask a question about it.

Q. Have you paid on your funded debt in 1920, as shown by your reports to the Public Service Commission, as of the day of your last report, $79,150.? Did you pay in 1919 $158,900.——

Mr. Moran. Will you please let it—I might be willing to take some of it, and others I might not—don't put it al-together.

Mr. Hill. How do you want me to spread it?

Mr. Moran. Each year, I think we might take it.

Q. Did you pay in 1920, as of the date of your last report to the Public Service Commission $79,450?

Mr. Moran: Now, I object to the question, and further because the report of 1920, report to the Public Service Commission, would not show any payment of interest in 1920. No other report has been made which would show any payment.

Q. Tell me how much you have paid as interest on your funded debt in 1920?

A. We paid —

Q. Dollars and cents, if you will make the computation?

1359 A. We paid our July interest. I can tell you what we paid. We paid July first the interest on our first mortgage bonds, first refunding mortgage bonds, amounting to $66,700. And March 30th we paid the interest on $750,000 of first mortgage bonds, amounting to $18,750. That is all this year.

Q. Does that aggregate $79,450?

A. That is correct, yes, sir.

Q. Did you in 1909, pay $158,900?

The Master: 1919.

Q. 1919, pay $158,900?

A. That is correct, yes, sir.

Q. Did you in 1918 pay $165,729.18?

A. What was that amount again?

Q. $165,729.18?

A. I do not think that is the correct amount, no, sir.

Mr. Moran: That is interest on bonds and probably some other interest.

The Witness: And a dividend — no. Oh, there is more interest than that.

Mr. Moran: I know there is, but you were so impatient.

The Witness: Beside this, Judge, I should include interest on the bonds on deposit in the Empire Trust Company. That amount I just don't know off hand in 1919 and also in 1918.

Mr. Moran: And 1920 too?

1360 The Witness: Yes, sir.

Q. I asked you if it was $165,729.18 in 1918. That figure seems to be made up as follows: 5 per cent interest on first mortgage bonds $37,500?

A. Yes, sir.

Q. And interest on first refunding bonds $128,229.18?

A. All right. That figure—if that is from the Public Service Commission reports, it is very likely correct, yes, sir.

Q. I assume—oh, it is from their records?

A. I would like to change that. I would like to change the 1920 and the 1919.

Q. All right, what is your 1920 then?

A. The 1920 would include the interest on the bonds on deposit.

in the Empire Trust Company. That amount I don't know offhand.

Q. There were how many on deposit there?

A. Something like $596,000 I think.

Q. And you are paying interest on that?

A. Yes, sir.

Q. Depositing it with the Empire Trust Company?

A. Yes, sir.

Mr. Moran. Now, there is just this. We are not paying interest on those bonds in the sense that we are paying interest on the outstanding bonds. We put the bonds in the trust company under the order of the Court. The order of the Court requires also to redeem the coupons when they come due, put the interest
1361 in there. The interest is in there, it may become our property and I am very hopeful that it will.

The Witness. Well, we are paying the interest on it.

Mr. Moran. No, we are not paying the interest on that, in the sense that we are paying it out.

Q. Well, you are depositing the money with the depository of the bonds?

A. Yes.

Q. And that happened also in 1919?

A. Yes, sir.

Q. And that figure is not included in the figure $158,100?

A. No, sir.

Q. And that figure was not included in the $79,450 in 1920?

A. No, sir.

Q. Now, in 1918, is that amount of money which you deposited in redeeming the coupons included in the $165,729.18?

A. Yes, sir.

Mr. Moran. Our annual interest on outstanding bonds in 1918, 1919, and 1920, and was $158,900.

Mr. Hill. Yes, and 1915, 1916, 1917, 1918, and 1919, except that in 1918 you have made that deposit.

Mr. Moran. Well, in 1918, 1919 and 1920, we have paid into the Empire Trust Company an amount of money equivalent to the face of the coupons maturing upon the bonds that are there on deposit. How much it is I can't say.

Q. You adopt that statement by your counsel as to the
1362 years 1915, 1916, 1917, 1918 and 1919, the bond debt of $158,900, yourself?

A. Yes, sir.

Q. And in 1914, was——

Mr. Moran. I object to going back to those years.

Mr. Hill. I will just ask.

Q. In 1914, did you pay as interest on your funded debt, on your bonds, $152,243.43?

A. I don't know.

Mr. Moran: Just a moment now. I object to that as it seems to be eliminated from the case.

Mr. Hill: It would seem to me, your Honor, that we should show what this company has earned during a certain period of time upon this theory of ours. We may be wrong. We might have an opportunity to argue. That the company should have prepared itself in the fat years for the rainy days that were to follow the sunshiny days.

The Master: Of course, in my theory of the case none of it is material. I may be entirely wrong. I think that you had better not go back any further if he objects.

Mr. Hill: Then an exception, and then I will just ask one question that brings it back to 1909, and take a ruling on that.

Q. I ask you if in 1913 you paid $143,933.55, and in 1912 $143,851.39, in 1911 $140,150, in 1910 $140,150 and in
1363 in 1909 $131,816.67 if those amounts were mentioned each year were paid as interest upon your funded debt.

Mr. Moran: I object to that upon the same ground.

The Master: Objection sustained.

Mr. Hill: Exception. Now, let us see. I did ask as to each of these amounts paid as dividends.

The Master: Well, have you finished?

Mr. Jackson: With this witness.

Redirect examination.

By Mr. Moran

Q. Mr. Elsman, with reference to adjustment of appliances, the Bunsen burner used in connection with a mantle burner, a Welsbach burner, incandescent lamp, need adjustment also to meet fluctuations in heating value?

A. Yes, sir.

Mr. Jackson: Well, now, wait a moment. I object to that as immaterial and incompetent.

The Master: I did not hear it.

(The question and answer were read by the reporter as above reported.)

The Master: I will let him answer. There is a lot of it, but I don't see that it is material.

Mr. Jackson: Exception.

Q. Is the adjustment in that Bunsen burner used with a mantle lamp limited simply to changing the size of the air orifice?

1364 Mr. Jackson: Just a moment. I don't wish to impose on you any further than necessary but frequently your voice is so low that it does not reach any further than the witness and the stenographer, perhaps the Master, but it does not get to me.

Mr. Moran: Well, I didn't know that you wanted it, Mr. Jackson. I didn't know you were interested. I saw you were talking with your associates.

Q. Is the adjustment of the Bunsen burner which is used in connection with the incandescent lamp limited solely to adjusting the size of the air orifices, or does the adjustment include also the gas orifice?

A. Includes both, on the lamps.

Q. Both on the lamps?

A. Yes, sir.

Q. And with respect to heating appliances, in an ordinary range there are as many Bunsen burners as there are gas plates?

A. I don't know what you mean by gas plates.

Q. Well, where the gas comes out, you know and radiates—gas burners?

A. Oh, yes, there is one for each burner.

Q. One for each burner?

A. Yes.

Q. It is not one Bunsen burner for a whole battery of burners on a stove?

A. Oh, no, each burner——

Mr. Jackson: Will you describe what he means by a Bunsen burner? I want this clear.

Mr. Moran: I know, but that is a matter I think the Court [illegible] will take judicial notice of that.

Mr. Jackson: Let me ask him then.

Mr. Chambers: What are Bunsen burners?

Mr. Jackson: Yes.

By Mr. Jackson:

Q. Mr. Elsman, is this little air shutter that you spoke of in answer to my questions, that lets the greater or lesser amount of air in to mix with the gas, at a gas stove—that is the principle of the burner, Bunsen burner applied to a gas stove, isn't it?

A. That is the burner that they use on a gas stove, yes, sir.

Q. That is what counsel mean and what you mean when you speak of a Bunsen burner in connection with a gas stove, isn't it?

A. That is one of them, yes, sir.

Q. Yes. Well, that is all of it, isn't it?

A. No, they use the different kinds of Bunsen burners.

Q. Isn't the principle of a Bunsen burner, the principle of mixing air with the gas in a certain proportion before it gets to the flame?

A. Yes, sir.

Q. That is all there is to the Bunsen burner, isn't it?

A. Yes, sir.

Mr. Jackson: I want that clear on the record.

Mr. Chambers: It is a carburetter.

The Witness: That is a good explanation.

Q. A carburetter for air and gas, that is all?

A. Yes, that is a good explanation.

1366 Q. And let me tell you—let me ask you. You own an ordinary automobile car, such as you see the streets of this city crowded with, don't you?

A. Yes.

Q. You know something about the carburetter there on the automobile?

A. Sometimes I think that I don't.

Q. That is rather a delicate apparatus, isn't it?

A. Very delicate, on some automobiles.

Q. But there is no comparison between that carburetter and this Bunsen burner on a gas stove, is there?

A. Oh, on some of them, yes,—very similar.

Q. Isn't it a perfectly simple thing for anybody in any house to operate, if he just wants to turn that one way or the other, and regulate that flame?

A. Well, they don't do that.

Q. It is a perfectly simple thing to do, if they would?

A. If they know how.

Q. Yes.

A. But they don't know how.

Q. Don't know how to turn that slide one way or the other?

A. They don't know how to get the proper amount of air, to introduce the proper amount of air in order to get the proper combustion. Very few people know that. It is surprising.

Q. Well, very few people know how to take medicine for themselves, but a simple well diluted medicine won't be very harmful, will it?

A. That is why they get a doctor.

Q. And that is the principle of your diluting the gas, 1367 isn't it?

A. We don't dilute the gas.

Q. Because a very small change in the bunsen burner will make very little difference to the consumer,—even a very large change in it will make very little difference—so that the Bunsen burner does not need to be adjusted so often, because it does not make much difference to him what the size of the air aperture is?

A. Oh, I don't agree with you General.

Q. He gets a diluted quality of gas in any event?

A. I don't agree with you, no.

Q. Well, all right. Now, the same proposition is—when you mention the incandescent lamp, the Bunsen burner of the incandescent lamp is simply, in another shape, a slide or shutter by which the hole is—holes are regulated, so that you may let more or less air in to mix with the gas before it comes to the flame?

A. Oh, it is a different burner with an incandescent lamp entirely.

Q. Of course, it is a different shape, that is all.

A. No.

Q. The same principle, isn't it?

A. No, it is a more refined form.

Q. Isn't it the identical principle?

A. No, it also has an air ——

Q. (Interrupting.) You mean you can let more air in to mix with the gas before it burns?

A. It also has an air adjustment on the lamp burner.

1,865 Q. That is so that you can hold back the quantity of gas?

A. Yes, or let it out.

Q. But it comes to the same principle, doesn't it? You hold back and do not let so much gas come up to the Bunsen burner where the air is admitted, and it is simply the same principle, regulating the heat, or proportioning the air to the gas, that is all there is to it, isn't it?

A. Oh, practically so, yes, sir.

Q. Perhaps we had better have it clear upon the record too as to the number of burners in your gas services there in Brooklyn. I think there is some expression to the effect that there are very few, or something of that kind. Now, have you. I imagine with all the computations and study that you have made of this subject, you know the exact number of open plain burners that there are on your services, do you not?

A. No, I am sorry to say that I don't know the exact number. I know that the percentage is very, very low.

Q. Don't you know, regardless of percentage?

Mr. Chambers. You have it in the record.

A. We can tell you what the percentage is.

Q. It is very low and very few?

A. Very few.

Q. And I suppose when you reduced it to your general proposition of cost per thousand cubic feet, it would be a very small decimal?

A. Oh, yes.

Q. But I want to know the number?

A. I say about 1 per cent or less.

1,869 Q. Tell me what that means in round number.

A. I don't remember offhand. I remember we made a ——

Q. If you can't guess the number, how can you say it is one per cent?

A. Well, I will tell you why I happen to think of it. Back in 1917 and 1918, when we had the very severe winter, after that there was a— after the investigation before the Public Service Commission, we wanted to find out what it would mean to equip all the open flame burners in our district with Welsbach lamps, and we made an estimate at that time, and while I don't remember the number, I remember the percentage was very, very small.

Q. Well ——

A. (Interrupting.) I can tell you where these open flame burners are used principally, as the result of that investigation.

Q. I know you have been over that ——

A. (Interrupting.) In attics and hallways and cellars.

Q. That was all in your prepared case, and now I would like to

have you supplement the preparation that you have already made by giving us the number of open burners. You can give that, can't you?

A. Oh, I told you right now I can't give you the number.

Q. Well, your books show it?

A. They don't show anything of the kind.

Q. Don't the number of open burners appear on your books?

A. No.

Q. Haven't you any record of it?

1370 A. No. I don't know of any gas company in the world that has.

Q. Haven't you any record as the result of your investigations back there with the State?

A. No. I don't know of any gas company in the world that has.

Q. I didn't expect to get your records from any other gas company.

Mr. Chambers. You have a record of it.

The Witness. That is an estimate, absolutely.

Mr. Chambers. Is it?

The Witness. For any gas company, that is.

Mr. Moran. The Consolidated made a count at the time they made that order in 1917 or 1918, they had collectors and meter readers as they made their calls make inquiries or look the premises over and from that they got an estimate. We never did that.

Mr. Chambers. They gave some odd figures like 8963. like that I mean. I have the written report signed by Carter.

Mr. Moran. Oh, yes, they have that. Mr. Carter agreed and pointed to get it up, and said it could be done.

Mr. Chambers. He wrote a letter to the Public Service Commission saying there were so many open flame burners.

Mr. Moran. That was in 1918.

The Witness. I remember sitting down and taking the district of the old houses and new houses and making a rough estimate at that time. I just got into an estimate.

Q. Have you got that number?

A. No, mine was purely an estimate.

Mr. Chambers. But Mr. Carter said there were so many burners and so many open burners, but I don't know whether it was estimated or counted.

The Witness. It was simply estimated.

Mr. Moran. They counted it.

The Witness. I was speaking of ours. Ours was simply an estimate in the sales department.

Q. Well, tell us how you estimated that number?

A. We took the district and we divided it into zones. We knew that new houses were all equipped with electric lights; we took the streets in which we had competition from the Edison Company, and we eliminated those houses entirely.

Q. Just a moment now, please. Let us get very clear what group of houses you are—or class of houses you eliminated?

A. I am just speaking of it. Those houses in which we had electric competition, we eliminated it.

Q. I see. What else did you eliminate?

A. Then we took the new houses.

Q. Just a moment. Let me have that just clear.

A. I am trying to tell you, if you let me finish.

Q. I will, but as we go along, I want to clear it up.

1372 What you mean by those houses which you had electric competition that you eliminated, you mean every house in which there was electric light you eliminated?

A. Where the houses were lighted by electricity, yes, sir.

Q. Yes, all right. What else? Go ahead?

A. Then we took the houses in the old zone, that is the older houses that we knew that had always been using gas, and we estimated that they had one burner in the cellar, one in the hallways and I think it was two in the attic. I think that was the estimate. Apartment houses we estimated I think two burners for each floor in the hallways. I think it was. I don't remember whether it was two or three burners in the cellar, and the stores—all stores and all apartment houses we estimated open burners in the cellars.

Q. How many?

A. I am just trying to think. I think we estimated one in each store.

Q. Yes.

A. In the older houses that were burning gas exclusively, we knew they were burning gas exclusively, we estimated an open flame burner in the attic and one in the cellar.

Q. You stated that.

A. No, I spoke then of—if I did I——

Q. All right.

A. I think that is the basis.

Q. You went upon the assumption that where they were burning gas exclusively, that they were burning for their

1374 better lighting purposes incandescent burners?

A. Oh, yes, we have always been at that propaganda, to have them put in mantle burners.

Q. Is that all, you think, your estimate?

A. I think so.

The Master. We will adjourn until 2.15.

Mr. Jackson. May I just add one question and we will be through with that?

Q. You eliminate all the houses that are lighted by electric light?

A. Yes, sir.

Q. All the houses, stores, buildings of every description where they use electric light?

A. Oh, no. No, I did not say that. I said new houses.

Q. All the new houses?

A. Yes. I didn't say stores.

Q. Didn't you say you eliminated all the houses where you had electric competition?

A. Yes, all the houses where we had electric competition.

Q That means where they had electric lights?

A. Yes, but I did not mean stores and tenement houses and things of that kind.

Q. I thought you did?

A Oh, no, because we figure—we know for a fact that in the tenement houses where they have electric light, that they also have gas meters. These gas meters, while they show no consumption, we know they have an open burner in the hallway which they use in case of emergency, if the electric light goes out.

1754 Q. Then you eliminate all the private houses where they have electric light?

A. All the small private houses.

Q All the private houses, you said?

A Yes, sir.

Q. Don't you know that every one of those private houses, even the most modern, has in the kitchen one open burner of gas?

A. No.

Q In connection with the fixture in the kitchen, as a combination electric fixture, an open gas flame?

A. No

Q To provide against emergency?

A. No

Q You don't know that?

A. No. I know the opposite now.

Q Wouldn't you say—what?

A. I know the opposite now.

Q. Are you ready to swear that?

A Yes, sir. I know that is the practice of fixture people generally and architects where they are putting in electric wiring today.

Q It is not the better practice to have an open flame burner in the contingency that if anything happens to the electric circuit, that there may be gas in the kitchen, or at any rate, light of some kind?

A. No, there is very little trouble that they can expect from electric circuits nowadays, electric lines.

Q. Have I got to swear against that proposition? Don't you know it?

A. Absolutely. I have been in the business a long while.

Q I know the contrary to be true?

A All that don't——

1755 Q Every one of those houses, those new private houses that have electricity in them,—is there one that hasn't an open flame burner in the cellar alongside of the furnace?

A I don't think they do, no.

Q. You don't think they do?

A. No They don't use it if they have.

The Master We will adjourn until 2.15.

(Whereupon a recess was taken until 2.15 o'clock P. M.)

1376 Afternoon Session.

Mr. Moran: Mr. Jackson, here is your form (Handing counsel). I do not know what is in here; they tell me that is what you are after.

Mr. Jackson: I guess we will have to have Mr. Gonnoud.

ANDREW J. GONNOUD, resumed.

Cross-examination continued.

By Mr. Jackson:

Q. Now, I asked Mr. Moran to produce a sample of every form of financial or accounting stationery, or statistical record, that the company used in addition to the books in evidence. Now, you have here some envelopes containing some of that stationery.

A. Yes.

Q. You have not yet examined those envelopes to see what they are; they have been sent down to you from the accounting department?

A. Yes.

Q. Perhaps you better take up each envelope and see what is lettered on the outside, as to what that contains, so that we may get some idea what the nature of those forms is that you have here in the court before the Master.

A. (Witness examines papers.)

Q. Will you date them, please, one envelope contains what?

A. One envelope contains what is known as General, General forms. Another envelope Commercial Bureau, Distribution Department, Sales Department, General, Purchasing Department,
1377 Cashier's Bureau, Election Bureau, Treasury and Works.

Q. In separate envelopes?

A. Yes, those are in separate envelopes.

Q. And enumerated.

A. Yes.

Q. It would only take not more than two or three or four minutes to look in each envelope and see if, as far as you know, all the forms are in each envelope; if you will just take the time to look through the contents of each envelope.

A. Yes.

Q. And concentrate your attention upon it so that you can give your best judgment as to whether they are all there or not. That is all I want.

Mr. Moran: I think that can be done off the stand, Mr. Master. He can do that off the stand.

The Master: He stated they were all over here. Let us assume at the present time that they are all here.

Mr. Jackson: Well, what I would like to have him say, then—and I do not see how he can say it without that—I would like to examine

him after he has looked over the forms, because these envelopes he has not looked into yet; they have been sent up to him, and I do not see how he can testify whether what is in them is the form, until he looks in the envelope.

1378 The Master: Are they the forms that you use?

The Witness: Yes, they are.

Mr. Jackson: He has not looked in the envelope.

The Witness: I assume that, because I assume the instructions have been followed out.

Mr. Jackson: He cannot swear to that. I appreciate that, until he sees them. They have been sent down to him and he should look them over.

The Master: Well, look them over, then.

Mr. Jackson: Just glance at them generally.

Mr. Moran: Can't we supply any that are missing?

The Master: Yes. I think we can assume they are all there, and if it later appears they are not all there we can have an explanation. He intends they all should be there, at any rate. You go ahead, Mr. Jackson. His answer is that they are all there so far as he knows.

Q. I would like to have you state all the different kinds of underlying data and reports, whether written or oral, upon which you rely for the entries and the allocations or distributions of the various amounts to the different accounts in the plaintiff's books, and specifying which are written and which are oral.

The Master: Now, I am not going to let him specify 180
1379 forms. I am not going to go into all that. I simply cannot do it.

Mr. Moran: That would take an afternoon to tell that.

The Witness: Oh, more than that.

Mr. Moran: It would take an afternoon to answer that question.

Mr. Jackson: All right.

The Master: What is the purpose of this examination? We had better get at it a quicker way than that.

Mr. Jackson: Can the witness, without taking time to repeat that on the record at this time, draw up a statement showing that, which will be a list of them, answering that question?

Mr. Moran: I think we would have to say no to that.

The Master: Mr. Jackson, this company's accounts are all open to the Public Service Commission; they must have a general idea of the way they keep their accounts.

Mr. Jackson: I have got an entirely different theory upon that.

The Master: What is the purpose of these questions?

1380 Mr. Jackson: We are not going to be willingly bound by that for a moment.

The Master: You do not need to be bound by it, but you ought to know what it is; you ought to know in a general way. You make examinations from time to time, your client does, of this company.

Mr. Jackson: Why, the Public Service Commission may know about these books that have been offered in evidence, and it might

be sufficient for the plaintiff if the theory were carried to the inventory at the close of the year, or according to that principle—it might be sufficient for him to say here the Public Service Commission have had an opportunity to examine our books, therefore our claim is correct, what is the use of our proving anything except here is the case, and except that you have had the opportunity, the law gives you the power, and you are therefore presumed to know all about it, therefore our claim is correct. We do not need to put any evidence in here, they say—that is the carrying it to its logical conclusion.

The Master: No, you should show that their books are incorrect or that their expense accounts are wrong or improper, and that is perfectly admissible.

Mr. Jackson: Yes sir.

1281 The Master: But I do not think it is pertinent to this inquiry to take up every possible form of accounting that this corporation uses.

Mr. Jackson: The plaintiff has gone at length into its system of accounts, brought up his books here, and said that his whole system and all of his accounts were open for inspection and open for the inspection of the court, and they have been open for the inspection of the Public Service Commission. That is true. But our knowledge of that system, whatever we may have in the Public Service Commission office, is not before the court. There must be some way of getting it before the court, and that is the purpose of taking the evidence here, to show what we know about this situation before the court.

The Master: We are perfectly willing to have you produce any evidence to show that their evidence is incorrect, inaccurate, or have any other infirmity which exists that you may have reference to.

Mr. Jackson: If that theory were carried to a logical conclusion, your Honor, the plaintiff only need put in his complaint in evidence and then we would have to disprove all his claims.

The Master: No, the plaintiff has audited its books, it is ordered to explain its books, it has produced evidence to show that 1282 these books were made up from a great number of original vouchers. Now, if there is a question about any particular evidence that the plaintiff has put in, or if you have any new evidence to show that their books are inaccurate and do not truly reflect operations of the company, I would be very glad to have it.

Mr. Jackson: Yes.

The Master: But I do not see any use in going through the forms—simply going through one form after another to discover what the forms are. If you wish him to produce certain original vouchers here that you question, and then examine him as to those vouchers, those vouchers being those on which the books are based, that is another question. But here you are simply asking him to produce a lot of blank forms.

Mr. Jackson: Yes.

The Master: There is nothing on the forms.

Mr. Jackson: No.

The Master: The forms that you are cross examining him about.

Mr. Jackson: No. Then, of course, the forms would go simply to the system. If we asked him to produce further—and we
1383 can if it is necessary, we can ask him to produce a sample form as used, showing the entries that are actually made for 1919, according to this system. But we have not gone as far as that, we have not asked him to pick out any sample all the way through, we have simply asked him to show the system. He has produced his books here and explained the system. Now, his books do not stop with the system that he has produced here and we are entitled to show the rest of it, it seems to me.

The Master: We have had a good deal of testimony as to what the system was.

Mr. Jackson: But we have not had it all.

The Master: Well, what particular part?

Mr. Jackson: These blanks that he is producing now. There is nothing of this in evidence. Now, he might just as well have produced his summaries and said this is sufficient because they are based on our books. He has seen fit to offer his books in evidence, and now I say you have something more than the books and something underneath the books, what is it.

The Master: Is this a demand for the vouchers?

Mr. Jackson: Pardon me?

The Master: Is this a demand for the vouchers on which
1384 the books are based? You question it. I mean is your objection to his testimony based on the ground that it is not the best evidence?

Mr. Jackson: Why, certainly.

The Master: Well, I do not see that this has anything to do with that objection.

Mr. Jackson: Because whether it is the vouchers—and the vouchers are not all—this is the data upon which any bookkeeping in the order of procedure, as the item goes from the fact and is carried on to the books and into the final schedule that is introduced here in evidence—this data is underneath the vouchers and underneath all that he has offered here in evidence.

The Master: This data is not, because there is not anything on the data.

Mr. Jackson: This is the system underneath. We can ask for each one of these, but I do not propose to. I have asked for them yet, but I ask for the system that goes underneath the books—the system upon which the books are built. This is the underlying system of data and I want to see it.

The Master: Suppose you had all that in evidence, what then?

Mr. Jackson: Well, we have not got to proving those in evidence yet. I want to know if it is here.

The Master: Supposing you had it all in evidence, what
1385 then? I mean what are we leading to.

Mr. Jackson: You have stated it, your Honor. That he has not produced the best evidence here.

The Master: Well, I am not going to go into all those vouchers.

If you want to go into a few of the vouchers to test the accuracy of them——

Mr. Jackson: Now, your Honor, you see unintentionally ——

The Master: Judge Hand did rule that those books were admissible in the Consolidated case without going into all the vouchers, and I am going to follow him on that.

Mr. Jackson: Your Honor unintentionally is not meeting quite what my suggestion was, and I had not proposed to do it—go into all the vouchers. I have only proposed to show what their system was underneath the books that they have offered in evidence and they have not shown what that system was that was underneath the books. I am going to question the witness on these blanks which will furnish a basis of ascertaining from him and getting definitely on the record what the system of accounting is with which the books started, to see what the basis is underneath those books. And as long as they have testified—and
1386 of course if this is all their testimony and just as much as they choose to go into it and no more, we might just as well rest and say, prove your case as we have nothing to say. But when we say they have not in their affirmative case shown their system I think that we are entitled to show the whole of it, as long as they have shown part of it.

The Master: After you have shown the system, what happens?

Mr. Jackson: We are going to argue from it, if we can show that, and that is what our inquiries are directed to—that they have not proved their case by the best evidence. I will be perfectly frank, that is what we are tending to do.

The Master: That is what I am just asking you. If after proving all these blank vouchers you thereby establish the system, that that proof is to be the basis of the objection that they have not produced the best evidence, I assume after all the evidence is in and you make that objection and move to strike out the books I am going to overrule you.

Mr. Jackson: What if that is so, your Honor. Don't you think that when we come to meet that question in this case, that in view of all the possibilities and eventualities that may occur, we should have the case in such shape that if we wish, and we probably shall
1387 wish to test the determination of all the issues, that we ought to have before the court upon a review of your Honor's ruling a fair presentation of the case, so that upon that question as to whether the plaintiff has proven his case by the best evidence, the court should determine that, as it will comes before the court to say, whether your Honor's ruling was correct or not.

The Master: You are absolutely entitled to that.

Mr. Jackson: I do not want to argue against your Honor's ruling in that way, if I may simply have enough here to show our contention upon that point. Now, if we are foreclosed from proving anything to the contrary or supplemental to plaintiff's claim as to his books, there is nothing before the court as to whether the plaintiff has produced the best evidence or not. We are trying to show that there is further and better evidence.

The Master: My own opinion is that there is enough in the case now to raise the question on my ruling as to the admissibility of the books.

Mr. Jackson: I think so, too; I want to formulate my question.

The Master: Perhaps Mr. Moran can furnish you with a
1388 statement that great quantities of vouchers are used in the first instance.

Mr. Jackson: No, I do not think it is illuminative. I do not think the court gets the clear idea by those generalities. He might just as well say that he consumes and he sells a great quantity of gas, which shows nothing.

Mr. Moran: Would you permit a suggestion?

Mr. Jackson: Surely.

Mr. Moran: Suppose, Mr. Jackson asks a question now to bring the matter up that he wants to present his direct question to the witness. I may not object to it.

Mr. Jackson: I am trying to. I have asked him now——

Mr. Moran: I know, but your question would require at least the rest of the afternoon to answer it. Would it not, Mr. Gonnond?

The Witness: It would.

Mr. Jackson: I said if he would take time and write out the answer and put it in as a statement, don't you see.

The Master: Let us see what your question is.

Mr. Moran: He could not cover it then; it would be utterly impossible to cover it.

Mr. Jackson: I can cover it very shortly, you see if that
1389 was the data there. I could make a list of them.

The Witness: I would not give out a statement that would not be fully comprehensive.

Mr. Jackson: Well, I have a question.

The Master: What was the question? It is not answered. I do not want to waste time here going into the question of how they keep all these vouchers.

Mr. Jackson: I have got to go into it to satisfy my idea of it to a certain extent. If I had this list I would get along.

The Master: Just let him ask his question and get along.

Mr. Moran: It would be to give in narrative form all that appears on this chart, plus all that appears in the uniform system of accounts. It gives the whole thing.

The Master: Won't you ask your question again, please?

Mr. Jackson: Read it.

(The reporter read the question as follows:)

"Q. I would like to have you state all the different kinds of underlying data and reports, whether written or oral, upon which you rely for the entries and the allocations or distributions
1390 of the various amounts to the different accounts in the plaintiff's books that are in evidence, specifying which are written and which are oral?"

The Master: Answer that question as best you can, now. What do you say?

Mr. Jackson: I say upon that if he wants that complete——

The Master: Let me see what he says.

A. I can give a list of the forms that we use for the underlying data, but I cannot give any list of forms that is an oral form, because I do not know of any form that we could have of that nature. It is in the question there.

The Master: Can you state approximately how many forms you use for the purpose—in the preparation of your vouchers and other memoranda of original entry in your business?

The Witness: At least a hundred. I could not say definitely.

Mr. Jackson: Now, may we have a list of those?

The Master: After you get the list what are you going to do with it?

Mr. Jackson: Then I am going to pick out the ones that I want to ask him a few questions about, and there will be only a few of them; but I want them all before me. There are a number of forms, doubtless, that are used for the transmission of en-
1391 tries for certain purposes—that is, forms of reports and so on.

That is one thing. That is reports to the Public Service Commission, for instance.

Q. I suppose you have a form for them?

A. For the Public Service Commission? No.

Q. Well, such forms as that——

A. They produce their own forms.

Q. That is just it. I want the forms and data on which the entries on his books are made—the underlying data, that is what accountants understand it is, that are the foundation of the books and the forms and reports that are written that constitute the underlying data, that is, the forms upon which the underlying data is furnished for the books.

The Master: And what do you state is the purpose of that evidence?

Mr. Jackson: To complete, in the first instance, the evidence of the plaintiff's bookkeeping system.

The Master: For what purpose?

Mr. Jackson: For the purpose of showing whether the books and the evidence that he has put in here as to the books is of any value or not. It is not of any value if we do not know what they rest upon, and this is what they rest upon, and that is what I am asking about.

1392 The Master: And you are asking for blank printed vouchers.

Mr. Jackson: To show the system in the blanks, yes. To show the system. If there is any question about that I can ask him to take any one item and the various items, whether it is coal or oil or labor, these expenses of 1919 or 1920, and ask him to follow that item back and to give me the original report all the way through

on it. Now, I do not need to do that if I have this statement, a list of all his forms, before me. I can pick out then the particular form that I may want to question about. But I have asked for the blank forms, in the way of having a form of this report before us, so that we may see upon some particular report that I may wish to call attention to if I have the list before me, what information they get there as to each one of these expenses.

Now, we can just as well, if a point is made about that, get a report that has been actually used and the fundamental data that has been actually used on some item or several items of this 1919 expense account; but I am purposing to see something beneath the books that has been offered in evidence, and I say they have not shown it before the Referee, or before the Master, and there-
1393 fore not before the court, completely their system. Without intending to go in and produce every voucher that lies underneath every expense, without intending to bring up here the original data as to every expense, I want something that will show the court these systems. They have not shown the systems yet, to my way of thinking, as far as our contention is concerned, for our purposes, according to the theory they have, but I say if you follow their theory to a conclusion, they might just as well have rested on the complaint, put it in evidence. That is, if we accept their complaint and concede judgment may be taken against us, all right—if we concede we are satisfied with what they have shown, all right. But we say we are not satisfied.

The Master: Then why don't you attack their figures, why bring a lot of blank forms. I am perfectly willing to have you attack their figures.

Mr. Jackson: I am going to attack their figures, and I have attacked every figure that they gave, and I am doing it in this way that I am attacking their books, and is every figure that is presented on their books. I want to know what is underneath their books, and by attacking this I am attacking every figure that have presented here.

1394 The Master: I do not see how you are attacking anything when you ask for a lot of blank forms.

Mr. Jackson: But I think with all deference to your Honor—not with any intention, but as a result, I think—your Honor begs the question, because I have tried to explain that I do not care a snap of my fingers for those blank forms, except as they show the system and except as they illustrate and are the same identical forms of all the other data, each in its own class, that underlie these books. I have not asked them to bring up the data that was used as to any one of these expense items, I have only asked them to bring up the form that shows the system.

I have said I do not care a bit about these forms, but I want to show the system. I have asked for the blank forms to eliminate that, and the asking of those blank forms is a partial answer to the question that I asked him. He can come up and say the underlying data is as to this single item a report that is made as follows, upon one of these blank forms that he shows here. That illus-

trates the system. Counsel went to great length to show how the different books were made up, that here was a journal, there was a journal, journal No. 1, journal No. 2, here are the odd journals, here are the even journals, and so on. That was to show
1395 you the system. Now, here is more of the system, here is the system, to my mind, that counts, because it shows on what all these items rely. I can ask him as to several items and it will take longer.

Mr. Moran. Name one item and we will give you the history of that.

Mr. Jackson. I say if this method of getting at it is not satisfactory we can go into several of those items, and if he will just furnish me with a statement, just a list of his forms so that I may have it for reference, that will do. I am not informed as to his books except as he states it. I can then pick out and say give me such an item and follow it through, and get all the underlying forms, and so forth. I thought I would get a short cut to it by this method, that is all. But it is not the idea of substituting for any proof of figures that this case might form, by any means. I have not intended that for a moment. It is simply the idea of showing their system of bookkeeping, so that after having shown that I can ask him somewhat as to the basis of the figures they have presented here for 1919 and 1920, and how those got into the books. And that is very material, according to our viewpoint of it. I will be perfectly frank about it.

1396 The Master. No, I do not [illegible] it this way. Take the books and as to any [illegible] figures that you want to illustrate your point about, ask him how they got in there and ask him to produce the vouchers on which they were made up.

Mr. Jackson. I am perfectly willing to do that.

The Master. Ask him to produce the vouchers.

Mr. Jackson. I am perfectly willing to do that, it is going to take longer, though. I cannot do it now. I would have to take at least the time to pick out these things, say until tomorrow morning, and go ahead immediately and pick out these, when I had in mind that the presumption of the list here and of these blanks would give me the opportunity very quickly to refer to these by referring to the various blanks. That is one method, and I thought it would be a shorter method, but to take up that now and ask him for those figures, he has not them here, he has been 24 hours getting these blanks together, he will have to go back and get some more, and I thought it was just a quicker method.

The Master. Well, I do not see what it is leading to. If I could see some light ahead in the thing, but I confess I do not see what it is leading to, to get a lot of blanks in here. We know from the testimony already presented that these books are not books
1397 of original entry, that is they are books of original entry in a sense, but when the weigher of coal weighs some coal and puts it down on a sheet of paper he does not put it in the books of account.

Mr. Jackson. No.

The Master: I am not going to have that weigher come up here and testify that he did sign that thing and that that was the amount of coal in it. Now, that is the original voucher.

Mr. Jackson: The point is this: I have not intended to ask him as to each one of these items, don't you see, but I think we are entitled to show the system up to the point of entry on the books. And there has not been one book that has been put in evidence here that to all ways of looking at it is a book of original entry. Now, as to what comes before these entries that are in evidence, it seems to me we are entitled to show and have it appear; and I do not mean for a moment to take every one of these items and bring the vouchers up here and go all through with it, but we are entitled to show the system and show on what it relies. Because, I think it is necessary, and there is a default in the evidence when that does not appear. I will be perfectly frank about it, although I imagine that your Honor understands perfectly what I mean.

1298 I stated in the first place in my objection to these books that if we admitted and were satisfied they could be accepted as satisfactory, but I do not purpose to do that in this case from the start and all the way through. I said I intended to do it at the start because the foundation of his figures was started one story above the ground. I was perfectly frank about it then and I want to show it now, that he has started his books, to speak in that way, one story above the ground, and he has not yet connected his building with the ground, the structure for showing the expenses. Now, that is my theory.

Mr. Moran: I do not intend to interpose any objection.

Mr. Jackson: Mr. Moran knows what I mean, there is no question about that.

Mr. Moran: No, I do not.

Mr. Jackson: He is proceeding upon a theory and I have proceeded upon another theory.

Mr. Moran: Well, I withdraw any objection to the question asked of the witness.

Mr. Jackson: All I want is a satisfactory answer to my contention in this case.

The Master: What would you be satisfied with?

1299 Mr. Hill: Why can't you ask him for the slip which the weigher makes out when coal is received and ask him where that blank is taken, what form that weighing slip is transcribed upon, and then trace the coal from the weigher to the books.

Mr. Jackson: We can very easily do that, and so I suggested.

Mr. Hill: It is all the same, and take a few of those leading items. Why can't that settle it?

Mr. Jackson: That will do if we are not going after it in the manner that I had in mind. Now we have brought up these blanks——

Mr. Moran: I think, Mr. Master, we will get along faster if we have a question. I think we all understand what Mr. Jackson wants to do, if we have a question, and let us have a ruling on it.

The Master: Well, I recognize the point that he is raising and I do

not want reversible error in my ruling. At the same time I do not want to drag out this hearing indefinitely.

Mr. Jackson: Of course you don't. I appreciate that.

The Master: With all these blank forms. What is the best you will be satisfied with?

Mr. Jackson: We will go over until tomorrow morning on the hearing, won't we?

1400 Mr. Moran: Oh, I object to that.

Mr. Jackson: Now let me continue. He has brought up today, not until this afternoon's hearing, how many envelopes there? It appears a number of envelopes of forms. I will take them over to the office and look at them and pick out the envelopes that I want.

The Master: Then you will abandon this line of inquiry now?

Mr. Jackson: Yes. I will not even ask him to make up a list, but I will take them, because I have to have them before me.

The Master: And if your purpose is to question further as to particular items of this account that have been put in after tomorrow morning, it will not be possible for us to hold any adjournment. We will have to proceed day after day to get through with it, because there is just so much of that that I am going to let in under Judge Hand's ruling, and then I am going to stop.

Mr. Jackson: I know without any question your Honor intends the same thing. If there is a serious question here I think that you are very glad to and want to have our contention fully illustrated and expressed so that the court can act upon it, and that is all I

1401 have in mind. There is a serious contention in my mind upon the sufficiency of the evidence on the books. All I want is enough to show that before the court and argue it. Mr. Moran has one theory and I have another.

Mr. Moran: Does the Public Service Commission admit that it requires oil to make gas? And if they will admit that it requires some oil, are they willing to concede that it will require a certain amount? Passing oil, will the learned Commission concede it requires generator coal; if so, will they concede an amount?

Mr. Jackson: No question about those things.

Mr. Moran: Then what is it all about? Will they say that repairs on a plant of this size are excessive when they are six cents in 1919 and in the neighborhood of seven cents in 1920?

The Master: Well, just let us have these papers and we will adjourn this part of the examination until tomorrow morning.

Mr. Jackson: I won't be long on that.

The Master: Just let us go on to the other questions. Let us go ahead with the next phase; we will drop that for awhile.

Mr. Jackson: May I ask Mr. Elsman a question?

1402 RALPH ELSMAN resumed.

Cross-examination.

By Mr. Jackson:

Q. I show you here a lump of material (Indicating). Do you recognize it?

A. No.
Q. You do not?
A. I have seen it, a lump like that, but I would — recognize it.
Q. Have you seen any that looked like it?
A. I have seen lots of them.
Q. Have you seen any that looked like it?
A. Looked a lot like it, yes.
Q. From your inspection of it what would you say it was?
A. That is quite a chemical analysis to
Q. No, answer my question, please.
A. Well, that is what I say, it has quite a chemical analysis.
Q. From your inspection of it what do you judge it to be?

The Master: From looking at it.

A. I will tell you what it is, it is a piece of corrusion knocked out of a carbureter.

Mr. Moran: Not an automobile carbureter?
The Witness: No, the carbureter of one of the machines. That is the clinker that gets in all around the carbureter.

Q. Well, is that one form in which the sludge that we have
1403 been speaking about appeared?
A. No, that is not the sludge at all.
Q. Isn't that baked sludge?
A. No, that is just a caking that takes place on the sides of the machines, we get that every day. That takes place always.
Q. Caking from what?
A. Why, it is a caking that is the result of the heat in the machine.
Q. What is it a caking of?
A. Why, something in the oil and ——
Q. The residue of the oil after it goes through the machine
A. Not the residue, no; it is ——
Q. What is it?
A. Why, it is a formation that takes place in the carbureter. It takes place in the superheater, it takes place in the generator. It is any place ——
Q. It is formed from the residue of the oil, is it?
A. If you will allow me to tell you, I will try to explain it to you.
Q. I will ask you the question then. Is it formed from the residue of the oil?
A. No, not altogether.
Q. What it is formed from?

Mr. Moran: I think the witness has told us what it is. I will object to any further question on that, as immaterial.

The Master: He has stated what it is. He may be wrong.
1404 Mr. Jackson: He has not expressed it yet. We have not got a definite statement of it.
Mr. Moran: The witness has said what it is. I appeal to the righteous

The Master: He said it, but I will let him repeat it once. Go ahead and tell exactly what you think it is from looking at it.

The Witness: Why, it is a caking of certain of the mineral products in the—it may be from the coal gases, oil, the steam, the water any everything that passes through machines due to the heats in the machines. You get that always in every gas machine, no matter what the condition of the oil is or what the condition of the coal is or what condition of the water or anything else is.

Q. Did you not tell me that the Public Service Commission had a sample of the sludge that appeared at the time that you had this trouble up there, when you went up and explained to the Public Service Commission about the stoppage of your pipes; did you not say that the Public Service Commission had taken a sample of it?

A. Yes, but that is not the sludge.

Q. Just a moment.

A. That is not the sludge.

Q. That is not the sludge?

A. No.

1405 Q. That is not one of the samples that the Public Service Commission took?

A. No, that is the part of the clinker knocked off the top of the carburetor, showing them the condition of the carburetor after running it 5,000 hours without taking it out of service.

Q. Who knocked the clinker off?

A. I do not know. Paddy McGinnis, I guess.

Q. What?

A. I don't know, some one of the workmen.

Q. Were you there when it was knocked off?

A. No.

Mr. Moran: I object to it. We have had enough of it.

Mr. Jackson: Just a moment.

Q. This clinker here was one of the manifestations of that sludge.

A. No.

Q. It was one of the manifestations of that poorer oil.

A. No.

Mr. Moran: Just a moment, I object to it. The witness has answered that and said to the contrary, it occurred with any kind of oil.

The Master: He has told us pretty clearly what he thinks it is. If your information is it is something else——

Mr. Jackson: Yes.

The Master: I do not possibly see how you can get it out of the witness; he has stated pretty clearly what he thinks it is.

1406 Mr. Jackson: Now then, to identify that, if Mr. Elsman will step aside, I will call a witness.

Mr. Moran: I want to be finished with Mr. Elsman. I think you ought to finish now; we are having see-sawing enough here.

The Master: I am of that opinion. I think we ought to be a little more orderly in calling these witnesses. We have had a great

deal of latitude given. I thought we finished with Mr. Elsman yesterday and I thought we were through.

Mr. Jackson: We did not finish on those papers yesterday, because he did not produce them yesterday.

The Master: I know that. That is all right, but can't we think of anything else that we have to ask Mr. Elsman and let us get through with him, and then you call your witnesses?

Mr. Jackson: I had the Public Service Commission's expert here to bring up this sample, and I thought this was what Mr. Elsman had already referred to, and Mr. Elsman being right here I thought it would not inconvenience him much.

Mr. Moran: Are you through with him?

Mr. Jackson: No. I am not through with him, because
1407 we have the correspondence to identify. But while we have the sample he could step aside.

The Master: Let us go ahead with the other evidence of Mr. Elsman.

Mr. Jackson: Of Mr. Elsman?

The Master: Yes.

Mr. Jackson: I have his correspondence here, that I have hold of. I would like to examine that tonight. Can't I examine the correspondence? I will ask him now if he has produced this correspondence. I will turn from the sample for a moment.

Q. Did you produce the correspondence I asked you for yesterday?

A. Yes, sir.

Q. And is it here?

A. I gave it to you.

Q. I haven't it now. I handed it back to you. I did not keep it at all.

A. All right.

Q. It is here?

A. Yes, sir.

Q. What is this correspondence you brought here?

A. It is what you asked for yesterday.

Q. That is not an answer to the question. What did you intend to produce when you produced it here?

A. Certain correspondence with the oil companies which invited bids for oil.

Mr. Moran: You mean copies?

The Witness: Copies.

Q. For what years?

A. The years 1919 and 1920.

1408 Q. And the answers of the oil companies to your letters?

A. All answers that we received.

Q. They are all there?

A. Yes sir.

Q. All the letters that you wrote?

A. Yes sir.

Q. And I asked you also if you wrote any letters of complaint about the oil, this poorer quality of oil that you received in 1920.

A. I answered that yesterday.

Q. You answered it that you wrote no letters.

A. Yes sir, it is on the record.

Q. Do these letters that you have produced here include all the letters that you wrote to all oil companies, any or all oil companies in regard to the specifications of contracts for oil, if you wrote any such letters? Do you recall having written any such letters?

A. I will have to refresh my memory on the specifications. (Examines papers.) They specify what we would like to have in the way of oil.

Q. Since when have you been buying oil without having a written contract for it?

A. We never bought oil without having a written contract.

Q. Are you buying under a written contract at the present time?

A. Yes sir.

Mr. Moran. Just a minute. I object to that. The contract shows all that, and the contracts are in evidence.

1409 Mr. Jackson. It is a whole lot quicker if the record does show that for the witness to answer by one short sentence, rather than taking the time with an objection.

The Master. He says they have. He says they are buying under a written contract.

Mr. Jackson. And that is in evidence, is it?

The Master. That is in evidence.

Q. Have you informed yourself during 1919 and 1920 as to whether the oil companies which you have had your contracts with during 1919 and 1920 have made any more favorable contracts to gas companies than the contracts they have made with you, have made any more favorable contracts with other gas companies than they have made with you?

The Master. Well, in the nature of things I do not think the witness can testify about contracts other oil companies have made. As I understand it, he testified he got what he believed was the best contract he could. Now, if it is a fact that he could have gotten a better contract, I do not believe you will ever get him to admit it. Let us have proof of it on the outside.

Mr. Jackson. No, I think your Honor, that my question to this witness was fair. He has told us about his—and I am en-
1410 titled to it as proper cross examination. He has told us about his contracts, he has said that a great many of his dealings were oral with these agents.

The Master. Well, go ahead. Do you know whether oil companies have given other companies any better contracts than they have given you?

The Witness. I have talked with all the executives of the oil companies in the Metropolitan district on the subject of oil, and the price they paid for it at that time, my only knowledge of the prices paid by other companies for gas oil——

Mr. Moran. By other gas companies?

The Witness: By other gas companies, for gas oil, is that information which I received from those executives verbally.

Mr. Moran: What did you find?

The Witness: A verbal conversation.

The Master: And what did you find out?

The Witness: I found out in some instances that certain gas companies were obtaining oil at a higher price than we paid and some gas companies were obtaining oil at a lower price than we obtained it. But in the event of the contract obtained by the gas companies receiving a lower price, the contract was either executed at
1411 a period before the one executed by my company or the quantities and conditions were entirely different.

Q. These contracts that are in evidence, I think they are marked for exhibit 19, 20, 21 and 22. Exhibit 19 specifies that the gravity of the oil mentioned in that contract shall be 22 to 34. That specification refers to the quality of the oil, does it not?

A. No, it simply relates to the gravity of the oil.

Q. Does that affect the quality of the oil at all?

A. Why, it has something to do with the flash point of the oil, yes.

Q. Has it anything to do with the question as to whether it is a better grade of oil or a poorer grade of oil, such as was furnished to us in the winter of 1919 and 1920?

A. Not necessarily.

Q. Then that question of gravity mentioned in this contract is entirely independent of the better or poorer quality of the oil?

A. To a certain degree; yes sir.

Q. That is the only specification as to quality of oil that I see in this contract.

A. Why, I think they usually specify the sulphur contents.

Q. Well, let me look at it a moment. Look at exhibit No. 19 and see if you see any specifications of sulphur contents (handing to witness).

A. No sir.

1412 Q. There is no specification as to sulphur contents there?

A. No sir.

Q. Is there any specification in that contract as to the quality of this oil, other than that specification as to the gravity?

A. No sir. Wait just a moment, may I read that?

Q. Look at it.

A. (Examining exhibit.) No, except this point in the paragraph here, "The agreement is understood to cover the liquid gas making material that will be required for use in the plant." I think that is the usual specification. I might say, General,—

Q. You are referring to a paragraph here that I will read: "This agreement is understood to cover the liquid gas making material that will be required for use in the plant of the said party of the second part continuously during the contract period, deliveries shall not exceed four million one hundred twenty-five thousand (4,125,000) gallons."

A. Yes sir.
Q. That is what you refer to.
A. That is the only thing.
Q. Is there any specification there as to the quality of the oil?
A. No, it never is specified.
Q. Now, I did not ask you that.
A. No.
Q. Now, I will question you about your statement, when you say it never is specified. Do you mean it never was specified with your company?

1413 A. We ask for certain things a certain quality of oil, and we always attempt to get it.

Q. Is that a fair answer, do you think?
A. Yes, I think it is.
Q. I am asking you about your written contract for oil.
A. Yes.
Q. Does the contract with your company for oil ever specify the quality of the oil?

Mr. Moran. I object. The contracts are in evidence and they speak for themselves.

Mr. Jackson. No, I am not asking for that, Mr. Moran, at all. The witness said it is never specified in the contract, the quality of oil, and I want to know if the quality of oil was never specified in the written oil contracts of his company.

The Master. Go ahead and answer.

A. I never have known of a contract to have specified anything other than the specific gravity and possibly the sulphur contents.

1414 Q. That is, the contract that your company has made for oil?
A. Or any contracts——
Q. No, will you answer my question?

Mr. Moran. Well, he is not limited to his company. He said any other company.

Mr. Jackson. I want him to limit his answer to my question.

Mr. Moran. Well, he won't.

Mr. Jackson. He won't if you instruct him so, but I think it would be proper for you to instruct him otherwise.

The Master. Go ahead and answer the question.

Q. I will ask you again, then, has your company ever made contracts to your knowledge for the purchase of oil, in which you specified the quality of oil any further than this specification that is mentioned in this contract Exhibit 19, where the gravity is mentioned?

A. Are you speaking——
Q. Will you answer that yes or no?
A. Well, if you asked me about the contract, I will say one thing and if you ask me about the specifications that we asked for, I will say another thing.

Q. Just a moment, please. Have you in mind my question?
A. No, I have not.

The Master: Read the question.

1415 Mr. Jackson: I thought perhaps you were not paying attention to my question. Please read it to him.

(The Reporter read the question as follows):

"Q. I will ask you again, then, has your company ever made contracts to your knowledge for the purchase of oil, in which you specified the quality of oil, any further than this specification that is mentioned in this contract, Exhibit 19, where the gravity is mentioned?"

A. I don't know.
Q. Is it your best recollection that your company has never made a contract with any other specification?
A. I don't know.
Q. Then why do you say it never is done?
A. Because I know the general practice.
Q. Is the general practice followed by your company?
A. Yes.
Q. Then you do know what the practice of your company is, do you not?
A. I know what the practice has been since I have been there; I do not——
Q. That is all I asked you.

Mr. Moran: No, you did not. You asked him all over the map.
Mr. Jackson: You can read the question I asked him—as far as he knew in his company whether it has done it.

A. If you want the truth about this oil, I will tell you.
1416 Q. That is all I want.
A. Then why don't you let me answer your question and give you some information?
Q. I have given you all the opportunity to answer all the questions I asked to date, and I am going to give more.
A. You shut me off when I try to answer that.
Q. No, I did not. There is a fair question. I will repeat it again. To your knowledge, has your company, the Kings County Lighting Company, ever made a written contract——

Mr. Jackson: Well, I don't know, Mr. Moran, if you are going to talk to him on the side——
Mr. Moran: No, I am trying to tell him now to confine himself to your questions on those contracts before you and not to the correspondence.
Mr. Jackson: All right.
Mr. Moran: I am trying to help.
Mr. Jackson: I do not need your help, if he will try to listen to it. I will start again now.

Q. Are you listening?

A. I refuse to answer that.

Q. Just a moment, now. I am going to start my question all over again, and then you can refuse, if you like. To your knowledge has the Kings County Lighting Company ever made any contract for the purchase of oil in which there was a specification as to the quality of the oil to be delivered, any further than a specification as to its gravity?

A. I believe so. Certain of those contracts you have be-
1417 fore you show a sulphur content.

Q. Now, I will call your attention to the contract, Plaintiff's Exhibit 20. This specifies 28 to 34 gravity, and after that in parentheses is "Sulphur content of the oil not to run above one-half of one per cent." See if that is true (handing witness exhibit).

A. Yes, sir.

Q. Is there any other specification as to quality mentioned in that contract?

A. No.

Q. All right. Now, I call your attention to Plaintiff's Exhibit No. 21, and there I read 24 to 32 gravity, and as far as I see, there is no specification as to sulphur. Look at that, and see if that is true (handing witness exhibit)?

A. It is true.

Q. And there is no other specification as to quality than as to gravity in that contract, is there?

A. No.

Q. Calling your attention to Plaintiff's Exhibit 22, I read a specification of 20 to 28 gravity, and I don't see any other specification as to quality. Is that so (handing paper to witness)?

A. That is true.

Q. It is true, that there is no such specification?

A. Yes.

Q. No other specification, I meant to say; is that right?

A. Yes.

Mr. Moran: Of course, the contract will speak for itself.

1418 Mr. Jackson: Pardon?

Mr. Moran: The contract will speak for itself. Yes, it will.

Mr. Jackson: Don't take time with that, Mr. Moran, because every figure that you have offered here spoke for itself, and you have lumbered up the record with any number of repetitions of it. It is a very brief reference I am making to it.

Q. Now, this last contract that we have mentioned, Exhibit 22, is your most recent contract?

A. If I might see it (taking exhibit)? That is right.

Q. That is the contract under which you are now receiving oil?

A. Yes, sir.

Q. Can you tell me why the mention of gravity in that contract has dropped from a specification of 28 to 34 on Exhibit 19, and 28 to 34 on Exhibit 20, 24 to 32 on Exhibit 21, to 20 to 28 on Exhibit 22?

A. That is the only oil the oil companies were able to deliver us.
Mr. Jackson: Now, I will move to strike that out.
The Witness: That is the reason.
Mr. Moran: Just a moment.
Mr. Jackson: No, no, his answer is manifestly incompetent and based upon hearsay, and I prefer to get it in a different form.
1419 Mr. Moran: I submit that it is a perfect answer to the question asked.
Mr. Jackson: He does not know as to what oil the company is able to deliver. If they say that is so, I will accept it.
The Master: Well, he means to say that is the only oil he could get from the company.

Q. I will ask you, then, to explain your answer. Did you say that was the only oil the company was able to deliver to you? You do not mean quite that, do you?
A. That is the oil——
Q. You have not any knowledge of your own upon that matter, have you?
A. That is the only oil I was able to obtain from the company.
Q. And how did you find that out?
A. By personal conversation with the Vice-President of the Company.
Q. What is his name?
A. C. M. Higgins.
Q. Did you buy oil during 1919 from any other oil company than the Standard Oil Company of New York?
A. No, sir.
Q. Did you buy oil in 1920 from any other oil company than the Standard Oil Company in New York?
A. No, sir.
Q. Had your company bought oil, to your knowledge, at any time from any other company than the Standard Oil Company of New York?
A. Yes, sir.
1420 Q. When and in what year? You say not in 1920 or in 1919? Did you in 1918?
A. No, sir.
Q. Do you—if there is any correction now——
A. There might have been some oil come in on an overlapping contract.

Mr. Moran: There was the year 1917——
The Witness: In 1917 we bought from the Texas Company.
Mr. Moran: There was one year there. You know better than I do.
The Witness: If you will let me answer the question.
Mr. Moran: We are trying to help you. Mr. Elsman; we are trying to help you.

Q. I just want the facts; there is no catch about it.
A. We had one year. I think it was 1917 we bought our oil from the Texas Oil Company. Now, there is a possibility that one or two

boatloads might have gone over into 1918 on that contract. I am not positive about that.

Q. Well, how much oil did you buy of the Texas Oil Company?

A. The supply for the whole year, I believe.

Q. Under contract for the whole year?

A. Yes, sir.

Q. And is that the only time that you bought oil from other companies to your knowledge?

A. Since my connection with the company that is the only time.

1421 Q. This supply of one year from the Texas Oil Company?

A. Yes, sir.

Q. And why did you do that?

A. Why, the contract was negotiated before my advent to the company, and I presume it was the lowest bid.

Q. But since your——

Mr. Jackson. Well, I think we better strike out his presumption, hadn't we—because it was before his advent with the company, and naturally he does not know anything about that at all, it is a guess.

The Master. I do not think it does any harm.

Mr. Jackson. It does not do any harm. The witness said——

The Witness. It has been testified to that it was the lowest bid.

Q. Who testified to it?

A. The man who made the contract, Mr. Flook, who was the Secretary of the company.

Q. Was he called here in this action?

A. Not in this action, in the previous action.

Mr. Moran. Well, you suggested he did not know it was the lowest bid.

Mr. Jackson. I am not going to take time with an objection, to do not take my time. I am trying to trim this down as much as I can.

Q. Since your advent with the company there has been no
1422 purchase of oil from any other companies than the Standard Oil Company of New York?

A. That is correct.

Q. And the correspondence that you have produced here, which we have not inspected yet, will set forth your strenuous efforts to obtain bids from other companies?

A. Only partially so.

Q. You have made other efforts?

A. Oh, I have made very many.

Q. But you never had any results?

A. From other companies?

Q. Yes, it never resulted in your buying oil from other companies?

A. I never succeeded in getting it, no.

Q. You never made a contract with any other oil company?

A. No, sir.

Q. Your contract with the Texas Oil Company for 1917 and perhaps extending over in 1918, was a written contract?
A. Yes, sir.
Q. Will you produce that?
A. Yes, sir.

Mr. Jackson: I would like to see that. And I will tell you frankly that I would like to look at the contract to ascertain whether in that contract you had a specification as to the quality of oil, whether in that contract you had a certainty of price for the term of the contract, and whether in that contract you had a certainty of the number of gallons to be delivered.

Mr. Moran: Well, I think I will object to it; to producing the oil contract of 1917. It is so remote and of no consequence to this case.
Mr. Jackson: No, it bears upon——
Mr. Moran: Can't you let me finish my objection?
Mr. Jackson: Pardon me, I thought it was all in.
Mr. Moran: It is so remote and does not bear upon any of the issues in this case.
The Master: Objection overruled and exception.

Q. Don't you know that it is customary practice of gas companies in contracting for oil with oil companies to have a specification in the contract as to the quality of oil that is to be delivered, because the price charged for the oil is very important in its relation to the quality of oil delivered?
A. That was true before the war to a certain extent, but it has not been true since the shortage of oil occurred, nor does it necessarily mean that you will get the quality of oil that is specified in any specification.
Q. It does not unless you insist upon it, does it?
A. No, it does not necessarily mean that you will get it under any conditions; it depends upon the availability of oil.

Q. You mean to say that these contracts here that you have had for oil with the Standard Oil Company, Exhibits 19 to 22 inclusive—if they had specified the quality of oil that you were to receive, and if they had specified that it was to be the grade of oil that was good gas making oil, and you had been formerly making gas *with* without any trouble in the machines, that if these contracts had covered the period of 1919, including all of 1920, specifying that higher grade of oil that you were to receive—do you mean to say it would have made no difference as to the kind of oil you received and you would still receive this poorer oil, a quality with sludge in it?
A. No, our plant would have been shut down because we could not have gotten that oil.
Q. You understand you would not receive the oil of the quality specified, even though you had a written contract with the Standard Oil Company specifying the delivery of it?
A. I know it.

Q. Well, you have been pretty thoroughly impressed then with it, haven't you, if you say you know it?

A. Oh, absolutely.

Q. Because all you know of it is what the Standard Oil man has told you?

A. No, not at all. I know the experience of other companies.

Q. The experience of other companies in getting poorer quality of oil?

1425 A. Getting the same quality of oil that I am getting.

Q. Under what kind of a contract?

A. The same kind of a contract that I have; possibly some more specifications, I don't know.

Q. You do not know about that, you do not know whether they have a specification as to the quality of oil or not, do you? Do you know?

A. Why, gas oil has always been considered gas oil, and it has a regular uniform specification.

Q. Does that answer my question? I do not need a dissertation on what gas oil is, because I am getting a notion on that myself. Do you know what was in the contracts of other companies as to——

A. I have not seen the contracts.

Q. Does your knowledge as to what the Standard Oil Company would deliver to you under any contract that you might make with them for oil—does that come solely through your talk with Mr. Higgins of the Standard Oil Company of New York?

A. Does what? May I have the question repeated again?

Mr. Moran. He has answered the question and says he knows it from the experience of other gas companies.

The Witness. May I have it repeated?

Mr. Moran. I will withdraw that question. It is too long 1426 a process. I can get it closer.

Q. Have you talked with any other member, officer or agent of the Standard Oil Company of New York with reference to what you might do as to your supply of oil?

A. Of the Standard Oil Company of New York?

Q. Yes.

A. They have just one gas oil man, and that is Mr. Higgins.

Q. And he is the only man you talk with?

A. Yes.

Q. And he is the representative——

A. Oh, he is not the only man I talked to. I have talked with other men interested. That is the gas oil department.

Q. He is the chief in that office?

A. That is the gas oil department.

Q. I see. And he is the chief of that department?

A. Yes, sir.

Q. About how many gas companies are there in this metropolitan district operating?

A. Do you want me to name them?

Q. No, the number, approximately.

Mr. Moran: A dozen.

A. About 12, 10 or 12.

Q. You are counting the Consolidated, for instance, the Consolidated Gas Company, and its 6 subsidiary companies as one?

A. No, I am counting that as six.

Q. And there are only six more to your knowledge?

127 A. In the Metropolitan District. There is the Brooklyn Union, Kings County, Brooklyn Borough, New York & Queens, Bronx Gas & Electric, and the subsidiary companies of the Consolidated.

Mr. Moran: And the subsidiaries of the Brooklyn Union.

The Witness: Well, I am counting that as one company.

Q. Have you talked with the representatives of nearly every one of these companies?

A. Oh, yes.

Q. About the oil situation?

A. Oh, many times.

Q. You talked with them in 1919 or within the last year or year and a half?

A. Yes, within the last ten days, I believe.

Q. Are they all dependent for their oil supply upon the Standard Oil Company of New York?

A. I do not think so.

Q. If you talked with them didn't you find that out?

A. Why, I know one gas company that has not been able to get any gas oil from any oil company, and is getting their gas oil from some of the other gas companies. And I know——

Q. Now, wait a minute, please, we are going further than we are not. Did you inquire in your talks with all these representatives of all the different gas companies, as to what company or what source of oil supply there was other than the Standard Oil Company, 128 of any one of those companies?

A. Yes, I attended a hearing of the Public Service Commission of the gas oil situation for many days, of all the gas companies in this district.

Q. Did you find out from that hearing or in talking with the gas company representatives that any of these companies are getting oil from other companies than the Standard Oil Company of New York?

A. I believe the Consolidated Gas Company is getting it from the Standard Oil of New Jersey.

Q. What about the other companies?

A. I think all the rest of them are getting it from the Standard Oil of New York, and possibly one company is getting it from the Gulf. I do not quite remember.

Q. The Gulf Refining Company?

A. Possibly, yes. I won't be sure of that.

Q. What company is that?

A. Why, I think that was the New York & Richmond Company.

But they failed in their supply, I believe. I do not remember whether they are getting the oil or not. I won't be positive.

Q. What did you do when you were negotiating contracts Exhibits 19 to 22, in reference to getting a specification as to the quality of oil that would have protected you against any such quality of

1429 oil as you received in the winter of 1919 and 1920?

A. I told each and every one of the executives of the oil company that we would have to have a high grade of gas oil to be able to go through the company winters. I told them that we would have to have a very low coke content. It is common knowledge that the sulphur content should not be over one half of one per cent and—

Q. Now, wait a minute, please. All right, haven't you finished?

A. Well, I told them further that we had to have oil of a paraffin base, that we could not handle the asphalt base oil, and I took up the general operating conditions and told them the quality of oil we would have to have. I was told that I would have to take the kind of oil that was available, that the days of specifications were gone, it was a question of getting oil of any kind at the best possible price.

Q. And that was the result—that conversation or to that effect, resulted in this contract, the written contract, Exhibit 19, did it?

A. If you will tell me what year that is, I will tell you.

Q. That is dated the 16th of December, 1918. I imagine it would be the 1st?

A. That would be for the first six months or the first seven months of 1919—isn't it, down to August?

Q. Yes. (Handing witness paper.)

A. Yes, sir.

1430 Q. So after all your oral negotiations with them this written contract was the result?

A. That is correct.

Q. And you regarded that as the best you could do?

A. Absolutely, sir.

Q. Did you repeat any efforts to get any better terms when you made your negotiations that resulted in your contract, Exhibit 20, which is dated the 31st of July, 1919?

A. Yes, sir, the same—went through the same process, the same experience.

Q. And that was the best you were able to do with them?

A. The very best, sir.

Q. And would you say the same as to the contracts Exhibits 21 and 22?

A. That is for the year 1920, isn't it?

(Hands witness paper.)

Q. Is it?

A. Yes, except that the year 1920 I was turned down by all the oil companies in New York for oil supply except the Standard Oil Company—for any kind of oil, at any price.

Q. This contract was the best that you could do with the Standard Oil Company?

A. Yes, sir.

Q. Upon the occasion of your negotiating each one of these contracts that are being *exhibit* here, did you take up at each time with them the question of having a specification in your contract?

A. Oh, of the quality—yes, sir.

1431 Q. Specifying the quality of oil?

A. Yes, sir.

Q. And what did they say about that and who said it?

A. The various people whom I talked with. It has been uppermost in our minds for——

Q. You say the various people—who?

A. Mr. Higgins, Mr. Woodbridge, Mr. Kenney——

Q. Who is Mr. Woodbridge?

A. Mr. Woodbridge is the Secretary of the Texas Oil Company.

Q. You do not understand me. You did not make a contract with the Texas Oil Company, did you?

A. No, but I interviewed him.

Q. You did not interview him with reference to closing a contract with the Standard Oil Company?

A. No.

Q. Answer my questions. I am asking you for the negotiations, when you closed each and every one of these contracts with the Standard Oil Company. Did you bring up each time the matter of getting a specification from them, a written specification as to the quality of oil that you wanted?

A. Yes, sir.

Q. With whom did you talk?

A. Mr. Higgins.

Q. Each and every time?

A. Yes, sir.

Q. Each and every time these contracts were made?

A. Yes, sir.

Q. Every time you brought up the subject again, did you?

A. Yes, sir.

1432 Q. And what did he say to it?

A. The same thing that I told you before.

Q. The same thing he said each time?

A. Yes, sir, except the last two times I saw him he said he did not want to give me any oil at any price, of any kind, to go elsewhere for my oil.

Q. Well, did you inquire of him where he might direct you, so that you could get some oil?

A. Yes, sir.

Q. Where did he direct you?

A. He said that was my business. He did not know where I could get it, but they were short of oil and did not have any for sale.

Q. Did he indicate to you that you would not be very likely to succeed in getting it in other places?

A. No, he did not say anything of the kind.

A. Yes, sir.

Q. And he said that was your business?

A. He said that was my business, that he did not know where I could get it, that I better try the Texas Company and the other companies.

Q. Did you?

A. Yes, sir.

Q. What was the result of that?

A. They refused to bid on any oil at any price, of any kind.

Q. Then what did you do?

A. I went back to Mr. Higgins and told him I simply had
1433 to have oil or shut the plant down.

Q. You told him you had been to the other companies and they had refused you?

A. Yes, sir.

Q. When was this talk?

A. You are speaking now of the January to April contract. It took place in December.

Q. No, I am not.

A. I am telling you now. If you will let me tell you, I will tell you.

Q. Just understand me, sir. You said I was speaking of it, but you were speaking of it. When was this talk that you had?

Mr. Moran: I object to this. It is so vague and indefinite, and the thing has been covered pretty well, I think.

The Master: Just read the question.

(The Reporter then read the question.)

Mr. Jackson: I want to know when that last talk was. He said you are speaking, but he was speaking.

A. My last talk with him was yesterday afternoon.

Q. Now we understand each other. You referring to a talk before, in what month?

A. The talk I am referring to now took place yesterday afternoon.

Q. When you were speaking before you were referring to that talk?

A. When I was speaking before I was referring first to the
1434 talk that took place in reference to the contract made from January to April, which took place in October, November and December of 1919, and the contract made in March, the one we are working on now, which took place in February and March. That is what I tried to tell you.

Q. So that when you went back to Mr. Higgins in negotiating contracts Exhibits 21 and 22—and as I understand it you went back to him after having canvassed the situation as to other oil companies, in the negotiation of each one of these contracts, did you?

A. Yes, sir.

Q. When you went back to him you had the belief that you could not get oil for your gas plant from any other source than the Standard Oil Company of New York?

A. I had the knowledge.
Q. You were convinced of it?
A. Absolutely.
Q. And you felt that you were compelled to take any contract that they gave you?

Mr. Moran: I object to this.
The Master: Objection sustained. I think we have gone into this pretty far.
Mr. Jackson: Exception, please.
The Master: He has testified at great length that is the only source he could get to sell him any oil. Now, if a different state of facts exists, and it would have been possible for him to get oil
1435 from other sources, if he made endeavors, I think you ought to bring it out from another witness. He has stated time and time again that he got it from the Standard Oil Company of New York, which was the only oil company that would sell him oil. If you want to look at these letters, we will suspend now, and you can have an opportunity to look at them.
Mr. Hill: I think if you run your eye over those forms, you will be able to show very shortly that the books are not books of original entry, and bring that fact out with all the force in the world—just by looking at these now.
The Master: Let us suspend for 15 minutes and see if we cannot make a little more progress this afternoon after looking at these letters.
Mr. Jackson: All right.

(A recess was then taken until five o'clock p. m.)

1436 ANDREW F. GONNOUD recalled.

Cross-examination (continued).

By Mr. Hill:

Q. Mr. Gonnoud, on the subject of the blanks which you furnished pursuant to the request of Mr. Jackson, what is the paper and record prepared when it develops that material of any kind is needed down there at the plant?
A. The sheets which you have in your hand there.
Q. That is called what (handing witness)?
A. Requisition for supplies and materials, form No. 8502-A.
Q. Assuming that it was coal that was desired, a certain quantity, who would sign that form requisition?
A. It would be signed by the head of the department requiring the coal—it would be signed by the clerk making it up and would be countersigned by the head of the department requiring the material, and signed by the vice-president and general manager, as approved.

Mr. Hill: Hadn't we better number that or mark it in some way?
Mr. Jackson: Mark it for identification.
Q. Did you ask him where to go to get oil?

The Master: Put it in evidence, that is the best way.
Mr. Hill: Will you please mark it, Mr. Stenographer?

(Marked Defendant's D-8 in evidence.)

Q. After that was signed by the various employes and of-
1437 ficials that you have mentioned, what would ultimately be-
come of Defendant's Exhibit D-8?
A. It would go to the purchasing department, who would make up from that the evidence, getting the information concerning the quotation on the coal and so forth, when a quotation is necessary; they would make up from that a material order.
Q. Have you a blank for the material order?
A. I have. And then that would be placed in the files of the company.
Q. That is, Exhibit D-8 would be placed in the files of the company?
A. That Exhibit D-8, yes sir. That is the form that would then be made out (handing counsel). It would be made out in quadruplicate.

Mr. Hill: May I have this marked?
Mr. Jackson: You are offering this in evidence?
Mr. Hill: Yes. I am offering them in evidence as one exhibit.

(The papers were received in evidence and marked as one exhibit, Defendant's Exhibit D-9.)

Q. Exhibit D-9 would be made out by whom?
A. It would be sent to the stenographic department for making out; it would be made out by a stenographer under the direction of the purchasing department and made up in quadruplicate. One copy would be sent to the dealer from whom the goods are to be
purchased, one copy would be retained by the purchasing de-
1438 partment for its records, and two copies would be sent to the department who made the requisition, and they would check it against their copy of the former exhibit that they would retain in their possession. They make that up in duplicate and retain that manilla copy for their own files.
Q. That is, Exhibit D-8 is made up in duplicate?
A. In duplicate, yes.
Q. One is retained by the department making the requisition?
A. Yes, sir.
Q. And the other is forwarded to the regular office as you have previously detailed?
A. Yes, sir.
Q. I have observed that in Exhibit D-9 there are four——
A. Four copies, yes.
Q. And each are numbered with the same number?
A. With the same number, yes.
Q. And those four copies are sent out and distributed as you have just detailed?
A. As I have detailed, yes.

Q. Is there any further blank in connection with the ordering of any material?

A. From outside dealers, no.

Q. You then would receive in the natural and ordinary course a bill of this material?

A. Yes.

Q. That bill would be what would happen to the entries on that invoice or bill?

A. The bill—if the goods had been received, the yellow
1439 copy, that is one of the copies that have been sent to the department—as soon as the goods are received they would send that yellow copy signed as having received the goods on such and such a date to the purchasing department and the purchasing department would then——

Q. Just a moment, you spoke of a yellow copy?

A. Yes.

Q. A yellow copy of D-9?

A. I did, yes.

Q. Directly an invoice or bill is received by your general office, that invoice or bill is sent to the department from which the requisition originated?

A. No. The yellow copy, as soon as the goods are received—if the purchasing department received the bill before they get the yellow copy, they hold the bill until the yellow copy comes up. They notify the department we have received the bill, where is the yellow copy. They say they have not received the goods, and as soon as they receive them, they sign it on the yellow copy, and they send it to the purchasing department, who check that yellow copy against the bill, and at the same time he checks the amount that has been placed on there, the amount of goods and the amount of the bill, and the amount is placed on the order. He always puts the amount of money that it is going to cost on the order.

1440 Q. Then what happens to the invoice or bill and the yellow copy?

A. The invoice and bill, yellow copy, it already has the charge number on it, that is, the account to which it is to be charged, that having been originally placed on the original requisition, Exhibit D-8—it has been transferred here, then that, together with the bill is sent to the auditor for checking.

Q. That is, the yellow copy?

A. That is the yellow copy.

Q. Exhibit D-9?

A. Showing that the goods have been received.

Q. The yellow copy is sent to you?

A. Yes.

Q. Assuming the goods received is a boatload of coal?

A. Yes, sir.

Q. Is there sent with the yellow sheet of Exhibit D-9 and the invoice any further data or records?

A. No, no further data.

Q. After you receive the yellow sheet of Exhibit D-9 with the invoice, what do you then do?

A. We check it and——

Q. Check it with what?

A. We check the yellow copy against the invoice again to be sure that we have the signed receipt for the goods, and we have the bill; we check that in order to check the purchasing department,
1441 because he is the man who does the ordering, because we have to check it as being paid and to enter it in the books. Then the invoice is entered in the accounts payable and also sent to the materials and supplies record clerk, who enters it in his materials and supplies as the goods having been received.

Q. The yellow sheet of Exhibit D-9 is physically delivered to whom by you?

A. Why, it is sent back to the purchasing department after we have finished with it.

Q. You enter it on the books and send it back to the purchasing department?

A. Yes.

Q. And then what was the other step you took?

A. I said it went into the materials and supplies record, which is in my department, of course, and also goes into accounts payable distribution, and is distributed to the account to which it is to be charged, the materials and supplies record being the sub-book. Then it is sent back to the purchasing department, who sent it to their copy; that is, he attaches it to his blue copy.

Q. His blue copy of Exhibit D-9?

A. Yes. He had that in his department to follow up the order. Then he attaches to that the yellow copy. Then he has the whole story; he knows right away from whom it is purchased. He has the story complete, and then it is put in the files.

Q. Then, we have, using the assumption of a boatload of
1442 coal—we have a boatload of coal in your yard?

A. Yes.

Q. When some of that coal is used in the manufacture of gas is there a blank made out by any person?

A. Yes.

Q. All right. Will you furnish me that blank?

A. (Hands counsel papers.)

Q. You have delivered to me a white and a yellow sheet?

A. Yes, sir.

Mr. Hill: May I have it marked as one Exhibit.

Q. They are one exhibit, are they, Mr. Gonnoud?

A. Yes, they are just duplicates.

(The papers were received in evidence as one exhibit, and marked Defendant's Exhibit D-10.)

Q. I show you Exhibit D-10, and ask you what that blank is used for by your company?

A. This blank is used for the purpose of charging out all the materials and supplies used from the account called materials and supplies or from the storerooms.

Q. Assuming, Mr. Gonnoud, that the material is coal——
A. I might in further explanation say that it is a receipt by the person receiving the material for usage, and signed also by the storekeeper as evidence that the material had been delivered.
Q. Assuming that material that is to be reported thereon, is coal, who would fill out that slip, Exhibit D-10?
A. The storeroom keeper at the works.
Q. And who would put onto that slip a certain number of pounds of coal; that is, what would be entered there, wouldn't it, if it were coal?
A. Yes.
Q. Where would he obtain the information from which he made the entry on Exhibit D-10?
A. From the coal weigher's sheet.
Q. Have you a blank known as the coal weigher's sheet?
A. (Hands counsel paper.)
Q. You show me a paper?
A. Yes.

Mr. Hill: May I have it marked?

(The paper was received in evidence and marked Defendant's Exhibit D-11.)

Q. Exhibit D-11 is the coal weigher's daily report?
A. It is.
Q. Where is that physically kept in your plant down there? When one of those blanks is in use where do they keep it?
A. While they are using it?
Q. Yes.
A. The coal weigher has it right there at the scale.
Q. And he is the man that is weighing the coal?
A. He is the man that is weighing the coal.
Q. And upon Exhibit D-10, as he weighs coal, he enters the number of pounds on that sheet, Exhibit D-11?
A. He does.
Q. He enters what, a day's consumption?
A. No, he puts in each buggy.
Q. All right, but how much does he enter? That seems to be a big sheet?
A. One day.
Q. One day?
A. Yes.
Q. He turns that over to whom?
A. He turns that over to the storeroom man.
Q. And the storeroom man then makes out from the data on Exhibit 11, the information contemplated on Exhibit D-10; is that right?
A. Yes, sir, that is correct.
Q. Where is Exhibit D-11 finally deposited; where does it find its ultimate resting place?
A. It is kept in the files of the company.

Q. Down at the plant?

A. Down at the works, yes.

Q. What happens to Exhibit D-10 after the figures on D-11 have been transferred thereon?

A. It then goes, together with the coal weigher's sheet, to the man who makes up what we call the daily manufacturing report.

Q. Have you a blank known as the daily manufacturing report? But I will withdraw that question for a minute and ask you, Exhibit D-10 seems to be in duplicate?

A. Yes.

Q. What happens to the second copy of it?

A. Well, we have not come to that. They are still together.

Q. All right, they are still together?

A. Yes, they go to him and he——

1445 Q. All right, they are still together and in duplicate and are delivered by the storekeeper to whom?

A. To the clerk, who makes out the manufacturing report (handing counsel paper).

Q. You show me a paper?

A. Yes, sir.

Mr. Hill: May I have it marked Exhibit D-12?

(The paper was received in evidence and marked Defendant's Exhibit D-12.)

The Witness: This is not logically bringing it into the books. We post from that other one again.

Q. I am glad to know that. Now, the clerk that makes out the daily report of manufacture, makes it out from blanks like Exhibit D-10 that covers various items that go into the manufacture each day; is that right?

A. He makes out part of the manufacturing report. He makes out the coal from here (indicating).

Mr. Moran: And he would have another one for oil; that is what he means.

The Witness: Yes.

Mr. Moran: And another one for any other material?

The Witness: Yes.

Mr. Moran: That is what he meant.

Q. That is, that clerk is the grand central station at which is gathered the blanks Exhibit D-10 used on coal and oil and various other materials that go into gas?

1446 A. Just the major items.

Q. Just the major items?

A. Yes.

Q. What does he do with Exhibit D-10 and Exhibit D-12?

A. He turns these over after he has calculated the amount of material used per thousand cubic feet made and has the other information on this sheet—he then turns that over——

Q. What sheet? Call it Exhibit D-12.

A. The daily record of manufacture, D-12. He then turns both of these over to the engineer at the works. The engineer of the works then checks one with the other to be sure of their accuracy.

Q. That is, he checks D-10 with D-12?

A. He checks D-10 with D-12, to be sure——

Q. And of D-12 there will be several?

A. There will be several, yes.

Q. That is, there will be one for each different material.

A. There will be one for coal and oil, that is all, and the different kinds of coal.

Mr. Moran: And oxide?

The Witness: Yes, if there is any oxide thrown out. The engrossly in error—checks the pounds per thousand in the case of the coal, and this gives him the evidence of how his plant is running, and that is all these are used for.

1447 Both of the copies of D-10, do they stay there with the engineer?

A. No, sir, one copy, the yellow copy is kept at the—one copy is then sent back to the storeroom keeper who posts it on his card to show what material he still has on hand, and the other copy is sent to the auditing department. On this copy, of course, is the account to which the material is charged and the account number and the amount of material.

Q. All right, Exhibit D-12 finds its final and ultimate resting place with the engineer of the works?

A. No.

Q. Where does it go?

A. It is sent to the several departments at the main office. It goes to the general superintendent who looks it over and approves of it; it is sent then to the purchasing department, who look over it to be sure if there are any receipts of material on there that he has the yellow copies. Then it is sent to the auditing department who look it over to see how things are going. Then it is sent to the general manager, the vice-president and general manager, who looks it over.

Q. And it is filed by him or his assistant?

A. It is filed then in the files of the company.

Q. With Exhibit D-12, Defendant's Exhibit D-10 goes along?

A. Oh, Exhibit D-10 goes to our department first.

Q. Our department is what?

A. It goes to the auditing department, tend to that first. (Handing counsel paper).

1448 Q. From the engineer?

A. No, from the superintendent. The superintendent has seen both of them.

Q. The engineer has delivered it to the superintendent?

A. To the superintendent, the general superintendent, and he delivers to us and we check it, one against the other, to be sure of the accuracy of this going on to that.

Q. That is Exhibit D-10?

A. Excuse me. Then D-10 is sent to the materials and supplies clerk, who enters it on his materials and supplies record, and the other D-12 is sent to the general manager for his information.

Q. And that is the end of its journey?

A. That is the end of its journey.

Q. Is the bookkeeper on materials and supplies that receives the white copy of D-10—is that bookkeeper the end of the journey of D-10?

A. He is.

Q. We still have the yellow slip of D-10. What happens to that?

A. Why, the storekeeper retains that, because he has this as his evidence that he has issued that material. When we come to take inventory, if there is any material missing we would go after him about it, and he would come to his yellow copies and say, "I have delivered that material, here is my letter."

Q. And he is the ultimate resting place?

A. He is the ultimate resting place.

Q. Of the yellow sheet, D-10?

A. Of D-10, yes.

1449 Q. Is the entry by the bookkeeper in materials and supplies made from D-10, the original source from which your general office and your general books receive information touching the coal which would appear on D-10?

A. No.

Q. What other source?

A. The other source is the inventory which governs.

Q. Have you a blank of the inventory?

A. It is not made up in blank form; it is written at the close of each month.

The Master: Then the book is a book of original entry, so far as the inventory is concerned?

The Witness: The inventory comes up and we enter that. We find out, of course, how much coal we have on hand according to the record, and then we take that inventory and we make an adjusting journal entry on it, if it differs with the amount we have on hand, you see.

The Master: But the Judge was asking where you got the inventory from, whether it was brought up to you on slips?

The Witness: No, it is not made up that way. It is made up each month and written right out. It is written out by the engineer. He writes it out first in his own handwriting, then it is typewritten.

We have the typewritten copies for convenience sake. They
1450 are signed by the engineer and the man who takes the survey.

Q. Then you make an adjustment on your books, if an adjustment is necessary between the aggregate of your receipts, as shown by your invoices, and your coal consumed, as shown by Exhibit D-10; you make an adjustment in the balance that exists there, and not the balance which your inventory indicates?

A. Yes.

Q. And that is the adjustment on the books that we have talked about?

A. Yes. The coal and oil entries on the books depend entirely upon the inventory.

Q. I understand.

A. And these slips are only to show us how the ship is going from day to day and from month to month, and in order to allocate to the different sub-groupings of accounts the different materials and supplies used. But in all cases the inventory at the close of period governs.

Q. When you receive coal it appears here in evidence that you do weigh it when it comes in, in three ton cars. Have you a blank by which the information obtained by that weigher is sent to the general office?

A. I do not see it here among the papers.

Q. But there is such a blank is there not?

A. Yes, sir, there is.

Q. You remember the routing of that blank?

A. Yes, I remember it is somewhat like——

Q. Just give us the routing of the blank in connection
1451 with your weighing? It is a ruling somewhat——

Mr. Moran: No, routing.

The Witness: Oh, the routing?

Q. Yes.

A. The man who weighs the coal puts down the weight of the several different buggies of the one shipment. That is then sent to a clerk at the works' office, sent to a clerk at the works' office and he foots that up to find out the total number of pounds used.

Mr. Moran: The number of pounds delivered?

The Witness: The number of pounds delivered. He then enters that number of pounds on the yellow copy showing that he received that number of pounds on the——

Q. When you speak of the yellow sheet, that is the yellow copy of Exhibit D-9?

A. Of Exhibit D-9, yes. Then that yellow copy, of course, is sent in the regular manner up to the purchasing department, and he receives the bill and checks the bill against the amount received.

Mr. Moran: You have told that before, now.

The Witness: If there is a great variance there——

Q. I understand, but that information comes back to you or to your general office on Exhibit——

A. D-9.

Q. On Exhibit D-9, and upon the invoice or bill—those come back to you together, do they not?

A. Oh, yes.

Q. When those papers come in you have the whole information?

A. Yes.

1452 Q. The amount of the weight?
A. Yes.
Q. The amount of the invoice and a copy of the order?
A. Yes.
Q. And the order is D-9?
A. Yes.
Q. For the use in your general books do you get information as to consumption from any source except D-10, D-11 and the inventory at the end of the month?
A. No.
Q. Now, take your payroll. I have not the beginning of your payroll, will you start in with the blank that you use when the man first comes? I have not it sorted out.

Mr. Moran. Won't it do if he describes what they do with them?
Mr. Hill. Yes, but they have all these blanks here and I want to put them in.
A. I described this fully and completely.
Q. I know you have.
A. The first sheet here is very important for our use, but I can describe the routine.
Q. Tell me what the first use is.
A. This is the first sheet (handing counsel).
Q. I am now asking you to take your element of labor and take one man, for example, and when he arrives there give me the routine or the routing of any data in connection with his labor and his payment, which comes to or emanates from your general office?
A. He makes up that application of employment.

1453 Mr. Hill. May I have that marked Exhibit D-13?

(Received in evidence and marked Exhibit D-13.)

Q. I show you Exhibit D-13, and ask you what it is?
A. Application for employment with the Kings County Lighting Company.
Q. That is made out by a man when he desires to enter your employ?
A. It is.
Q. And presented to whom?
A. To the head of the department for whom he is going to work.
Q. And where does it ultimately stop?
A. It ultimately stops at the files.
Q. At the files of whose office?
A. Of the general office.
Q. That is, the head of the department for whom he is going to labor then sends it to whom?
A. He sends that to the employment bureau. We have an employment bureau over there. Usually the employment bureau handles all the company's—handles all the applicants. They come to him first, as a rule, and then the information inside there—there is a space there allocated, or a space set aside, rather, for the head

of the department to sign stating that the applicant has started to work on such and such a day at such and such a salary.

Q. That is, he says this applicant was engaged?

A. Engaged as his occupation, in the blank department,
1451 and will be carried on the payroll at such and such an amount from such and such a date. Then he signs that and dates it.

Q. And then Exhibit D-13 is delivered to him?

A. Another sheet is made up, then, what they call an authorization sheet.

Q. Have you that?

A. No, I have not that with me.

Q. All right.

A. This authorization blank is made up giving the man's name and occupation, the date he is to start work, that is, the effective date, and the amount of money he is to receive, compensation, and that is signed by the head of the department and attached to that form and forwarded to the employment bureau. The employment bureau then enters the record on a card.

Q. Have you the card?

A. I have not the card.

Q. Have you any of the forms?

A. Of the card record?

Q. Yes.

A. No, it is just a plain card.

Q. All right.

A. He enters that information on this card and then—

Q. Where does the card remain?

A. The card remains in his possession.

Q. In the employment bureau?

A. Yes. Then the application is sent up to the filing department for filing and the authorization slip is sent to the general manager, the vice-president and general manager, who authorizes the hiring
1453 of the individual. Then that sheet is sent up to the payroll department, who make note of the man's name and amount, and then it is forwarded to the addressograph department where a plate is made up. But in one step there, when it reaches the employment bureau, an arbitrary number is assigned to each man, and this number is then put on the plate that is made up in the addressograph department.

Q. This authorization makes the journey to the general manager, your payroll department, to the addressograph department?

A. And then it is——

Q. And that is made out from Exhibit D-13 in the employment bureau?

A. Yes.

Q. All right. Go on.

A. No, it is made out by the head of the department, because he has to sign it.

Q. Go on.

A. Then that is returned to the payroll department.

Q. The authorization is?

A. The authorization is returned to the payroll department from the addressograph department and he holds it there until the payroll is received. That is a blank payroll with just the names on it of the employes. That is received and he checks it to see that that name is on there, and enters the——

Q. Have you the blank payroll?

A. Yes. (Handing counsel.) I am just putting in there one of these forms, there are several forms, one is weekly and then some semi-monthly and——

Mr. Hill: I will ask that that be marked.

1456 (Received in evidence and marked Defendants' Exhibit D-14.)

Q. Exhibit D-14 is made up by whom?

A. The payroll number and the employe's number, name and occupation, is run off on the addressograph machines and these plates begun up there. It is then sent to the payroll department and he uses it for entering the time record on.

Q. That authorization, the missing link between Exhibits D-13 and D-14, where has that gone to?

A. The authorization that was signed, that authorization is held by the payroll department until he receives this (indicating), then he checks it.

Q. I see. Until he receives D-14?

A. Yes, then he checks it and notes the date that the employe starts on. You see, so that he knows when he gets the first time slip he has that to check by, and then he sends it to the files when he is through with it.

Q. When he makes the checking the first time?

A. When he makes the checking, yes.

Q. The first week after the man comes to work there?

A. Yes, sir.

Q. He keeps that authorization and checks with D-14?

A. Yes, but before finishing, through, he also enters it on this form. (Handing counsel.)

Mr. Hill: If I may have that marked, please.

1457 The Witness: It is known as a payroll change form.

(The same was received in evidence and marked Defendants' Exhibit D-15.)

Q. The payroll department has the authorization there and they checked it with D-14, and may I ask you what entry they make on Exhibit D-15 from that authorization?

A. They show the employe's number, the payroll number, the name and the notation as to the change, showing what the change was, the date that the employe was engaged, if he was engaged, or in the case of discharge, the date he was discharged, and the amount of money at which he was engaged.

Q. The entry on your books, your time books, is made from the authorization, which is the missing paper between Exhibit D-13 and D-14; is that right?

A. The time books?

Q. Yes. Where does it get onto your books; where does that man's name and his number get onto your books, from what?

A. He gets onto the payroll. He does not get onto the books.

Q. That is a book, is it not?

A. It is not a book. It is that payroll right there (indicating).

Q. Haven't you any payroll except these sheets?

A. No, we do not have an extra payroll.

Q. This Exhibit D-14 is made up singly?

A. Yes, singly and alone.

1458 Mr. Moran: For the different departments.

Q. Where is D-14 sent?

A. When D-14 is made up, the D-15 is attached to it, and another form attached to it.

Q. All right, let us have that other form here.

Mr. Moran: What are you looking for now?

The Witness: I am looking for the distribution sheet showing the distribution of his time. It is similar to the other, but I do not see it here.

Q. All right, is there a distribution sheet attached to the payroll in Exhibit D-14; is that sheet attached to it?

A. Yes.

Q. And that distribution sheet, what happens to that?

A. The three sheets are sent to me for my approval after the payroll man has signed it, and it is sent to me at the same time, the voucher is made up. A voucher is made up for the total amount of the payroll, and that voucher is made payable to the assistant treasurer, who cashes the voucher and takes the money. This is attached to it, and I take the money and then a copy of the charge sheet is sent to the——

Q. The change sheet is the allocation sheet?

A. No, this change sheet here (indicating).

Mr. Moran: It shows changes in the payroll, changes in the payroll appear?

1459 The Witness: Yes, that is sent to the general manager with a copy of the distribution, and on this distribution sheet, they show the number of men in the different departments and the amount of money they received on the current payroll, and also on the last previous payroll, the connecting link between the two of them being this change sheet. By means of this change sheet, the general manager can merely look at the previous payroll, which he knows is correct, and he checks the present payroll.

Q. Now, does that allocation sheet divide the labor up into the various items?

A. Yes, that divides the labor.

Q. Now, go on and tell me its route, where it goes, its physical journey. It is now with the general manager.

A. Oh, no, that is a copy of it goes to the general manager.

Q. All right. The original is with this voucher, and it is sent to the accounts payable in my department, the man who takes care of the accounts payable distribution, and he enters that just the same as an ordinary bill, enters the name of Paul Bucher, the assistant treasurer, and the total amount of money, and then shows the distribution across the set of accounts on this sheet.

Q. That is, on that allocation sheet it appears how much of that payroll should be charged against distribution?

A. Yes.

1460 Q. How much to gas making labor?

A. Yes.

Q. And how much too——

A. Every item on there.

Q. Every item?

A. A distribution of the whole payroll.

Q. And that which is the missing link after D-15, is what you make up your books from, your general books showing your allocation of labor?

A. Yes.

Q. The schedules of which have been introduced in evidence here?

A. Yes.

Q. As Exhibits 2 and 13?

A. Yes.

Mr. Hill. Now, I show the witness an exhibit which I will ask be marked D-16.

(Received in evidence and marked Defendants' Exhibit D-16.)

Q. I show you Exhibit D-16, and ask you if that is the blank which the reader uses when he reads the consumer's meter?

A. Yes.

Q. What does he do with that, what does the meter reader do with that Exhibit D-16?

A. Of course, we are assuming here that the name and address and meter number and everything is on there.

Q. Everything is on there.

A. And the previous meter index is on there.

Q. Yes.

A. He takes this, together with other sheets and he reads

1461 the meter and he puts the meter reading on this ticket, on this sheet. Then the sheets are sent first to the accounts receivable department; that is ledger clerks.

Q. Containing the last reading on the meter?

A. Containing both readings, the previous reading, of course, being on here, and the last reading.

Q. I see. That is when Exhibit D-16 is delivered to the meter reader it has John Smith's name on it?

A. Yes.

Q. And it has figures showing the reading of the meter at the last previous reading to the time when it is delivered to him?

A. Yes.

Q. And he goes to the house and he reads the then number of thousand cubic feet?

A. He reads the registration on the meter.

Q. Yes, he reads that?

A. Yes.

Q. And the difference between the figures which were on there at the time it was delivered to him and those which he obtained by observing the meter is the amount which the consumer has used during that period or that interim?

A. Yes.

Q. All right. Go on.

A. This sheet is then forwarded to the accounts receivable department who post into the accounts receivable ledgers the present reading, checking at the same time the previous reading to see that it is correct. It is then sent to the tabulating department, who tabulates this, putting it on the Borroughs ——

1462 Q. What is the tabulating department?

A. The tabulating department is a department in which they have tabulating machines, Burroughs calculating machines, shall I get that form?

Q. Yes.

A. Well, they throw onto this sheet, this tabulating sheet in the machine, the previous and present reading as shown on the sheet. The machine mechanically calculates the difference which is the consumption. These sheets are then sent to the accounts receivable department; that is, the tabulating sheets.

Q. Has not D-16 been to the accounts receivable department before?

A. Yes, but I say the sheet is sent, the tabulating sheet is sent to the accounts receivable.

Q. I see. And they depend on that for the subtraction?

A. Just a moment. They then check — they have already entered it; they have the previous and present reading on their books and they then check the previous and present reading as shown on the tabulating sheet and enter the amount of gas consumption.

Q. As shown on the ——

A. On the tabulating sheet, having been mechanically calculated. They then extend the amount of money, the gas represents, in the money column. This sheet in the meantime ——

Q. Sheet D-16?

A. Sheet D-16 in the meantime has been forwarded to the 1463 billing department, who have gas billing machines, Burroughs gas billing machines. They take the gas bill and throw onto the gas bill by means of this machine the previous and present reading as shown on this original sheet, together with the date and the gas billing machine mechanically calculates the difference or the consumption. The bill is then handed to another clerk who extends the amount of consumption by means of a rubber

stamp, the top of the rubber stamp showing the amount of consumption, and the bottom of the rubber stamp representing the amount of money that the consumption is—representing the amount of money. Then the bills, together with these sheets, are again forwarded to the accounts receivable department. The accounts receivable department then have the tabulating sheets which they have checked, the bill, and the original entry. Then they check the bill, the amount of the bill in money, against the amount which they have extended by means of their own brains, you know—by their own means.

Q. Man power.

A. Man power to see that that is correct, and then they put in arrears or any other additional information that is necessary on the bills and the bills are sent out.

Q. All right, that is enough. A. Then when the man pays you give him credit for it?

1464 A. Yes, but then we get a balance out the end of the month, and we have another check on that reading.

Q. That is in your books, isn't it, the balance at the end of the month?

A. Yes. We get another reading.

Q. Will you explain what that is and have it marked? (Handing paper to witness).

A. This is the consumer's ledger sheet.

Mr. Hill. I offer it in evidence.

(The same was received in evidence and marked Defendant's Exhibit D-17.)

Q. What is that (handing witness paper)?

A. A tabulation sheet.

Mr. Hill. I offer it in evidence.

(Received in evidence and marked Defendant's Exhibit D-18.)

Mr. Hill. That is all, Mr. Gonnoud.

RALPH ELSMAN resumed.

Cross-examination (continued).

By Mr. Jackson:

Q. Mr. Elsman, you have brought with you all your correspondence with any and all oil companies relating to the obtaining of a supply of oil during the years 1919 and 1920?

A. Yes, sir.

Q. You have it here?

A. Yes, sir.

Q. And bearing upon these contracts, Plaintiff's Exhibits 1465—19, 20, 21 and 22?

A. Yes, sir.

Mr. Jackson: I would like to offer, so as not to pick out part of the correspondence and claim that it shows one thing that might be unfavorable or to the disadvantage of the witness—I am perfectly willing to let this correspondence go in evidence for what it is worth, as long as he says it is all—for whatever it shows. I would like to offer it in evidence.

Q. They are copies of the letters that you wrote, and the original letters that you received in reply?

A. Of those to which I did receive replies, yes, sir.

Q. And where you have here a copy of a letter that you wrote and no original corresponding reply from the other company or your correspondent, that means that there was no reply as you understand it?

A. That is correct.

Q. Is that the situation?

A. Yes, sir.

Mr. Moran: I am going to object to these being marked. The very object of having a Master in these cases is to cull out and put in what is evidence and exclude what is not evidence. Now, if there is any of this correspondence that is material, it should be picked out here and offered as material evidence. Obviously, the whole of it is not——

Mr. Jackson: I will call attention to it then, particularly.

1366 Mr. Moran: Just a moment. It consists of I would say some forty or fifty letters.

Mr. Jackson: How many?

Mr. Moran: I would say there were forty or fifty letters.

Mr. Jackson: All right, I will call attention to them specifically.

The Master: Just let me look at them, will you?

Mr. Jackson: Yes.

Q. Now, here are six sets of correspondence; that is, letters and replies that refer to or were preliminary to the contract that is Plaintiff's Exhibit 19; is that so?

A. Yes, I guess so.

Q. And here are five sets of correspondence that were preliminary to the Plaintiff's Exhibit 20; is that correct?

A. Yes, sir.

Q. And here are 13 sets of correspondence that were preliminary to the contracts, Plaintiff's Exhibit 21 and 22; is that correct?

A. There is some of that correspondence there, Mr. Jackson that possibly may have taken place after one or the other of those contracts were closed.

Q. But they were preliminary to or bearing upon those two contracts?

A. That is correct.

Q. And there were 13, as I counted them there?

A. I think that is correct, yes.

1467 Mr. Jackson: If adjoined to any letter, where one has replied, there is some advertising matter, I do not care to include that.

The Master: I will admit these papers in evidence. I should anticipate in settling any bill of exceptions in a case of this sort a summary of the letters would be made, and they would not have to be printed.

Mr. Moran: What about the Master's report? One of the rules is to file the testimony and exhibits in court. That is as I understand it. I am not very familiar with it.

The Master: That is perfectly true, but they do not have to be printed at this time, and the question of reproducing these exhibits is not up at this time. If I were preparing personally any bill of exceptions in a case of this sort, I should think both sides would agree on the elimination or the summation of a lot of those letters, and I am perfectly willing, if you can agree on a summation now, to take that summation. But since they are offered in evidence, they are some evidence of the efforts made by Mr. Elsman to secure oil for his company.

Mr. Moran: But is there anything in them? You see I am entitled to know what there is in there that any party intends to use, so that I can bring out something about it, or explain
1468 it, if it needs explanation. But here is a mass of correspondence offered here without any explanation. Take any one of them, what does it amount to? I have looked them over here. They notified the oil dealer that the company is in the market for approximately a certain amount of oil, to be delivered in a certain period and asks for bids. Following that is usually a letter saying that the party addressed is not in a position to deliver any oil. That is the way it runs.

The Master: There are some of them there that quote, and then he refuses to accept the quotation or refuses to close with them on that. I should think that was evidence in your favor rather than evidence against you.

Mr. Moran: I know it is; he has testified to that effect, that he had bids from all these people and that the contract that let was at the lowest price, to the lowest bidder. I do not think it needs a letter to corroborate that. That is just the point. What is there here that is at variance with the testimony the witness has given? What is the occasion that requires all this mass of correspondence to go into the record? This case has got to be submitted to a Fed-
1469 eral Judge and this correspondence goes into the possession of the Court now. It is our private correspondence. Have we got to reproduce it all? What part of it have we got to reproduce? What part of it is going to be used against us? If there is some part of it, let us know it now so we can examine the witness about it.

Mr. Jackson: I will. If the Master chooses to reserve his decision, I will ask another question or two about it.

Q. How would your company receive shipments of oil by railroad tanks?

A. We could not receive it that way.
Q. Well, you do not mean that it is impossible?
A. Yes, sir.
Q. Think again on that and see if you are sure?
A. Yes, sir.
Q. What obstructions stands in the way or difficulties to your receiving oil by railroad or tanks?
A. We have no rail connection.
Q. What is the nearest railroad connection to your plant?
A. About 66th street and First avenue.
Q. And what is that?
A. The Long Island Railroad.
Q. Railroad connection with the Long Island Railroad would do us what good as to the receiving of oil by railroad tanks?
A. Do us no good.
Q. At the same time, railroad tanks could be trans-shipped from other lines to the Long Island Railroad and delivered to that point?
A. 66th street and First avenue, yes.
Q. Yes, so it would do you good?
A. No, it would not do——
Q. (Interrupting.) From any railroad in the country you could get trans-shipment across different lines to the Long Island Railroad, couldn't you?
A. It would not do us any good at 66th street and First avenue.
Q. Just a moment.
A. We have to use it at 55th st.
Q. But it would come to 66th st. and First avenue by tanks?
A. Yes, sir.
Q. And that is how far from your plant?
A. About 14 or 15 blocks.
Q. City blocks? You mean this point in Brooklyn is the nearest connection with the Long Island Railroad, is it, in Brooklyn?
A. Yes, sir.
Q. It would be possible for you to unload from tanks, railroad tanks at that point and carry to your plant, would it not?
A. It would be physically possible.
Q. That is enough?
A. But financially impossible.
Q. Well, it would be physically possible?
A. Yes, sir.
Q. Now, what is the nearest railroad connection with your plant, considering water intervention?
A. Perth Amboy.
Q. New Jersey?
A. Yes, sir.
Q. And Perth Amboy has railroad connections for the supply of railroad tank cars?
A. Yes, sir.
Q. Oil tank cars?
A. I think they have pipe line connections also.

Q. It would be physically possible at Perth Amboy to have railroad tanks delivered, and the railroad tanks could be emptied into a barge and delivered by water to your dock as you now have boat deliveries?

A. I am not in position to state that.

Q. Can you imagine that situation?

A. I could imagine it being done, but I don't know that.

Q. You could imagine that it would be physically possible?

A. Why, if you had the boats and the facilities there, I imagine it could be, sure.

Q. Surely. You have the water?

A. And the water.

Q. And you have the dock?

A. Yes, sir.

Q. And there is a railroad terminus at Perth Amboy, New Jersey—and that is across what body of water?

A. The Narrows.

Q. And that is the route that your oil now crosses?

A. Yes, sir.

Q. Does it not?

A. Yes, sir.

Q. It is now delivered to you from where?

A. Perth Amboy.

Q. That is the Standard Oil Company's point—the Standard Oil Company of New York?

A. That is the terminus of their pipe line, I believe, yes, sir.

Q. Yes, and they deliver by land up to that point?

A. They deliver by pipe line, I believe.

1473 Q. That is by land, across land?

A. It is by pipe.

Q. By pipe line, all right; Perth Amboy, New Jersey, and from there they load on to barges?

A. Yes, sir.

Q. And deliver by the barges from that point to your dock?

A. Yes, sir.

Q. And the only difference then would be—from tank cars at Perth Amboy, would be loading from tank cars on to barges and delivering at your dock?

A. I imagine that is correct, yes.

Mr. Jackson: Yes. Now I will call attention, so that counsel may examine as he likes upon this point.—I will call attention to the fact that in many instances the replies to the witness's requests for bids were not a refusal of oil, nor a statement of a scarcity of oil, nor a statement of an impossibility of oil, but a statement of that oil company's inability to deliver by boat to his dock,—that they could deliver him oil by railroad tank cars.

Mr. Moran: No, sir; there is no such statement in any letter, no such statement. It is impossible, and it is unfair.

Mr. Jackson: Well, now, all right. I do not mean to misstate it.

Mr. Moran: Well, you did.

Mr. Jackson: I am under the impression, in looking over
1474 those letters just now, that there were many of those conditions expressed.

Mr. Moran: No, sir.

Mr. Jackson: And I will take the trouble now to read those letters in the evidence, that state that, show that point, if you wish me to, if you have a question in your mind about it; but of course my statement as to the contents of the letter would not make any difference if the letters were in evidence, they would show for themselves.

Mr. Moran: You point to the letter or name the company, where any company ever offered to deliver oil to this company in car tanks at its door at a price better than the bid that they had.

Mr. Jackson: I didn't say they——

Mr. Moran: Or deliver it at its door by railroad tank car at any price.

Mr. Jackson: I did not say that. I say that the general proposition was that this plaintiff made, that they should deliver oil at his dock.

Mr. Moran: Yes, he made that.

Mr. Jackson: Yes.

Mr. Moran: And that is the only way we ever wanted oil, and the only way we ever can take oil.

The Witness: The cheapest way.

1475 Mr. Moran: And the cheapest way to get oil.

Mr. Jackson: Yes, that is another question. And that the reply of the company was, not a refusal to deliver oil, but they said they did not have facilities for delivering oil at his dock.

Mr. Moran: Well, it is just——

Mr. Jackson: And there wasn't any reply then, so far as this correspondence goes, from this plaintiff, suggesting that they might deliver their oil, if they had oil to deliver; and this plaintiff needed the oil and wanted to get a bid at lower prices than he could get across the River, asking if they could deliver oil at Perth Amboy, New Jersey, and what bid there would be for that.

Mr. Moran: Well, that is plain pettifogging.

Mr. Jackson: Well, very far from pettifogging, in my opinion. I think it is extremely valuable. It is not offered for any pettifogging purposes. If it was offered for any pettifogging purposes, before the Master rules upon the admissibility, I would not be so frank about my construction of these contracts. Now, it is offered with those ideas, also to show that the plaintiff did not make, as far as his correspondence went, a sufficient effort, as we contend the correspondence shows, to get oil from another company at a lower
1476 price. The correspondence there shows for itself. If the correspondence shall be accepted by the court as sufficient effort, well and good. I claim that the correspondence does not show a sufficient effort, in view of what the plaintiff has declared were the necessities of his company during 1919 and 1920; and if those are all his written efforts, I offer the letters themselves, his requests and their replies, to show that situation; and I am willing to abide by

what they show. If in his favor, all right; if against him, all right. There is another point I would like to ask a question about, while we are about it, bearing upon that, before the Master rules. I will be very brief.

The Master: Well, I don't know whether there is any testimony in this case showing how practicable—showing that it was practicable, showing affirmatively that it was practicable to deliver oil in any other way at this company's plant except by tankers or barges.

Mr. Jackson: The burden of proof is on the plaintiff; but before your Honor rules, may I suggest one other point?

The Master: Well, on these letters, as far as these letters are concerned, I suppose they are admissible in evidence on the general question; but I agree with Mr. Moran that a great many

1477 of these letters will simply cumber the record, and before the case is sent to the District Court, these letters must be summarized.

Mr. Jackson: I would be very glad, and I would not——

The Master: In some way or other.

Mr. Jackson: And I would not consider treating that evidence in any other way than to trim it down to the least possible bulk.

The Master: So that when the evidence goes to the District Court, it will be simply a summation of these letters, because a great many of them don't amount to anything.

Mr. Jackson: Yes. I would not want a complete summation; there might be some letters that one would want some parts of it expressed in full.

The Master: That is all right.

Mr. Jackson: But I am ready to cut it down, trim it down to just the point that we wish to show, that is all.

Mr. Moran: The only reason it has been stated for offering the letters is to bring out the fact that some of the oil companies stated that they were not in a position to make deliveries of oil in the manner requested by the company. That is the only contention that has been made.

1478 The Master: I understood they were offered—though from the letters I don't see why Mr. Jackson offers them—I understood he offered them to show that possibly Mr. Elsman had not made sufficient inquiries and had not made sufficient endeavor to get oil. A few of the letters that I have read indicate that the quotations that he was given by other companies, were in excess of the quotations of the prices he finally bought oil at. So I don't know what you offer those for.

Mr. Jackson: I am going to be fair to him. Whatever argument—when I put in this correspondence, instead of putting in the part of it I think is against him and letting his counsel go to the trouble of picking out the things that are in his favor, I say I will be fair and offer the whole correspondence for what it shows.

The Master: My duty is though—I recognize my duty, and I don't want this record encumbered any more than is necessary.

Mr. Moran: We are simply here to sift the wheat from the chaff, and we should do it now.

Mr. Jackson: If counsel wants to cut out any of those letters wherein he was quoted a higher price than he got the oil for, I am perfectly willing to let counsel cut out that letter; but
1479 if he wants that in, why we will have it in. I agree with him.

Mr. Moran: I object to the offer on the further ground that it is improper to do it en masse. It should be taken up letter by letter, so that we can have a ruling on it.

Mr. Jackson: I will, if counsel wants to take that time.

Mr. Moran: We are going into procrastination here; we are going to sift things later on. Let us take up each letter separately by itself, and let us see if it is material.

Mr. Jackson: If the Master thinks it is worth that effort, to take that time, I will go into each one of those letters. I will save time by referring to them in bulk; and there — I think in the neighborhood of, as I estimated there, 25.

Mr. Moran: Suppose we went out and threw money in the air for oil, we got it at as high a price as possible.

Mr. Jackson: You came pretty close to it, pretty close to it, if you want my opinion. Now, if you don't like my answers, you must not ask them.

Mr. Moran: Well, your answers are in keeping with the trend of your inquiry. Your inquiry assumes that the company has
1480 been wasting its money buying oil at high prices when every other company is paying more for oil, and you know it. In adjoining districts they are paying fourteen cents, and other companies fifteen cents for oil. It cannot be purchased for ten cents now in this district. It seems to me, Mr. Master, it is about time some witness was called here to prove the contrary of the facts that we have established, if they are provable, rather than to question our good faith by inuendo day after day.

Mr. Jackson: I did not seek any argument. I offered in evidence your witness's own correspondence, and that was as far as I intended to go.

The Master: Mr. Elsman, in November and December, you negotiated with the Texas Company for an oil contract—for a contract for your supply of oil, did you not?

The Witness: Yes, sir.

The Master: As appears from—you can refresh your recollection from these papers (handing papers to witness).

The Witness: Yes, sir.

The Master: What price did they quote you?

The Witness: Seven and a half cents per gallon.

The Master: And what date?

The Witness: December 12th, 1918.

1481 The Master: What answer did you make to them?

The Witness: "I regret we are not able to close the contract with your company at this figure."

The Master: That is all on that. I won't admit those in evidence any more.

Mr. Jackson: May I add something to your Honor's question on that?

The Master: What is that?

Mr. Jackson: "Barge lots delivered at your Brooklyn works."

The Master: Well, you quote, or you ask them for quotations on barge lots at a better price *that* it can in carload lots?

The Witness: Yes, sir.

Mr. Moran: Just why do you ask for barge lots?

The Witness: Because that is the way we receive our oil, the cheapest way to get oil.

Mr. Moran: Is it a matter of practice that oil can be purchased in barge lots at a better price that it can in carload lots?

The Witness: Yes; all large companies get their oil in barge lots in this metropolitan district.

Mr. Jackson: There is more in this, your Honor.

The Master: What more? Explain to me.

Mr. Jackson: Not on the record?

1482 The Master: Not on the record.

(Discussion off the record.)

By the Master:

Q. In the Texas Company letter to you, making you this offer, it is stated, is it not, that the writer of the letter understands from telephone conversations with you—that is with Mr. Elsman—that you have prices on a like grade of oil and like periods, of a somewhat lower figure, and that under these circumstances you would be unable to accept our proposition. I suppose that simply means that you had told him that you had gotten a lower bid than seven and a half cents—than his bid of seven a half cents?

A. I was trading with him, yes, sir, trying to get his bid down.

Mr. Moran: Aha.

The Master: Did you have negotiations with the Gulf Refining Company?

A. Yes, sir.

Mr. Jackson: Don't you think——

The Master: That is all I am going to let in on those papers. I don't see anything else in it.

Mr. Jackson: But you see, your Honor, you let him destroy the force of it.

The Master: I don't see any force in it, myself.

Mr. Jackson: I think that the question was, in that way,

1483 that he had told an untruth to this man, because when his answer does not reply to that statement, it is an admission of it.

The Master: In his telephone with him, and your own letter, it states——

Mr. Jackson: Oh, does it not follow that that was not true, what he had told him on the telephone, that he had lower prices?

The Master: Well, I am not going to investigate now whether he was lying at that time or not.

By the Master:

Q. Did you have negotiations with the Gulf Refining Company?
A. Yes, sir.
Q. What was the result of those negotiations? They were carried on about the same time, weren't they?
A. Yes, sir.
Q. What was the result of them?
A. They advised me they would be unable to ship me any oil on account of the Government having taken over their ships.

Mr. Jackson: Well, I am going to object to the Master's summary of these. I think if there is a summary made of these, it is just fair, Mr. Master,—I think if there is a summary made of these, that the counsel for the defendant who offers them should pick them out and not the Master.

The Master: Specify your objection.

1484 Mr. Jackson: And I think it is longer, Mr. Master.

The Master: I am going to get through with this now pretty quickly. I think I can.

Mr. Jackson: It does not cover the points that this correspondence shows.

The Master: Now, I will let you put in this Standard Oil one, if you want that in.

Mr. Jackson: You see, this is getting mixed up; and all I will put in, as your Honor gives me permission—this is a letter of December——

The Master: Well, altogether.

Mr. Jackson: Strike out what I said about this letter.

The Master: Did you negotiate with the Prudential Oil Company at or about the same time?

The Witness: Yes, sir.

The Master: Have you any letter from the Prudential Oil Company?

The Witness: I believe there is one there.

The Master: Can you find it? (Handing papers to witness.)

The Witness: Oh, as to a reply? No, I received no reply to that. However, I received a reply from them by telephone and by

1485 personal—by conversation in their office. I personally visited Dudley in his office.

The Master: But you never received a reply to this letter?

The Witness: Not by letter. No. I never received a letter in reply.

The Master: And did he give you a quotation on oil?

The Witness: No, sir.

The Master: Now, you can't possibly want this in. You negotiated with the Crew, Levick Company?

The Witness: Yes, sir.

The Master: This one I suppose you want in?

Mr. Jackson: Now, just as to the last one that you have mentioned and said to me that I could not possibly want that in, that is in response to this; and it is just fixing it up—with due deference to your Honor's idea, according to my idea—it just musses this up so that it is almost impossible to pick out what is valuable. Please pardon my suggestion in that way, your Honor does not need to take anything of that kind, I know. But take this letter of November 21st, 1918, that I—that is just correspondence and he did not get any reply to it. Now, that correspondence is such that he, to my mind, foreclosed a compliance with his demands, with his require-

1486 ments, except under conditions that the company could not comply with. They say they require—the general manager says he requires from the Prudential Oil Company "7,500,000 gallons of oil for the year 1919, deliveries of oil will have to be made by barge alongside our dock, 55th street and First avenue."

The Master: Let me ask you this, Mr. Jackson: It is admitted here by the plaintiff that they always demanded that as a condition of their oil contracts. Now, they may have been entirely wrong in that, but they admit that they did it in every single contract, and they would not take oil from any one else. Now, if they have acted wrongly, and if they could have gotten oil at a more reasonable rate, it seems to me that after the evidence that we have had here of the price of oil at that time, during that period, from a number of different witnesses—it seems to me that the defendants should adduce evidence here to show that oil could have been bought—to rebut the evidence which the plaintiffs have already established.

Mr. Jackson: It won't be necessary for us to produce independent witnesses, if we can rebut it from the witnesses themselves by cross examination.

The Master: But it seems to me that it is impossible to get

1487 out of this witness's mouth any refutation of the statements which he———

Mr. Jackson: He has already spoken in these letters.

The Master (continuing): Of the statements which he has made time and time again.

Mr. Jackson: I do not need it, if I have his correspondence which proves to the contrary better than his statement now.

The Master: Where does that come in?

Mr. Jackson: This letter, referring again to November 21, 1918, means another thing; it proves, it proves that in his request for a bid he has not made any mention of a specification of quality of oil, and there is not any one of these letters that he has written, either to the Standard Oil Company, or any other company, that has a suggestion of any question of quality of oil.

The Master: Ask him if he ever in any of his correspondence made any requirement, or set forth any requirements as to the grade of oil, or specification as to oil.

Mr. Jackson: I will ask it, as the Master suggests.

The Witness: I answered that question before the last adjournment, saying that all specifications and all negotiations for oil are

taken up verbally with these different oil representatives. I
1488 know of no oil company who would close any contract by letter. They are very—they guard their secrets very carefully.

Mr. Jackson: Now, I object to that answer and ask to have it all stricken out as not responsive to any question.

The Witness: His specification——

Mr. Jackson: Now, your Honor, I think a letter in evidence would take less space—for this when it is printed is a very short space—than the time it would take to get a direct answer from the witness; and for all I would expect to argue and all I would expect to show.

Mr. Moran: Now, you want to know——

Mr. Jackson: It is the shortest way, I think, of putting all of this on the record.

The Master: Do you have to put all of this on the record.

Mr. Jackson: I would want to put all the letters in. They take very little space when printed. And I would agree to go over them with the Master and the counsel, and to cut out anything—I would prefer the exact language of these letters than any discussion with the witness upon that score.

The Master: I don't think that you and I can ever agree on
1489 these letters, however, Mr. Jackson, because I can't see that they contain anything that has not been testified to.

Mr. Jackson: The argument about them is going to take more space than the letters, your Honor.

Mr. Moran: That is due to your persistence in trying to get them in.

Mr. Jackson: That is due to your objection to the letters.

Mr. Moran: No.

Mr. Jackson: Of course if you want to go further, to the primary cause, it is due to the fact that there were——

(Discussion off the record.)

Mr. Jackson: Let me ask you a little further then.

By Mr. Jackson:

Q. A little further is that oil situation over at Perth Amboy. Now, there is a place called Elizabethport that is not very far from Perth Amboy, practically adjoining. The adjoining town, is it, Elizabethport?

A. I don't know.

Q. Well, don't you know that between Elizabethport and Perth Amboy, or in the immediate vicinity of Perth Amboy, there are about fifty different oil refineries?

A. I know there are considerable—there are a considerable number of refineries there, but I am not very well acquainted with them.

Q. Of various oil companies?

1490 A. I am not very well acquainted there.

Q. And do you know that there are a number of pipe lines that run into Perth Amboy from different parts of the country?

A. I have been so informed, yes, sir.

Q. How many would you say?

A. I don't know.
Q. Five or six at least?
A. I don't know.
Q. Different companies?
A. I don't know.
Q. Well, that is your impression—different pipe lines, different companies?
A. I won't swear to it. I have heard it.
Q. Your best information?
A. I have heard there were pipe lines. Of which companies and how many, I don't know.
Q. And that they deliver oil there by pipe line to Perth Amboy from great distances, even from Oklahoma?
A. I presume so.
Q. Different companies, large companies; for instance, the Gulf Refining Company, has that company a pipe line in Perth Amboy?

Mr. Moran: Will you let me ask a question?

A. I don't know.

Mr. Moran: Won't you let me ask a question?
Mr. Jackson: Yes.

By Mr. Moran:

Q. Mr. Elsman, do you know whether the Standard Oil Company would be willing to cancel the contract that you have got at
1491 the present time with the company for the delivery of oil?
A. Yes, sir, and pay me a bonus in the bargain.
Q. They would?
A. Yes, sir.
Q. Are you willing to take oil now from any company that the Public Service Commission will name, at the price that the Public Service Commission will name, provided——

Mr. Jackson: Well, now, I object to that as immaterial.

Q. (Continuing.) Provided it is under ten cents?
A. If it is under ten cents, yes.
Q. You have always been willing to do that?
A. Yes.

Mr. Jackson: I object to that as immaterial and ask to have it stricken out.

Mr. Moran: I think it is time we come to the point. They are claiming we are acting in bad faith, that we are squandering our money and the consumer's money, that we have made an unfortunate contract. Now, the witness says the other contracting party will cancel the contract and relieve us from it. I forgot to ask that. Will you do that providing the Public Service Commission or its counsel, will get oil from any other quarter at any other price?

The Witness: Yes, sir.

Mr. Moran: Now, there it is.

Mr. Jackson: I don't care to object.

Mr. Moran: Yes, object.

1492 Mr. Jackson: I object to that as incompetent and immaterial, and ask to have it stricken out.

The Master: Objection overruled and exception.

Mr. Jackson: All right, exception, please.

By Mr. Jackson:

Q. Now, haven't you informed yourself as to the large companies that have pipe lines coming in there?

A. No, sir.

Q. Have you informed yourself as to the export gas, price of gas?

Mr. Moran: I object to that.

A. I don't know what you mean.

Mr. Moran: Well, never mind. Let us have a ruling on this thing, export price of gas.

Mr. Moran: Export price of gas.

The Witness: I don't know what that is.

Q. Export price of gas oil, that is what I meant to say.

The Master: Oh.

A. I don't know what you mean by that.

The Master: Of course, that would depend on a great many different things. Supposing it was export to Great Britain or export to Italy, and one thing and another like that.

Q. Have you informed yourself upon the subject of the export prices of gas oil?

1493 Mr. Moran: He says he has not and he says he does not know what you mean.

Mr. Jackson: Is that what he said?

Mr. Moran: I think so. Is it?

The Witness: Why, I am just trying to think and get it in my mind. I don't know, no, sir.

Q. Where in these contracts, Exhibits 19 to 22, specification of gravity is mentioned, what does that gravity mean?

Mr. Moran: Well, I object. Just a moment now, I object to that.

Mr. Jackson: Now, the witness wants to explain it

Mr. Moran: No, he does not want to explain it.

Mr. Jackson: He told me he wanted to explain it, off the stand. It is a point he knows about.

Mr. Moran: Well, he ought to take me into his confidence.

Mr. Jackson: It is a point he knows about.

The Master: Go ahead.

Mr. Moran: Go ahead then: I won't deny him anything he wants to do.

Q. What is the gravity there, is the question?

A. I am not a chemist, but specific gravity has a great many

meanings, but in the gas oil we usually look upon the specific gravity as giving us some idea as to what heats it would be necessary to carry in machines in order to properly crack the oil when it is introduced into the carburetor and it gives us an idea also
1494 as to whether the oil is a paraffine base oil, or an asphalt base oil. An asphalt base oil has a very low specific gravity, where a paraffine base oil usually has very much higher specific gravity.

Mr. Moran: So I presume specific gravity means the relative weight of a certain amount of oil, compared with the standard——

The Witness: Weight of oil——

Mr. Moran: What?

The Witness: Go ahead.

Mr. Moran: With the standard, whether it is water, or whatever it is?

The Witness: Yes.

Mr. Jackson: We understood that pretty well, Mr. Moran.

Mr. Hyatt: It is the ratio of the weight of the oil with the weight of water.

Mr. Moran: That is what we naturally expected, but it might be different now, Mr. Hyatt.

Mr. Jackson: As I understand it, this gravity here that is mentioned, does not mean specific gravity at all; it means what is known in the gas business as the flash point of the oil, doesn't it?

Mr. Moran: Oh, nonsense.

The Witness: It has something to do with it.—very little.

1495 Mr. Jackson: You say "nonsense". What does Mr. Elsman, a gas man say?

The Witness: Sometimes.

Q. Isn't that what you told me it meant,—the flash point?

A. It sometimes means the flash point, but it does not necessarily mean that.

Q. I don't know anything more about it than you told me a few minutes ago.

A. I think you have got my opinion as to it in the answer.

Mr. Jackson: Well, all right. I want to refer to a contract or two here that did not get any further than to be identified. Now, I refer to defendant's Exhibit D-2 for Id., which was——

The Master: Do not forget it is not in evidence.

Mr. Jackson: Yes, sir. I shant read any more of the paper, in any event, than Mr. Moran read of his exhibits before he put them in evidence. Is that satisfactory?

Mr. Moran: Well, this has been excluded.

Mr. Jackson: Well, I am going to refer just briefly to identify it. This is an agreement made between the Gulf Refining Company and the Public Service Gas Company of New Jersey, dated the 5th day of August in the year of our Lord one thousand nine hundred and fourteen. That is there, isn't it? So as to be perfectly fair
1496 to the Master, in regard to a paper that he has excluded, I want to call that paragraph to the attention of the witness.

(Indicating to the Master). And ask him about it. It does not refer to the price of oil, it refers to the quality and specification. Upon that point I would like to question the witness about it.

The Master: You can ask him if specifications of that sort were in his contract, or were made generally so far as he knew about it, so far as he knows about the use in contracts.

Mr. Jackson: That is the point.

The Master: If you want to do something like that. He has already testified that that is against his information, that is contrary to his information.

Mr. Jackson: All right.

Q. Now, Mr. Elsman, I call your attention to this paragraph in the contract: "Now more than 5 per centum of the said oil shall distill over and above 700 degrees Fahrenheit, and it shall not contain more than one half of one per centum of sulphur, nor more than three per centum of coke, it being understood and agreed, however, that buyers shall have the right to specify oil of the same character and description as that at the present being delivered to 25th Ward Gas Works in Philadelphia, Pennsylvania, by seller."

I call your attention to that specification as to quality of gas oil. During the year 1919 and 1920, did you insist in any of
1497 your contracts for the purchase of oil, upon any such specification of quality?

A. Not during 1919 and 1920, no, sir.

Q Have you in contracts prior to that time? Yes or no?

A. No, my last contract—my first contract was in 1918 in the period of the war, after the war had started.

Q. And you have never in any of your contracts had any similar specification as to quality as that?

A. Could not get it in no, sir.

Q. Don't you see, if you said yes or no, it would shorten this somewhat?

A. No. May I ask the date of that contract?

Mr. Moran: 1914,—he read it.

Mr. Jackson: Fifth day of August. Well, witnesses sometimes do not remember dates when they are specified. I would be very glad to give it to him. The 5th day of August in the year of our Lord, one thousand nine hundred and fourteen.

The Witness: Well, of course, that is long before the war.

Mr. Moran: You could ask a good many things in 1914, and demand them, that you can't now.

Mr. Jackson: Your explanation is all right. Make the best of it now, or at any time you want.

Mr. Moran: I could get an office boy in 1914 I can't do it now except in school vacation.

1498 Mr. Jackson: I understand this contract is excluded, so far as it specifies anything regarding the price of oil.

Mr. Hill: Yes his Honor ruled that, unless we could show deliveries in 1919.

Mr. Jackson: Yes.

Mr. Hill: And we can't do that. It stopped in 1917.

Mr. Moran: That contract, the specification that you read from, was on the information Judge Hill has that no oil has been delivered under it in 1918 and 1919.

Mr. Hill: No; they said their boats were commandeered by the Government. I looked that up. And that they had made no deliveries after this country entered the war.

Q. Now, I would like to call your attention, Mr. Elsman, to Defendant's Exhibit D-3 for Id., which is an agreement made on the 25th day of May, 1913, between Gulf Refining Company and Public Service Gas Company of New Jersey, and I would like to read this paragraph: "Second. Not more than five per centum of the said oil shall distill over and above 700 degrees Fahrenheit, and it shall not contain more than one half of one per centum of sulphur, nor more than three per centum of coke, it being understood and
1499 agreed, however, that buyer shall have the right to specify oil of the same character and description as that at present being delivered to the 25th Ward Gas Works in Philadelphia, Pennsylvania, by seller."

You never required in your contracts any specification like that, did you?

Mr. Moran: I object. It is the same one that was read before. I object to it as a repetition, and incompetent, immaterial and irrelevant.

The Master: It is a little different, I think,—the percentage of sulphur.

Mr. Moran: What?

The Master: Isn't it a little different in the percentage of sulphur?

Mr. Jackson: Wouldn't it be shorter to let him answer?

Mr. Moran: I know, but it is the same specification.

Mr. Jackson: Then why object to it? It would be the same answer. You take up more time with your objections and arguments than the witness's answer.

The Master: Is it a little bit different in specification?

The Witness: That is a standard U. G. I. specification in their contracts previous to the war. I know the specification.

1500 The Master: No. Objection sustained. It is the same thing. I prefer to have a little change.

Mr. Jackson: It is the same thing.

The Master: Yes. It is unnecessary.

Mr. Jackson: Well, I would like to have the fact then in evidence that here is another corporation, that here is another contract, Gulf Refining Company,——

The Master: That is just the point. Those contracts are not in evidence. They were excluded from evidence.

Mr. Jackson: May I have these facts though in evidence?

The Master: I can't see, if the contracts are not in evidence, why any fact from the contract should be in evidence. I have ruled on the contract, and the contract is out. I don't see how we can put them in by indirection.

Mr. Jackson: I understood your Honor ruled them out on the question of the price of oil; but as to the custom of business, to have this specification of quality in, I think that it is valuable; and may I make offer then that as to Defendants' Exhibit D-3 for Id., I offer to show that that contract which I have specified the date of, had a provision in it worded the same as the wording of the provision relating to the specification of the quality of oil, the same
1501 as Defendants' Exhibit D-3 for Id. And I shall also offer to show that Defendants' Exhibit D-4 for Id., being an agreement made the first day of June, 1910, between the Gulf Refining Company and the Public Service Gas Company of New Jersey, also had this same provision.

Mr. Moran: General, will you just wait a moment?

Mr. Jackson: I am making my offer. The same provision——

The Master: I will admit it for that purpose.

Mr. Jackson: You will admit the whole three of them?

The Master: I will admit the clause.

Mr. Jackson: And the fact that those contracts had that clause—that is all I want. Have you got another contract? While we have a favorable wind, or ruling, I think we had better rest sails, and here is another that I would like to spread under the Master's ruling.

The Master: Under the previous ruling.

Mr. Jackson: Contract dated September 1st, 1916, between the Gulf Refning Company—and this one is bringing us closer home—and the Boston Consolidated Gas Company, in which——

Mr. Moran: Boston Consolidated?

1502 Mr. Jackson (continuing): The following specification is made as to quality, which is somewhat different, but which shows the specifications. May I not read it into the record? It shows the insistency of the companies to have a specification as to the quality of oil.

(The Master referred to the clause of the contract.)

Mr. Moran: May I object to this on the ground that confusion is apt to arise. These contracts all antedate the present period, the present oil situation. Now, if there is anything material here, it should be a contract that some company has made that is in force now or was in force last year, last winter, where they had a specification for a certain quality of oil and got that quality of oil; to show that we could get a better quality of oil. But when you go back prior to the war and show that the oil companies put in these specifications, it does not prove anything at all. Gas oil was gas oil in those days, and you could get as high a specification from any oil company just as well as we can. You would have it without asking it. It was in their printed form. That is demonstrated by those contracts right there. They are worded identically.

The Master: Is that provision that has just been read, is
1503 that, as you understand it, a U. G. I. standard requirement?

The Witness: Why, if I remember correctly, when I was with them years ago, seventeen or eighteen years ago, they had that specification in their contracts.

The Master: I think that is admissible—those other contracts. This is a very different sort of a specification.

(Discussion off the record.)

The Master: I will let you put it in, in this individual contract, that there was a specification with reference to the quality of the oil.

Mr. Moran: Well, I don't admit the verity of that contract, and I object to it as not authenticated.

The Master: Objection overruled and exception.

Mr. Moran: Well, if your Honor please, that contract nobody ever knows—they can bring in a typewritten paper here——

Mr. Jackson: Let me ask a question first.

The Master: Mark it for identification, and the contract will be excluded from evidence.

Mr. Jackson: I will offer this paper, which purports to be a contract, for identification.

The Master: And it is excluded from evidence.

Mr. Jackson: And I will refer to it in just a moment, to ask a question of the witness from it.

1504 (The paper was marked Defendants' Exhibit D-19 for identification.)

Q. Referring to this Exhibit D-19 for Id., I read from it: "2. Quality of oil. The refining company guarantees that the oil to be delivered under this contract shall be the quality known as Red River crude, produced in the State of Louisiana, and similar to the samples submitted to the Gas Company, about June 28th, 1916.

"If Red River crude is found unsatisfactory at any time during the first year of the contract, the Gas Company is to have the option of demanding and receiving gas oil distillate (known as 'solar' oil) of 30-32 Baume gravity for the remainder of the contract period.

"If the refining company's supply of Red River crude shall become inadequate to take care of the contract requirements at any time during the life of this contract, it is further understood and agreed that the refining company shall have the privilege of delivering solar oil to meet such requirements at the price fixed below for solar oil.

"The Refining Company guarantees that all oil delivered under this agreement shall be suitable for the manufacture of water gas at the plants of the gas company at all seasons of the year."

Now, that provision and similar provisions such as I have read were at one time considered to be proper provisions to insert
1505 in a contract as protecting the gas company in the purchase of its oil, were they not?

Mr. Moran: I object to the question.

The Master: He has answered that, I think.

Mr. Moran: That one there about Red River crude—I never heard of Red River crude before.

The Master: I don't know what Red River crude is.

Mr. Moran: Why, certainly.

The Master: And he has stated——

The Witness: The trade name, that is all.

The Master: The witness has stated that previous to the war gas companies ordinarily were able to secure certain specifications with reference to their oil.

Mr. Jackson: I appreciate the argument against it.

The Master: I think he has answered the question. I think it is simply repetition.

Q. Well, calling your attention to the latter part of this specification, "The Refining Company guarantees that all oil delivered under this agreement shall be suitable for the manufacture of water gas at the plants of the gas company at all seasons of the year: did you try to get any such provision as that inserted into your contracts for 1919 or 1920?

A. No, sir. I tried to get it, but I did not get it.

Q. Does any of this correspondence show that you tried to get them?

A. Not that correspondence. That is simply preliminary.

1506 Q. All right. But then after writing a letter that did not specify anything about the quality of oil you should get, in your request for a bid, or in any other correspondence with the company, did you go over and whisper it in Mr. Higgin's ear that you wanted a fine quality, or what?

A. Well, the first thing you ask for is oil.

Q. Yes.

A. The next thing we asked for is price. Then we go into quality.

Q. Now, that is enough. So that anything you said to him upon the subject of the quality of the oil, was said to him orally?

A. Oh, always is.

Q. Well, I say——

A. (Interrupting.) Yes.

Q. Always is orally?

A. Yes.

Mr. Moran: Well, right in that connection, are you willing now to secure—they are willing to cancel this contract, you say?

Mr. Jackson: I object to this.

Mr. Moran: You are willing to make a contract with any company that will——

Mr. Jackson: I object to this.

Mr. Moran: Can't I ask the witness a question? Well, I can ask a question.

Mr. Jackson: If you agree not to answer it until I make my objection and get a ruling, because his answer comes close to your question, so I would be glad to get in between.

1507 Mr. Moran: You would be glad to make a contract with any oil company, or even with the Public Service Commission—any responsible party—to furnish you high grade gas oil now, for the rest of the year and on indefinitely, would you not?

The Witness: I will sign it right now.

Mr. Jackson: I object to the question.

The Master: I will allow him to answer, and give you an exception.

Mr. Jackson: Exception, please.

Q. I would like to call your attention to an affidavit made by—well, wait a minute. Do you know James H. Jourdan?

A. Jourdan, yes, sir, very well.

Q. Who is he?

A. The president of the Brooklyn Gas Company.

Q. I call your attention to a naffidavit made by him and I quote from it: "The sales for ten months in 1919 have been 13,660,292,456 cubic feet, making a loss of $20,490.43. The year 1920 will show a greater loss. The price of gas oil after January 1st, 1920, will be 7.31 cents per gallon plus transportation. The average price during the ten months of 1919 has been 6.61 cents per gallon." Had you any information similar to that?

Mr. Moran: Oh, I object to that. Wait a moment, I object to that as certainly incompetent, immaterial and irrelevant.

1508 Q. Well, all right now. Having read you that, have you information as to what the Brooklyn Union Gas Company was paying for its gas oil in 1919 and 1920?

A. I had an approximate figure, yes, sir.

Q. And was it approximately as I have read to you?

A. It was approximately the same as ours.

Q. Do you know where the Brooklyn Union got that gas oil that Mr. Jordan referred to there?

A. I think they got it from the same people we got ours.

Q. Do you know?

A. I know they got some of it, yes, sir.

Q. The price, on the face of it, is a lower price than what you paid, isn't it?

A. I don't agree with you, no.

Mr. Moran: Now, let us see just what it is, while you are talking about it.

The Witness: 1919 it was lower. 1920, there was a different condition.

Mr. Moran: What is it there for 1919?

The Witness: They received gas oil at various works.

Mr. Moran: Wait a moment now. What did he read? Let me see the book you read from.

Mr. Deegan: Mr. Jourdan's affidavit on a motion for preliminary injunction.

The Witness: He says, "It will be", he does not say it is.

Mr. Moran: Yes, they had 6.61 in 1919, and we have got
1509 6.46. We have a lower price in 1919 than they did.

Mr. Deegan: Then there is no objection to it?

Q. In 1919, and 1920, did you keep what is known as your manufacturers' book?

A. I don't know. I am not in position to state. Mr. Gonnoud——

Q. Does Mr. Gonnoud know?

A. He very likely would, yes.

Q. You know that you have kept such a book?

A. Oh, yes.

Q. You kept it up to and including the year 1919? Tell us.

A. Why, I am just trying to think, if you will let me.

Q. Yes, if you know.

A. I don't remember just the date; I don't know whether we kep it now.

Q. Well, you remember when it was kept?

A. Oh, I remember the book, yes.

Q. That it was kept up to a certain date?

A. Yes.

Q. And generally what was the purpose of that book?

A. Why, it was to be used principally instead of a yellow pad, to compile figures of coal used and gas made and gas sent out, and things of that kind.

Q. It was something in the nature of notes, original notes and computations as to the——

A. (Interrupting.) No.

Q. (Continuing:) as to all sorts of various matters connected with the plant, showing you the bases of your figures, and memoranda regarding the cost of production generally?

A. No; it was merely a minor statistical record kept in the gas works for the information of the superintendent, to let him know how the ship was sailing.

Q. I see, and it was designed to give you information that, no matter how things got mixed up subsequently, in the books, in your intricate accounting system, by your various bookkeepers and expert accountants,—so that you would have some record there right close at hand, in one book, so you really could tell from it how things were going?

A. No.

Q. For your own private information?

Mr. Moran: That is enough, you have answered No.

Q. Well, was that so?

Mr. Moran: He has answered No, that is all of that subject.

Mr. Jackson: No, it is not quite all.

Mr. Moran: Now, General, I will enlighten you. Do you want enlightenment?

Mr. Jackson: If I can't get enlightenment from the gas man, I will look to you.

Mr. Moran: We have a substitute. It is received in evidence. I am reliably informed by Mr. Gonnoud.

Mr. Jackson: Who knows about it?

Mr. Moran: Why, it has been testified to by——

Mr. Jackson: I want to know first, before I get through with this witness, because I have been accused of calling this witness and taking him off the stand, and I am trying to finish with him
1511 now. If you say, Mr. Moran, that this witness does not know about it, I will accept your word as to the limit of his knowledge. Now, isn't he supposed to know about this?

Mr. Moran: He possesses a vast amount of information. I don't see how any man carries all the information he has been spilling around here.

Mr. Jackson: He knew that there was a book once that was sort of a yellow pad, that they put down figures there.

Mr. Moran: Far from a yellow pad, it was a formidable looking book.

Mr. Jackson: I never saw it.

Mr. Moran: No. 66, that was the number of it.

Mr. Jackson: A queer name.

Mr. Moran: Witnesses were examined concerning it for three months.

Q. Now, what has become of No. 6, Mr. Elsman? Is it being kept now for 1919 and 1920?

A. No.

Q. Wait a minute——

Mr. Moran: He says No.

Mr. Jackson: All right, I am going ahead and get beyond that, though, if I can.

Q. You had such a book in evidence in the trial in the State Court before Justice Greenbaum, that covered the operations of the company for 1918 and prior years.

1512 Mr. Moran: Now, I can tell.

Mr. Jackson: No, I want Mr. Elsman, please.

Mr. Moran: No, I can tell better what was in evidence in that case than he can. It was not in evidence.

Mr. Jackson: Was it before the court?

Mr. Moran: It was in the court room, but the court refused to——

Mr. Jackson: Now, that is as close to evidence as I think I care to have it. Was it there in the court room?

Mr. Moran: There in the court room for three months, steadily every day examined about it.

Mr. Jackson: And where is it now?

Mr. Moran: Wore out two men telling what it contained. What?

Mr. Jackson: Did it wear out the book, or where is the book now if it is not worn out?

Mr. Moran: Oh, I don't know where it is.

Mr. Jackson: Now, then, we have got the limit of your knowledge on this.

Q. Mr. Elsman, do you know where that book is, No. 66?

A. Why, I presume it is in the Company's works, Mr. Jackson.

Q. Do you think it is down there?

Mr. Moran: I object to it. It relates to a prior period.

1513 A. I don't know. I could not swear. It is in the company's possession, very likely.

Q. You believe so?

A. Oh, yes.

Q. Now, you are the general manager. Did you direct the discontinuance of that record after that trial?

A. No.

Q. Did anybody discontinue it?

A. Why, it was discontinued in the general trend of the reorganization of our accounting system, it was found unnecessary.

Q. And who was the captain of that—Mr. Moran?

A. Oh, no. Mr. Moran doesn't know anything about it. I am the captain.

Q. Did Mr. Gonnoud know anything about it?

A. Mr. Gonnoud would probably know about it, yes sir.

Mr. Jackson: Can I ask Mr. Gonnoud now, and consider it part of his testimony, while he is sitting here?

Mr. Moran: I object to it.

The Master: What has that to do with this litigation?

Mr. Jackson: I want to find out if there is a manufacturing book kept now.

The Master: He states it is not.

Mr. Jackson: Who states so?

The Master: The witness.

The Witness: You asked me if it was discontinued, and I told you I didn't know.

Q. Then it is discontinued?

A. I believe it is, yes, sir.

1514 Mr. Jackson: Shall we accept that expression, he believes it is, for a settlement of the fact?

The Master: Well, ask Mr. Gonnoud.

Mr. Moran: Mr. Gonnoud, in your absence told about this daily report of manufacture.

Mr. Jackson: I ask Mr. Gonnoud now, in my presence to tell it to my face, and you object to my question.

Mr. Moran: I object to the see-saw between witnesses. It was asked while you were absent, and your associate examining and putting in evidence the daily report of manufacture and it was marked Exhibit 12.

Mr. Jackson: I want to ask Mr Gonnoud about it now, and settle this point without further wrangling. I want to get an answer from him and settle it.

Mr. Moran: Well, are you through with this witness?

The Master: Let us get through with this witness, and then you can ask Mr. Gonnoud. He does not know anything about it, he thinks it is discontinued.

Mr. Jackson: I am through with this witness then, with the exception——

Mr. Hill: You want to put in this daily make and send out.

Mr. Jackson: Does this witness know anything about it?

Mr. Hill: I don't know. We want it in by somebody.

1515 This is the daily make and send out for thirty months.

Mr. Jackson: I have here a schedule covering the years 1918, 1919 and 1920,—January 1st to June 30th, 1920. Who compiled this?

Mr. Moran: The statistician.

The Witness: One of the clerks in the office.

Mr. Moran: Under the direction——

Mr. Jackson: Who produced it?

Mr. Moran: The company, through its counsel, now produces it and vouches for its accuracy.

Mr. Jackson: Do you produce it as correct?

Mr. Moran: Yes, sir, I never produced anything that was not.

Mr. Hill: I move to strike that out as a conclusion.

Mr. Jackson: Well, if it will add any value to my exhibit, I am going to let it stand in relation to this feature. May I offer that in evidence, the three as one exhibit?

The Master: All right.

Mr. Moran: We were called upon for a statement showing the daily make and daily send out of the plant from 1918 to June 30th, 1920, and these yellow sheets have been prepared by the accounting department, and are brought in here and may be used for any purpose.

(The papers were received in evidence and marked De-

1516 fendants' Exhibits D-20, consisting of three sheets.)

By Mr. Hill:

Q. Now, the amount impounded between July 1st, 1918, and March 29th, 1920, under the order in the action in the State Court, the temporary injunction order, was how much?

A. $608,554.12.

Q. That money has been withdrawn and put into betterments?

A. Yes, sir.

Mr. Moran: Well, that is hardly accurate.

Q. Well, put into capital account?

Mr. Moran: Well, that is hardly accurate.

A. Put into the operations, used in the operations.

Mr. Moran: A lot of that money never got into the Empire Trust Company. The Company impounded from July 1st to about August—July 1, 1916 to August 1918. It then withdrew what was in there, and from that time on it was relieved from impounding it. But this figure given here, as I understand it, is the collections that would have gone in there in that period.

The Witness: That is correct.

Mr. Moran: I don't know—it looks large to me, I will tell you frankly, it looks big to me. They say it is correct. It is a little more than I thought it was. What do you want to do with it, Judge? Do you want to divide it up? I am willing.

1517 Mr. Hill: Yes. Some one will answer that, and I thought probably it was me. I want to get these papers cleaned off as fast as we can.

The Master: Are you finished with him now?

Mr. Hill: Yes.

The Master: Are we really finished this time?

Mr. Jackson: I think so.

Mr. Moran: I want to ask a question.

By Mr. Moran:

Q. There appears to be just enough in the record to warrant this. You have bought oil and had it delivered by barge lots at your dock?

A. Yes, sir.

Q. And your plant is equipped for receiving oil in that manner?

A. Yes, sir.

Q. And is not equipped for receiving it in any other manner?

A. No, sir.

Q. I think you said you have no rail connection?

A. No, sir.

Q. Now, oil comes in barges, comes in large quantities,—how many gallons in a barge, roughly?

A. Oh, about from 200,000 gallons on up.

Q. Is that considered the—can oil be delivered in that way cheaper than it can in carload tanks?

A. Oh, indeed, yes.

Mr. Jackson: I object to that as incompetent and immaterial.

The Witness: The cheapest way in the world.

1518 The Master: He must know what it costs to deliver oil to his company.

Mr. Jackson: That is not the best way of showing it.

Q. Well, have you——

The Master (interrupting): I think he is competent to tell about it.

A. Yes, indeed. Of course, yes.

Mr. Jackson: Yes, but to do it in this way with this witness is not competent and material.

The Master: I think you are entitled to know the facts, how he arrived at his computations. He must know about what it costs to deliver oil to his company.

Mr. Jackson: If he has ascertained it.

Q. Well, how is the oil brought to New York harbor, if you know?

A. Why, the oil that we are receiving now comes from Texas, and the oil is gotten from the wells in Texas and is shipped to the seaboard by pipe lines and by rail.

Mr. Jackson: I think this is immaterial, if your Honor please, and it is hearsay evidence.

The Witness: No, I know it, I have been over the field and know it.

Mr. Jackson: I don't think he has any actual knowledge of it.

The Master: I think this witness must know how he gets his oil. He must have some first hand information about the oil
1519 which he purchases.

Mr. Jackson: It is just mere hearsay.

The Master: I assume the general manager of the company would know where he got his oil, where it was cheaper to get it from and where it was best for him to purchase oil.

Mr. Jackson: The Standard Oil Company, as I understand it, delivers him oil in a barge, and he hasn't the slightest idea where that oil came from, as far as the Standard Oil Company's receipt of it is concerned, other than what some man of the Standard Oil tells him. Now, if he wants to prove that fact, it is hearsay.

The Master: He knows that oil that comes—that is he may know at any rate, that oil delivered at New York in tanks here, was brought here by steamer or by pipe line, and I should think if he knew anything about his business, he would know in a general way where the oil that he purchased came from. I will let him give the facts, what he bases his information on, as far as that goes.

The Witness: Do you want me to go ahead?

Mr. Moran: Yes, sir.

A. And I said, or meant to say, that some of the oil is shipped by rail to seaboard, and from seaboard it is transported by barge lots to the metropolitan—to this harbor. The oil is also pumped by pipe line from the Oklahoma, Texas and some of the
1520 western fields to Perth Amboy by means of pipe line, where it is loaded, pumped by—where it is loaded in barges and shipped across to our pipe line at our dock. I know at the present time that the price of oil in Texas is 11 cents a gallon. The cost of that oil at our dock today shipped by pipe line and boat, would be between 13½ and 14 cents per gallon. Were it shipped by rail, it would be at least three to four cents a gallon in excess of that.

Q. Well, to get it to your plant anyway, it would have to——

A. To New York, to Perth Amboy.

Q. And to get it to your plant it would have to be carried there in a barge, at any event, by water?

A. We could not get it to our plant any other way, except by wagon loads from the railroad into our plant.

Q. The railroad could not get it over there except on a lighter?

A. Well, the railroad could possibly get oil to the Long Island Station, and from there we would have to haul it down by wagon loads to our plant.

Q. Well, how can it get over to the Long Island station unless it is carted across the harbor here?

A. By lighters.
Q. Well, that is what I say.
A. Tank cars on lighters.

Mr. Jackson: Freight is constantly transported across the water here by lighter, isn't it, —freight cars?
The Witness: That would be a very small quantity of oil, in a tank car, a very small quantity.

1521 Q. Mr. Moran: I think now we won't spend any more time on it. It is contended here that instead of buying it wholesale, large lots, you ought to buy in tank car lots. I am going to submit it to the Master and to the District Court in just that way.

By Mr. Jackson:

Q. Didn't Mr. Searle testify that he got it in tank cars at Rochester? Rochester is not a seaboard town, is it?
A. He got it in tank cars from Buffalo.
Q. You say so, but didn't Mr. Searle say he got it in the tank cars?
A. In the tank cars from Buffalo, but the oil comes to Buffalo by pipe line.
Q. How far is Buffalo from Rochester?
A. A very short distance.
Q. How far?

Mr. Moran: 67 miles.

A. Oh, I don't know; a very short distance. That is the only way you can get it, there is no river to get it, no harbor.

The Master: Is there any more for this witness?
Mr. Moran: It costs Searle more than it does us on account of carrying it in that car.
Mr. Jackson: Does it?
Mr. Moran: Oh, yes.
Mr. Jackson: Look at the record on that.
1522 The Witness: There is always a one cent differential between Albany and New York on oil coming from Buffalo.
The Master: Now, are we through with this witness?
Mr. Jackson: Yes, I am.
The Master: Well, I think we will adjourn then.
Mr. Jackson: Do you want to take time to identify that lump?
The Master: What?

(Witness excused.)

Mr. Moran: They think we ought to. We will be all through then. That lump is the only thing to be identified.
Mr. Jackson: I want to offer it though in evidence. I don't know whether Mr. Moran will object to that or not.
Mr. Hill: Are you going to close then?
Mr. Jackson: It will only take a short time, and I suggest to the

Master that if we adjourn until 12 o'clock tomorrow, it will only take a few minutes after that.

The Master: All right, let us identify the lump.

BERNARD A. KNORING, called as a witness in behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Jackson

Q. Where are you employed, please?

A. Public Service Commission for the First District, mission for the First District.

Q. In what capacity?

A. As chemist

Q. And for how long have you been employed in that capa——

1523 A. For about four years

Q. You are a graduate of some school of chemistry?

A. Yes, sir, chemical engineer, Polytechnic Institute of Brooklyn.

Q. And you have been engaged in following up that——

A. Profession, ever since I graduated.

Q. Do you recall an occasion some time in the spring of 1926, when you went down to the plant of the Kings County Lighting Company, to investigate a situation of some trouble there?

A. I did not go down, but the chief gas engineer, Mr. Merrifield, went down and——

Mr. Moran: That is all now, he went down, you did not go down.

Q. And he brought back what?

A. This sample.

Mr. Moran: I object to that.

Mr. Jackson: Let him say what he brought back. He brought back this lump here.

Mr. Moran: He can't say what he brought back. I object to it as hearsay now. I object to it.

The Master: I must sustain it, if he insists on it.

Mr. Jackson: I think that we can show—is it a matter of the identification of this lump?

The Master: Well, apparently.

Mr. Jackson: All right.

Q. Mr. Merrifield is who?

A. He is my superior, my immediate superior, the chief 1424 gas engineer of the Public Service Commission.

Q. And at that time he was employed in an official capacity as what?

A. As chief gas engineer.

Q. And you were under him in that department?

A. Under him.

Q. And Mr. Merrifield brought that—did Mr. Merrifield bring this lump in to you upon some occasion there?
A. Yes, sir, he did.
Q. In the office of the Public Service Commission?
A. Yes, sir.
Q. And did you learn from him that this lump was taken from the Kings County plant?
A. Yes, I did.

Mr. Moran: Just a moment now, I object to that as hearsay.
The Master: Objection sustained. It is a good objection.
Mr. Jackson: If we were charging the Kings County Lighting Company with any crime, I think they might be as technical in their objection, if we were trying to connect this in that manner.
Mr. Moran: Well, I asked to have Mr. Merrifield produced here as a witness, and he has not been brought here.
Mr. Jackson: Then you are only making this objection for the purpose of getting hold of Mr. Merrifield for some other question than this question.
1525 Mr. Moran: No, not at all. I think it is wholly immaterial. If it were anything material, I would be glad to waive the point, but it is going into immaterial things, and if I can block it I will.
Mr. Jackson: All right, sir; I am going to see that you do not block it, if the Master will give me time. I am going to refer to this lump, so as not to bring this man here again, and I will identify this lump and have a tag put on it, and I think we will adjourn, if Mr. Moran wants to take the time of the court for such trivial purposes.
Mr. Moran: I don't know where it came from at all.

Q. Do you remember about when Mr. Merrifield turned this lump over to you?
A. Well, approximately the spring, I would say. I can't remember the exact date unless I would refresh my memory from my report I sent in.
Q. Then did you go down after that to the Kings County Lighting Company's plant?
A. I did, with Mr. Merrifield.
Q. Yes, and then you observed something with your own eyes?
A. I did, I saw that the carburetters was clogged with a similar formation.
Q. Yes, alike in all respects to this, except the matter of the form of this?
A. Except the matter of form.
Q. Different sizes?
A. Different sizes.
1526 Q. The same substance as this is?
A. Similar substance to this.
Q. And you understood from Mr. Merrifield that this was the same substance, and he got it there?
A. That is what I understood.

Mr. Moran: That is objected to.

The Master: Objection sustained.

Mr. Jackson: I think, under the circumstances he could tell it, if he went down and saw himself the same substance at the plant, and this is a superior officer.

The Master: This has not been identified and he objects to it.

Mr. Jackson: Well, all right.

Q. Now, then, what did you see then as to substance—the substance there at the Kings County Lighting Company's plant that was identical with this in materials?

A. I saw that the carburetter was the checker brick of the carburetter was pretty well coated with a similar formation.

Q. Well, was it the identical formation except as to form?

A. Identical, that is the same composition.

Q. As a chemist you can say that?

A. I can say that, yes.

Mr. Jackson: Yes. Have we got the identity established enough now, do you think?

1527 The Master: What for? For it to be marked for identification?

Mr. Jackson: All right.

Q. Now, then, then you saw some other material in the yard of the plant?

A. I did not.

Q. Didn't you see some material there that they designated as sludge?

A. I did not.

Q. You just saw the material that was in the carburetter?

A. Carburetter, that is all.

Q. And who was there with you at the plant, that you talked with about it, if you talked with anybody?

A. I was over with Mr. Merrifield, and Mr. Chasmuller of the Kings County Lighting Company.

Q. And who was this man of the Kings County Lighting Company?

A. Mr. Chasmuller.

Q. Well, what is his employment there?

A. I really do not know. I believe he is superintendent.

Q. At the works? What is that?

Mr. Moran: General superintendent at the works.

Q. General superintendent. Now, did he tell you anything about what this substance that you see in the——

A. No, he did not, but I analyzed this particular lump.

Q. No, but I didn't mean as to the chemical analysis of it. Did he tell you anything about how that material came to be there?

A. Yes.

1528 Q. What did he say about that?

Mr. Moran: Just a moment. I object to that.

Mr. Jackson: But this ought to be competent, I think. Here is a superintendent of the plant.
The Master: Objection overruled and exception.
Mr. Moran: Exception.

Q. What did he tell you about it?
A. He said that owing to the fact that the oil was a very poor grade of oil that it produced a very large residue which clogged up the carburetter, necessitating much more frequent cleaning and necessitating shutting down of plant equipment and at very frequent intervals.
Q. What else did he say about it? Did he say anything about 150,000 gallons of sludge being out there?
A. No, he did not. He did not say anything to me about it.
Q. Did you see 150,000 gallons of sludge lying around there any place?

Mr. Moran: Objected to now. He has asked that two or three times.

Q. You did not see it?

Mr. Moran: I object.
The Master: Objection sustained. He stated already that he did not see it.
Mr. Jackson: All right.

Q. And what did this superintendent of the plant ask you
1529 to do about it, if he asked you to do anything?
A. He simply was——

Mr. Moran: No, did he ask you to do anything?
A. He did not ask me — do anything.

Q. Go ahead with your answer.

Mr. Moran: No, I object. You have a question now.

Q. You have enough of a question. Tell what he did and what he said.

Mr. Moran: I object.
The Master: He can answer.
Mr. Jackson: Surely.

Q. Tell all.
A. Now, the plant superintendent did not ask me to do anything. He simply was showing the difficulties under which the Kings County Lighting Company was working due to the poor grade of oil that is being supplied.
Q. And then you saw some of these—some lumps similar to this?
A. I did, in the carburetter.
Q. In the carburetter?
A. In the carburetter.
Q. And in the carburetter, they are subjected—this material is—to a high degree of heat?

A. That is, the oil is. The oil is, and of course, this is the residue, this results.

Q. This is the residue as it appears in the carburetter?

1530 A. The residue as it appears in the carburetter.

Q. Where there has been a high degree of heat?

A. Heat there, yes.

Q. And you saw some of that material, that residue, in the carburetter at that time?

A. I did.

Q. Did you see lumps as big as this?

A. I saw the carburetter, checker of the carburetter being clogged completely in parts with a similar formation.

Q. There were some lumps as big as this?

A. There were samples as big as this, yes.

Q. And this you have made a chemical analysis of?

A. I did, yes.

Q. And you say that this is, in substance and as to hardness and as to general cohesiveness, identical with the material that was pointed out to you there?

A. Yes, sir.

Mr. Jackson: I offer it in evidence. I offer it in evidence as an illustration of one of the grains of dust that Mr. Elsman has testified to, and as a part of this material that was gathered, only this was gathered from the carburetter inside of other material that went out into the yard.

The Master: Did you make a chemical analysis of the other material that you had—that you saw?

The Witness: I did not.

The Master: So that your testimony to the effect that this

1531 material corresponded exactly with the other material that you saw there, was simply testimony by observation and not by any chemical analysis?

The Witness: Yes, sir.

The Master: Excluded.

Mr. Jackson: Well, may I have a question?

Q. From your experience as a chemist——

The Master: A chemist can't have any experience without analysis that I know of.

Mr. Jackson: Oh, yes.

Q. Let me ask you about this. You know something about chemistry and geology and such allied sciences?

A. I do.

Q. Do you know that a geologist can be so expert in acquaintance and familiarity in rocks that he can tell by observation merely, without any chemical analysis as to just what kind of a stone he sees before him, and as to a great variety of stones?

Mr. Moran: I object to that.

A. He can, yes, sir.

Mr. Moran: Wait a minute. I object to that.

Mr. Jackson: You don't want to press that, do you? I want to know if he can tell. Now, if he wants to tell that he knows it ——

The Master: There has not been competent evidence, in my
1532 opinion, to identify that piece of material as a piece of material which was brought by Mr. Merrifield from the Kings County Gas Company to the Public Service Commission.

Mr. Hill: I think that Mr.——

The Master: Now, if the plaintiff presses his objection to the admission of that in evidence, I think you have got to prove it more completely.

Mr. Jackson: Yes.

Mr. Hill: I think that Mr. Elsman said that it came out of their——

Mr. Jackson: He said it looked like it.

Mr. Moran: Mr. Elsman did not know anything about where that came from, but he said it looked to him like a clinker, that would be found in a carburetter. He said that it was not the sludge that we have been talking about. Now, this witness comes here and says that it is the same sort of material that he saw down there in the carburetter. I agree with both of them, that it is carburetter clinkers. I agree with them—carburetter clinkers. When both, two such eminent men, will agree, I won't say a word, but accept it. Now, that is accepted. Now, what more about it? Why go in evidence?

Mr. Jackson offers it in evidence as a grain of dust, of sludge
1533 out-side. There isn't a witness who said there has been any such thing. Mr. Elsman has sworn that it was not. This man said he never saw the sludge. Now, how are you going to put it in evidence as the grain of dust that comes from the sludge?

Mr. Jackson: Let me ask one question more, and then we will get at it, and I will have this in evidence, even if we have to bring Mr. Merrifield here.

Mr. Moran: You don't have to bring Mr. Merrifield.

Mr. Jackson: Oh, yes.

Mr. Moran: There is nothing about Mr. Merrifield now.

Q. Now, I only want the extent of your knowledge on it. You brought it down here. It was up in your office.

The Master: As I understand it, Mr. Moran has waived his objection to the admission of that in evidence.

Mr. Moran: No. I say that this is a clinker that is found in a carburetter.

The Master: You have interpreted the testimony. I don't know why it is offered in evidence.

Mr. Moran: He states, he says it has been offered to con-
1534 tradict this witness; he says that the sludge turns into dust, and he says this is a grain of dust.

The Master: This witness has testified that it was sludge?

Mr. Moran: No, he never saw the sludge, so he does not know anything about its being sludge.

The Master: As I understand, this witness testified that it looked

like the material which he saw in this carburetter, and Mr. Elsman testified that it looked like carburetter——

Mr. Moran: Clinkers.

The Master: Clinkers.

Mr. Moran: The same thing.

Mr. Jackson: Yes.

Mr. Elsman: Sludge comes out of a pipe.

The Master: There seems to be no difference of opinion as to what it is.

Mr. Jackson: No. Here is what it is if I may be permitted to attempt to enlighten: this is the residue from this poor quality or heavier oil, one form of it, this is the residue.

Mr. Moran: Now, General Jackson, it is not. That is just what the witness said it was not.

1535 Mr. Jackson: Now, let me get through and you can explain. This is the residue which accumulates in the carburetter, where it is subjected to a baking process, a high degree of heat, and is accumulated on the brick as clinkers that they have to knock off. This thick accumulation, this same residue from the oil, after it goes from the carburetter, manifests itself in another form after it gets out into the yard through the pipes as sludge.

Mr. Moran: No, there is no evidence of it.

Mr. Jackson: All right, Mr. Moran, then will you keep still, then, while I try to get some evidence of Mr. Elsman that is true?

Mr. Elsman: I don't follow you, General, to tell you the truth.

Mr. Jackson: Let me ask you the question then.

The Master: Well, let us get through with this witness.

Mr. Jackson: I want to. I will ask him another question then, this witness.

The Master: The admission of it in evidence is objected to. I will sustain the objection, since it has not been sufficiently identified. Let us go ahead with this witness.

Mr. Jackson: I will.

1536 Q. Can you tell from your experience as a chemist, by having that in your hands and by the observations of the material that you saw, those clinkers, whether that is the identical chemical material that you saw down there in the carburetter upon that occasion, and that was pointed out to you by the superintendent of the plant as an accumulation due to the residue of this heavier oil? Can you tell?

Mr. Moran: Wait a moment. I object. That whole evidence—that whole question is based on evidence not in the record? The general superintendent did not point out to him, or he has not at least said so.

Mr. Jackson: Well, get it on the record.

Q. Did he point it out to you?

A. He pointed out to me the stuffed carburetter when we examined the entire plant; we saw a carburetter for superheater of a plant, and we saw the condition it was in. It was pretty well choked up.

Q. What did he say was the cause of it?
A. The poor quality of oil.

Mr. Moran: Do you know whether those clinkers formed in it with good oil?
The Witness: With good oil the checker brick does not get covered with any such formations.
Mr. Moran: Do you know that?
The Witness: Yes. With good oil it is—it may exist in
1537 the form of fine flux, or even if there is a formation, you can take and rub two bricks against each other and rub off the formation, but this is real hard stuff.

Q. Now, this flux, that when it dries is rather dusty, you can rub it easily?
A. Yes.
Q. That comes from the good quality of oil?
A. Yes.
Q. But this that comes from this heavier oil——
A. Is quite hard.
Q. Yes, forms in those clinkers like that. What is that? What degree of hardness is this that you have in your hand?
A. I don't know.
Q. Hard as a lump of coal?
A. Much harder.
Q. Harder than coal?
A. Yes.

Mr. Moran: Almost a diamond.

Q. And how heavy does it compare with a lump of coal?
A. It is pretty heavy.
Q. And about what dimensions is that lump that you have in your hands?
A. The original lump was twice the size.
Q. And that would be about what—a foot, 8 inches in diameter?
A. I would say six by six, roughly speaking.
Q. Six by six in diameter?
A. Six by six.
Q. One solid lump?
A. Yes.
Q. And to break it you have to hit it pretty hard with a hammer, don't you?
A. With a hammer.

1538 Mr. Jackson: Yes.
Mr. Moran: When did you ever see a gas carburetter before?
The Witness: I have been to the plant of the—years ago—to the plant of the Citizens Branch of the Brooklyn Union.

By Mr. Moran:

Q. Years ago? How many years ago?

A. Well, when I was gas inspector in the Department of Water Supply—I would say about 1904.

Q. When else? How many times did you go to the Citizens plant then?

A. A couple of times.

Q. And when did you go to a gas plant before that?

A. I don't—I have not gone to very many gas plants.

Q. How many carburetters did you ever see dismantled?

A. Not very many.

Q. Do you swear here that those clinkers do not form with good oil?

A. Well——

Q. Now, do you swear of your own knowledge?

Mr. Jackson: Let him answer.

Q. Of your own knowledge?

A. Well, I can't see what a big percentage of ash would come with good oil.

Q. Oh, you can't see it, but do you know it?

A. Well, you see, this was analyzed and found to be 51 per
1539 cent, as near as I can remember, mineral matter. Now, the mineral matter does not come—of course, a certain amount of mineral matter will come from the generator, but never to that extent. Now, a good—I have analyzed also a sample of the oil that was supplied to the Kings County, and I found it contained some one per cent ash. Now, I have analyzed a number of samples of oil in the Brooklyn Navy Yard, when I was working there, and I found that the ash in a good mineral oil very seldom ran over .05 of one per cent.

Q. What has that got to do with the clinkers forming?

A. Well, those clinkers form—you see, the clinkers form due to the carbon of the oil, forming from the oil, and the mineral matter present combining and forming a new composition.

Mr. Jackson: That is induced by the heat?

The Witness: The heat, of course, will deposit carbon, but the carbon itself will not cake together in such hard formation unless there is a pressure of a considerable extent of mineral matter. The tendency for carbon ordinarily is to form something like lamp black.

Q. Then if a machine was run a long, long time, even with good oil, wouldn't it form a clinker?

A. Well, but the—I don't believe it would.

1540 Q. Then why do you have to clean out a carburetter?

A. Well, so as not to block up your—the interstices between the shutter brick.

Q. If it is just stuck, that can be blown off, can it?

A. Not necessarily.

Q. Mr. Merrifield is a gas engineer, isn't he?

A. Yes.
Q. Where is he?
A. What do you mean, where he is?
Q. Where is he today?
A. He was in his office when I left him. He probably is home now.
Q. He is in his office? Where will he be tomorrow, do you know?
A. In his office, I presume.
Q. And he is the Gas Engineer of the Commission?
A. Yes.
Q. And he visited this plant?
A. Yes, sir.
Q. You never—you don't qualify as a gas engineer, do you?
A. I do not, no.

By Mr. Jackson:

Q. As a chemist?
A. As a chemist, that is all.

Mr. Jackson: We do not need an engineer on this lump.
Mr. Moran: What is he here telling what will form in a carburetter for?
Mr. Jackson: Because he is a chemist.
Mr. Moran: He does not know.
Mr. Jackson: He can testify as to the material of this lump.
Mr. Moran: He testified this would not form except with more oil.
Mr. Jackson: I was not going to get Mr. Merrifield on this lump, I needed him on bigger problems. All we need is a chemist on its formation.

Q. Can you tell now from your inspection of that, can you say as to whether you know—or do you know that that is the identical substance that was called to your attention as the clinkers in the carburetter upon that day that when the superintendent of the plant spoke to you about it, and you went down there to investigate it?
A. Yes; but you see, this lump came before that.
Q. Now, understand my question. Do you know whether it is or not? If you don't know, I won't ask you; if you do know——

Mr. Moran: I won't make any objection to that. It is a fairly good sample, according to the record, of the clinkers that were down there now.
Mr. Jackson: Did you see them, too?
Mr. Moran: Why, I have seen the clinkers lots of times.
Mr. Jackson: I am going to finish with the witness, if I can.

Q. Do you know if it is the same substance or not?
A. I do.
Mr. Moran: No, you do not.
Q. Say whether it is or not?
A. I do.

Mr. Jackson: I offer it in evidence.

Mr. Moran: I object to it. I do not see any reason for it at all.

Mr. Jackson: I offer it in evidence.

Mr. Moran: I object to it.

Mr. Jackson: The witness says he can tell from his observation and his chemical knowledge.

Mr. Moran: All right. Then, what is the purpose of it?

Mr. Jackson: Now, when he says he can, and he says it is the same substance, I think we are entitled to it in evidence.

Mr. Moran: What is the purpose of it, I inquire? What is the purpose of it?

Mr. Jackson: Well, I suppose the Master will pass upon the question as to whether the lump is in evidence or not.

Mr. Moran: Well, you say——

Mr. Jackson: It is a sample of the sludge.

Mr. Moran: No, it is not. Now, he is offering it in evidence as a sample of the sludge.

1543 Mr. Jackson: Well, it is a sample of the effect of this poor quality of your oil upon your carburetter?

Mr. Moran: No.

Mr. Jackson: The same residue.

The Master: You can't possibly offer it as a sample of sludge from your own witness when the other witnesses are agreed that it is not sludge.

Mr. Jackson: Now, it is a sample of the manifestation of this poorer quality of oil that had a certain residue in it, and that residue manifested itself in different places in the plant, as the other witnesses have testified to and Mr. Elsman. Mr. Klumpp saw it and he described it his way. Now, they describe it as getting into the carburetter and into the machine and forming clinkers, and they have had to knock them off.

The Master: This is a clinker, isn't it? You agree it is a clinker, isn't it?

Mr. Jackson: Yes, it is a clinker, and I don't pretend it is the same consistency and has the same form as the sludge in the yard—I don't pretend it, but it is a manifestation of that same residue, which in the carburetter produced this clinker and took that form, and out in the yard, when it had not gone through the heating process or was not in the same place, the carburetter, it came out as

1544 a sludge. It is the same residue of this oil in a different form and subjected to a different process. It first went through the process of being converted from oil into gas, is that true, Mr. Witness?

The Witness: Yes, sir.

Mr. Moran: Is what true?

Mr. Jackson: What I said.

The Master: Now, let me ask you this: Supposing that is in evidence, what light do I get from it? Just supposing you were asking me to find something about it, what would you say I should find?

Mr. Jackson: Of course, it is not offered primarily in evidence on account of its illuminating quality, inherent, but——

The Master: But I mean, just tell me what your finding is, what

your proposed finding is with reference to that, because for the life of me I don't see any disagreement between the witnesses as to what it is. I have not had any chemical analysis of it, we have not had any chemical analysis made of sludge. We do not know what it reduces itself to in a chemical analysis. I don't see that it is enlightening in any way.

Mr. Jackson: Wouldn't your Honor be able to find as to this lump that it would take more than a light summer breeze to blow it away?

The Master: Of course, that lump could not be blown away, I suppose, if it was of that consistency.

Mr. Jackson: Now, these clinkers, all this residue—whether they were in clinkers or in the form of sludge—have been accounted for on the plaintiff's books, to account for the disappearance of 150,000 gallons. Now, for whatever amount of that was in this form and whatever was in some less—some softer form it may not appear; but it may appear that——

The Master: Do you admit, Mr. Moran, that that piece of material was taken out of a carburetter at the plant?

Mr. Moran: I don't know about that particular piece. Mr. Elsman says that is the same kind of stuff that comes out of the carburetter.

Mr. Elsman: It always has since we have been in the business; the clinker always forms.

Mr. Moran: This witness says he can identify it as the same kind of stuff that is down there. I have not any doubt myself that it is the same kind of stuff that forms in the carburetter.

The Master: Do you base your objection on the ground that it has not been identified by the witness?

Mr. Moran: No, but I do object to Mr. Jackson's saying that Mr. Elsman here——

The Master: It may be offered for that purpose, but it remains for counsel to find any evidence on which the contradiction can be based in the record.

Now, since it is taken—if there is no objection, since it is admitted that that or a similar substance was taken from the carburetter in the plant and since you insist on it going in evidence so you can argue from it, I will admit it in evidence. But your own witness and Mr. Elsman have testified to what it is, and they seem to be in entire agreement about it.

Mr. Jackson: Yes.

Mr. Moran: It is not sludge.

Mr. Jackson: I just brought it down to—so far as we could just at present, contradict the impression that Mr. Elsman, I thought, intended to convey, that we might account for the disappearance of this vast quantity of 150,000 gallons by the fact that it had powdered into dust and blew away, as they attempted to account for the discrepancies of these carloads of coal in transit.

The Master: Well, you may have it in evidence, and then argue about it later.

1547 Mr. Jackson: That they had it in the open air and it blew away.

Mr. Moran: Do you contend this sludge was not made down there?

Mr. Jackson: No, sir.

Mr. Moran: What is your contention about it?

Mr. Jackson: Do you want my contention about this material named sludge?

Mr. Moran: Yes.

Mr. Jackson: Yes; there was never formed 150,000 gallons of it; that is my contention.

Mr. Moran: What difference does it make if it was not?

The Master: I will admit this in evidence.

Mr. Moran: Exception.

(The lump was received in evidence as Defendant's Exhibit D-21.)

The Master: Are you through with this witness?

Mr. Jackson: Yes.

The Master: I think we will adjourn.

(Witness excused.)

Mr. Hill: To what time, your Honor?

The Master: How much longer are we going to take?

Mr. Hill: Not over 15 minutes.

1548 Mr. Jackson: Can it be marked for identification?

The Master: Do anything with it you want.

Mr. Jackson: I guess there won't be any question about it, for we will have it tagged in some way?

(An identifying tag was attached to the lump, Exhibit 21.)

(Whereupon an adjournment was taken until Thursday, September 2, 1920, at 11:45 o'clock a. m.)

1548¼ [Endorsed:] Public Service Commission, First District. Sep 3 1920 Bureau of Statistics & Accounts.

1548½ United States District Court, Southern District of New York.

Before Hon. Gordon Auchincloss, Special Master.

KINGS COUNTY LIGHTING COMPANY, Complainant,
vs.
CHARLES D. NEWTON, Attorney General of the State of New York, et al., Defendants.

Transcript of Reporter's Minutes.

Alfred J. Price,
Certified Shorthand Reporter,
15 Park Row,
New York.

Barclay, 8477.

1549 KINGS COUNTY LIGHTING CO.

vs.

NEWTON et al.

62 Broadway, New York,
September 2, 1920—11.45 a. m.

Met pursuant to adjournment.

Present:

The Master.
Mr. Moran.
Mr. Hill.
Mr. Jackson.
Mr. Deegan.

Mr. Jackson: I will proceed right away and in the most expeditious manner. I have not had a consultation with Judge Hill as to his opinion about calling Mr. Merrifield, in view of the intense desire that the plaintiff's counsel has exhibited to have his produce here, and my own opinion is that I would put him on the stand. I do not know whether Judge Hill consents as far as his defendant is concerned.

Mr. Hill: I concur.

Mr. Jackson: Taking that chance, whatever chance there may be.

The Master: Let us get finished with the tag ends we had last night. There were some letters.

Mr. Jackson: I want to put Mr. Merrifield on in view of Mr. Moran's position in regard to him.

1550 The Master: We are through with these letters, are we?

Mr. Jackson: There might be some questions to be asked of Mr. Elsman, in view of Mr. Merrifield's testimony, and if Mr. Merrifield was sworn, there might be some rebuttal testimony. But Mr. Merrifield might challenge some testimony of the experts that we have had. If there is any further questioning of these other witnesses, we will know it then.

The Master: All right, call Mr. Merrifield, then.

Mr. Jackson: You see, that is what I had in mind. Mr. Merrifield, take the stand.

WILLIAM MERRIFIELD, called as a witness in behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Jackson:

Q. Mr. Merrifield, where do you live?
A. 166 Westvelt avenue, New Brighton, Staten Island.
Q. And what is your occupation?
A. Gas engineer.

Q. How long have you been in that business or profession?
A. Since I was 18 years old or 29 years.
Q. In what employment are you at the present time?
A. Public Service Commission for the First District.
Q. In what capacity?
A. Chief Gas Engineer.
Q. And how long have you been in their employ, in that
1551 capacity?
A. Since August, the 1st, 1919.
Q. Where were you employed immediately *for* that?
A. With the Consolidated Gas Company.
Q. Of New York?
A. New York City.
Q. In what capacity were you employed there?
A. Plant superintendent.
Q. For how long?
A. For one and a half years, at the 14th street plant.
Q. Will you just give us a general idea of what your duties were as plant superintendent?
A. The 14th street plant, during the period I was there, operated for something like seven months, under a contract with the United States Government for the production of absorbent carbon for gas mask fillers for the American Expeditionary Forces. The production of that involved the use of the gas generating equipment, coal gas generating equipment. During another period of the time their gas plant was in operation, to supplement the other plants during the peak periods of high gas consumption during the winter time. At all times, the plant in addition to its manufacturing activities was a distribution center for the lower section of the city. Gas varying in amounts from 12,000,000 per day in the summer months to 25,000,000 per day in the winter months was distributed from that
station. I had supervision over the general operation of the
1552 distribution and the manufacture, when that manufacture was going on during that period.
Q. Before you went with the Consolidated Gas Company, where were you employed?
A. I was with the Consolidated practically for 25 years.
Q. I see. In different capacities?
A. Yes, sir, in different capacities.
Q. And your total experience in the various branches of the gas industry was about how long?
A. About 29 years.
Q. Before your employment with the Consolidated Gas Company, you were employed with some other gas companies?
A. The Brooklyn Union and——
Q. That is operating in Brooklyn?
A. Yes.
Q. How long were you with them?
A. Two years.
Q. With what other companies were you?
A. The Lawrence Gas Company of Lawrence, Massachusetts.

Q. You have operated and managed gas manufacturing plants, and you are familiar with the methods of gas manufacturing, covering coal gas, oil gas and carburetted water gas, are you not?

A. Yes, sir.

Q. And you are familiar also with gas distribution methods?

A. Yes, sir.

Q. And you have supervised and managed gas distribution stations, have you?

A. Yes, sir.

Q. You are also to a certain extent familiar with the plant and with the methods of operation of the Kings County Lighting
1553 Company?

A. Yes, sir.

Q. Now, you have some before you some of the plaintiff's exhibits in this case.

—, ——.

By Mr. Hill:

Q. I call your attention to Exhibit 6 and to the item generator coal. Are you acquainted with the form under which this Exhibit is gotten up?

A. Yes, sir.

Q. Do you follow it?

A. Yes, sir.

Q. It appears that this plaintiff used 32.3 pounds of generator coal per thousand cubic feet on the average during the year 1919. What have you to say as to the reasonableness of that?

A. That is a reasonable figure.

Q. I call your attention to the price of $8.10½ per ton. What have you to say as to that figure?

A. Also reasonable.

Q. I also call your attention to the boiler fuel coal. It appears that they use 18.8 pounds per thousand cubic feet. What have you to say as to that?

A. Slightly in excess of normal, I should say.

Q. How much in excess would you say?

A. Well, I consider anything up to 16 pounds for an item of that kind normal, and anything over 16 pounds would be excess.

Q. But if you also take into consideration that with the boiler fuel coal there is boiler fuel water gas tar, which is a residual,
1554 and boiler fuel gas oil, as they use the gas oil for heating purposes and steam making purposes——

A. The gas oil apparently is rather negligible, the quantity of gas oil used, and the number of gallons per M on the water gas tar was good, or indicated good operation.

Q. Mr. Merrifield, the boiler fuel coal and the boiler fuel water gas tar are used for the same purpose, are they not?

A. Oh, yes.

Q. As is the boiler fuel gas oil. That is all heat under the boilers?

A. All for steam production.

Q. So you would really combine these three items?
A. Yes, sir.
Q. As one?
A. Yes, sir.
Q. How much would you regard as the normal amount, the normal and reasonable amount for that gas plant? You know that gas plant over there, do you?
A. Fairly well, yes.
Q. How much would you regard as a reasonable amount of generator fuel coal if they had only that item—suppose they had no residual at all?
A. You mean boiler fuel coal?
Q. Yes, if they did not have any residual and did not use any oil?
A. Well, that cannot be answered any rigid figure.
Q. I see. Well, give us your limits one way or the other within reason?
A. The quantity of coal depends on the evaporating efficiency of the fuel. Assuming that they got coal of what we would
1555 consider good evaporating efficiency, so that would evaporate seven pounds of water per pound of fuel used, why, a figure up to 16 pounds per M would be a fair consumption. I have no means of knowing what the evaporating efficiency of this particular boiler fuel was, as coal.
Q. This boiler fuel was quite largely barley coal; am I right about that?

Mr. Moran. That was purchased, and screenings from local dealers.
Mr. Hill. That and screenings purchased from local dealers.

A. What percentage of the total coal was screenings?

Mr. Hill. Perhaps you can tell me that quicker than I can look it up.
Mr. Moran. You have it there in the exhibit.
Mr. Hill. I know I have. Well, their purchases for 1919, as appears by Exhibit 29, was barley coal. It would be my idea with this witness to have him take these schedules and look at them over by himself and then we could ask him what he suggests, rather than going over with him item by item. Wouldn't that be better and facilitate matters, your Honor, and counsel, for Mr. Merrifield
to take these sheets and point anything to counsel that he
1556 would regard as proper to be examined upon, rather than for me to go through this whole schedule item by item? I will go on with the coal, though.
The Master: That is on Plaintiff's Exhibit 14?
Mr. Hill: Yes.
The Master: There is Plaintiff's Exhibit 14 on which you see it (handing witness). Perhaps that will help you to answer the question.

Q. 2,359 tons of anthracite; 1,739 tons of bituminous and 9,049 tons of barley.

A. I would say, Judge, that from these figures I am inclined to think that that 18.80 is not a high figure for boiler fuel.

Mr. Hill: It would strike me, if I am going through each one of these items I will use up a lot of record, and if Mr. Merrifield would take these one side and examine them, and, if there is anything he wishes to be examined on, let me know.

The Master: Why don't you do that? He is apparently very familiar with this form of compilation, and he would be able to run over them very quickly, I think.

Mr. Hill: Yes. Give your special attention to the gas oil, the amount used and the price.

The Witness: Yes, sir.

Mr. Hill: And also to repairs.

1557 The Master: It seems to me that what you are asking Mr. Merrifield to do is to take——

Mr. Hill: Exhibits 6 and 13.

The Master: Exhibits 6 and 13.

Mr. Moran: And give them the once over.

Mr. Hill: Give them the once over and show us places——

The Master: If he has any particular place on those which you can discuss——

Mr. Hill: Criticise the plaintiff on.

The Master: Criticise the plaintiff on.

Mr. Moran: Oh, no, adversely criticise the plaintiff. If there is any compensating favorable criticism I would be very glad to have it from Mr. Merrifield.

Mr. Hill: All right.

Mr. Jackson: Well, have you seen Exhibit 6, Mr. Merrifield?

The Master: He has got them now.

The Witness: Yes, I have seen Exhibit 6, Mr. Jackson.

Mr. Moran: You want Mr. Merrifield to retire now?

Mr. Jackson: No, not at all. We had in mind having him testify right out in the open.

Mr. Hill: So the Attorney General will bear the burden. I will ask him if there is anything particularly laudatory about

1558 about these figures.

The Witness (examining exhibit): All right, Judge.

Q. Will you point out as to the summarization contained in the Exhibits Nos. 6 and 13, No. 16 for the year 1919 and No. 13 being for six months of the year, 1920, items as to material or labor where an excessive amount of either, or what appears to you to be an excessive amount of either is shown?

A. On gas making labor——

The Master: You are referring to plaintiff's Exhibit 13, now?

The Witness: Plaintiff's Exhibit 13, yes. There is an item there of .0709 cents.

Mr. Moran: Or 7.09 cents per thousand.

The Witness: Yes, that is the same thing, 7.09 cents per thousand. I would say offhand that would be rather high without knowing what particular items the company may include in this particular classification.

By Mr. Jackson:

Q. Can one state from looking at that figure there and without knowing or having knowledge of other considerations—is it possible for one to state whether that is reasonable or unreasonable?

A. Well, estimating gas making labor as the labor used solely for gas production purposes in the generator house, this figure would appear high.

1559 Q. By how much?

A. By 2 1/2 to 3 cents per thousand.

By Mr. Hill:

Q. Your assumption, figuring it to be 2 1/2 to 3 cent high, as to how many men around each generator?

A. You would hardly put it in that way, Judge.

Q. All right, put it in some way, but answer my thought, if you are able to interpret my thought?

A. Roughly speaking, in a plant such as the Kings County, operating those machines such as they have, the gas making labor in the generator house alone, which is the gas production plant, should reach a figure of about 3.75 to 4 cents. Now, if the other portions of the plant were added to that, such as the labor incident to gas making, boiler house labor, for instance, purifier house labor, common labor, coal handling, it would be reasonable to—the figure here is not unreasonable.

Q. Well, will you look at the other items there and see if there are items of labor other than—

A. The only other labor item I see on this is the repair labor.

Q. This gas making labor, figuring 7.09 cents, appears to consist of—

Mr. Moran: That is on Exhibit 12, page 2, right here (indicating to witness).

Q. (Continuing:) Consists of works superintendence, 1.23 cents, boiler house labor, 2.2 cents, generator house labor, 3.14 cents, purifier house labor .1 of a cent, miscellaneous labor at works
1560 .13 of a cent, and I call your attention to the second sheet beyond the one which you are examining——

Mr. Moran: He has got the right one now.

The Witness: I have got the one.

Q. Take the items.

A. Yes, these are reasonable items.

Q. And the gas making labor, as explained by that itemization, you would say was reasonable?

A. Yes, sir.

Q. Any further explanation?

The Master: Still referring to Exhibit 13; you are still being questioned about that.

A. Repairs, the item of repairs, rather blurred here—it looks like 3 1 3 cents, or something of that kind.

Q. That does not include the distribution repairs?

A. This is plant repairs.

Q. Yes.

A. I would say that was reasonable, sir. By the way, I might say in that connection that repairs and repair labor and material is rather an indefinite composition in a gas plant; that is, an item of 3 cents a thousand may be reasonable and an item of 10 cents a thousand may be reasonable, depending upon the necessity for repairs or the exigencies that call for them. But without knowing the particular repairs made by the Kings County Lighting Company, and assuming that the repairs were general, I would ——

Q. As I understand it, for the period which you are examining, which is the six months just passed, there was no unusual repair, they were the ordinary repairs. That does not include the placing of their larger connections; they were just the ordinary repairs, no extraordinary repairs.

A. Well, this is a reasonable figure for general repairs.

Mr. Jackson: May I ask a question?

Mr. Hill: Sure.

By Mr. Jackson:

Q. Now, in considering the reasonableness of an item of repair from a summary such as that, you would always have to take into consideration to ascertain definitely upon the question of reasonableness or unreasonableness, the operating condition of the plant during the period which the repairs cover, would you not?

A. Yes, sir.

Q. And it would require from anybody looking at those summaries some knowledge as to the operating condition of the plant before he could say definitely whether under the conditions that the plant was operating under that item of repair was a reasonable item for that particular time, would it not?

A. Yes, assuming that the item—that the cost item was beyond what we usually consider fair for general practice. For instance, if this item happened to be 7 to 8 cents, I would like to know before passing upon its reasonableness what constituted the repairs that brought about this figure.

Q. Then you would assume, as any other expert would assume in looking at a summary such as that and testifying as to whether such an item appears to be reasonable or unreasonable—you would assume that the plant was in good operating condition?

A. I would not assume that, but that they had not done any more than the ordinary repairs incident to the operation of a plant of that kind under——

Q. To the operation of a plant in good operating condition?

A. Yes sir.

Q. Would not that be the general assumption, when you say generally that would be a fair estimate?

A. Yes, you might put it that way, Mr. Jackson, the assumption being that the normal repairs assume normal conditions.

Q. That is the idea. And that is what one looks to when he expresses an opinion such as you are called upon to express now from such a summary?

A. Yes sir.

Q. You have to make certain assumptions or considerations that you have not exact and definite knowledge about, necessarily, isn't that true?

A. That is quite true, sir.

1563 By Mr. Hill:

Q. Well, you have seen the plant down there how recently, sir?

A. In July.

Q. Now, what do you say as to whether it is on a reasonable rate of repairs from your cursory examination?

A. Well, the units—that is rather a broad question, Judge.

Q. Well, if you cannot answer it, say so.

A. If you take the units individually why, the units are in pretty good condition, but if you take the plant——

By Mr. Jackson:

Q. You are speaking of the units of the plant?

A. The units of the plant. The generating units, condensing units, purification units, exhaust units, holder units—on the whole they are in fairly good condition.

Q. Now you are speaking from your knowledge again from an examination of the plant at that time?

A. Several examinations, Mr. Jackson.

Q. During what period?

A. From subsequent to last March.

Q. Your first examination was in or about last March?

A. About last March.

Q. And how many times have you been over the plant [illegible] since then?

A. Possibly four or five times.

Q. I just wanted to get that on the record so it would appear as to what you are testifying. I did not mean to interrupt you; won't you proceed, please.

A. Now, the generators need rather more than the normal—when I saw them, rather more than the normal repair incident to such equipment, due to or possibly due to the fact that they were operated longer than the usual period consistent with good gas practice.

Q. Without letting the fires down and——

A. Taking care of them, in other words. Gas practice calls for a more or less defined schedule of operation, and that calls for the

ting down of these machines at periodic intervals for the purpose of rechecckering and examination of the installation as a whole to find out if there are any repairs needed.

Q. Just you state your opinion as to those proper times, ordinarily.

A. Well, judging by what we consider a suitable oil for gas making purposes it was considered good operating condition to run a generating set for a thousand gas making hours between cleanings of the carburetor and three thousand gas making hours between cleanings of the superheater, and also once a year the machine as a whole would be let down and thoroughly overhauled, the generator relined, the valves faced, the pipe connections seen to, the shell

765 examined. As happens frequently in operation, the yearly examination and the repairs incident to the examination does not take care of the equipment for the year. As a general proposition a schedule of that kind leaves the plant in fair operating condition.

Q. But does not the general operation, the ordinary operation of plant, also include the common practice of running the generators for a longer period of time than a thousand hours, as you have mentioned?

A. Oh, yes. If a plant has got sufficient equipment it is not considered good practice to exceed those hours in operation.

Q. To what?

A. To exceed that time. But if a plant has not got a sufficient margin of reserve, why, then of necessity the plant is operated for longer periods.

Q. Is that commonly done?

A. It is commonly done in plants that have not got the margin of reserve to do the thing the other way.

Q. To what extent or what longer period of hours would you say commonly done under those circumstances?

A. Well, that would depend upon the particular plant you are discussing. I have known instances where a machine was run for two thousand hours without materially decreasing its efficiency.

Q. Without decreasing its efficiency by what per cent?

766 A. Oh, two or three per cent.

Q. And without any material ultimate damage to the plant in any way——

A. No, I——

Q. (Continuing.) That the regular repairs would cause the machine to recover from?

A. No, the period of repair after a two thousand hour run is in proportion to the length of time the machine has been in operation. The work incident to the rechecckering is greater than it would be after the one thousand hours, and the probability of other portions of the equipment becoming weakened and needing attention is in proportion to the number of hours that I spoke of originally.

Q. Just to get a definite idea on the record, after a machine is run a thousand hours how long is it ordinarily down for repair?

A. About a week.

Q. And upon those occasions when it is necessary to run for two thousand hours, how long would it be down for repairs?

A. About ten days.

Q. Under these circumstances the efficiency of the plant would not be decreased more than two or three per cent?

A. The efficiency of the machine.

Q. Of the machine, yes.

A. Yes.

Q. In all plants there are times when the ordinary run which would be for the best interest of the machines and their operation,—when those runs have to be exceeded, there are certain periods of the year, are there not?

A. Usually, yes.

Q. And what are those periods?

A. The peak period, which in this section is about from the middle of December to the middle of February.

Q. And those are conditions that are required to be met in the operation of any plant in this section?

A. Yes sir.

Q. And are they prepared against customarily before the period starts?

A. Yes, it is the usual practice in gas plants to devote their efforts to having the plant in such condition that its entire or all possible equipment can be utilized during this peak period.

Q. And in what way do they prepare for that before hand?

A. By doing all the repairs during the slack or non peak period, in the summer time.

Q. And in that way they could prepare for the stress of winter?

A. Yes sir.

Q. And then it is the ordinary experience of plant that during the winter months in this section they are run to about the limit of their capacity?

A. Yes. Not exactly, Mr. Jackson.

Q. It all depends, of course, upon the plant, I suppose?

A. Gas companies have tried to have a sufficient margin [1567] over possible load to enable them to take care of a breakdown or something of that kind.

Q. That is desirable?

A. It is not considered good gas practice to run with everything that can hold a fire under fire and, speaking in terms of generating machines, there should always be a reserve machine. That is, comfort would require, comfort in operation would require, that an assurance of continuity of service would require that.

Q. And that rule is understood to be the rule that some have mentioned for the plaintiff, that they generally estimate that they would like to have the largest machine down all the time?

A. Well, gas engineers usually estimate a gas production capacity with its largest unit out of operation.

Q. Is that an estimate that they make for practical operation or for purposes of statistics, in estimating the capacity of the plant?

A. No, practical operation. There is another method that we

and that is to multiply the plant's productive capacity by 200, ide the answer by 365, which would give you the daily capacity the plant.

Q. That is in practical operation?

A. Practical operation.

Q. But this estimate of the largest machine down is rather for statistics than capacity, is it not?

A. Not altogether, Mr. Jackson, because——

Q. Well, let me ask you a little more definitely. Is it the practice plants commonly during the winter months in this section, the od of stress, as you say, to keep the largest machine down?

A. No.

Q. Then it is not the common practice of plants, even though have estimated that the capacity is, for some purposes of finding capacity, that with the largest machine down—it is not the mon practice during the stress months to keep the largest hine down?

A. No, it is not. It is not the common practice to keep any——

Q. They exceed——

Mr. Moran: Let him finish.

Mr. Jackson: All right.

The Witness: It is not the common practice to keep any——

Q. Explain what the practice is, that is all.

The Master: We will adjourn until two o'clock. I hope we get to questioning Mr. Merrifield on these Exhibits specifically, ause I think his testimony is very illuminating.

Recess.

Afternoon Session.

Direct examination continued.

By Mr. Hill:

Q. Mr. Merrifield, taking the Schedule 13,—that is for the year 20—and looking at the generator coal, having in mind that this pany manufactured gas which varied in candle power, accord- to the City test, from as low as a shade under 4 to as high as 20 21, what would you say as to the amount of coal used, having in d that candle power and a B. T. U. standard during the light od varying from as low as 475 and going up to 640?

A. Well, the low candle power or a low B. T. U. would mean a h quantity of generator fuel. For instance, the reduction in dle power or the reduction of B. t. u.'s is predicated upon a les- ed quantity of oil per M. The oil contains a certain quantity of r per gallon, and as you decrease the quantity of oil you must sup- that deficiency by generator fuel, by the blue water gas, so that making the low B. t. u. gas or low candle power gas your genera- fuel per M would increase.

Q. Then what is your answer as to whether the pounds of coal is reasonable?

A. Well, as I recall it the average, or monthly average of b. t. u.'s of the Kings County for the first four months of 1920 was around 600, and the monthly averages for the months of May and
1571 June were around 535, I think. So this figure is not at all out of proportion to the production of gas under those conditions.

Q. What do you say about the oil then, making a low candle power——

A. 3.6 gallons of oil would seem to me to be the quantity necessary for the first four months of 1920. That is what I had in mind when I said 600 b. t. u.'s.

Q. What about the last two months of 1920?

A. This 3.60 is rather expressive.

Q. How much oil would you expect should be used to manufacture gas of the quality I have mentioned, or which you know is manufactured from the reports, during May and June, 1920?

A. Assuming that the oil used during the months of May and June has the same classification value as the oil used in the four months previously, gas of 535 b. t. u.'s ought to be productive on a use say of 2.6 gallons a thousand.

Q. That is how much?

A. 3.6.

Q. That is a gallon less?

A. A gallon less.

Q. Have you seen the oil down there?

A. I have.

Q. Have you seen the oil used in March?

A. Yes.

Q. And the oil used in May and June?

A. Yes.

Q. What about it?

A. Well, there was a marked difference in the physical appearance. The oil used in the months of May and June might
1572 better be described by calling it mud than calling it oil. A dipping of your finger into it, for instance, instead of the liquid draining off and leaving the finger clean, there was a slimy and at times a granulated deposit stuck to your finger after immersing it in this oil.

Q. Have you seen the oil used by other companies?

A. Yes sir.

Q. During the months of May and June?

A. Yes sir.

Q. What about those?

A. I saw oil used by the Brooklyn Union during the months of May and June which corresponded somewhat to the Kings County, but was not quite as bad.

Q. And the other oil?

A. The other oil was good.

Q. Of other companies?

A. Of other companies.

Mr. Jackson: How many other companies?

Q. All right, how many other companies do you say?
A. The Consolidated and the New York & Richmond.

Mr. Jackson: Would you say that the Kings County Company had the worst oil in this respect of any company that you examined?

The Witness: Yes sir.

Mr. Jackson: And that was only for a certain period of time. What time?

The Witness: That was the oil that I saw there in the
1573 month of April.

Mr. Jackson: Have you seen it since?

The Witness: I have not. I have, yes, I have seen the oil there in the latter part of June, and it showed somewhat of an improvement over the oil that I saw in April, but was not comparable to the oil that they had prior to that.

Q. What do you say as to whether they should have used 3.6 gallons of the kind of oil which they had there for April, May and June?

A. Now, the oil that they used subsequent to April, I don't know what its b. t. u. value is or was. But on the assumption that the—if they had continued using the oil that they had in the early months of the year they should have been able to produce a gas of that 535 b. t. u.'s on approximately one gallon of oil less per M. I don't know either by analysis or by experience what the b. t. u. content of this oil was, or whether 2.6 gallons would produce a gas of this kind.

By Mr. Jackson:

Q. And are those the considerations that would deter any man who was as you, called as an expert to look at those summaries, from definitely concluding as to whether that summary figure was reasonable or not under all the circumstances?

1574 A. Those are the things that would influence me, from giving a rigid opinion upon it.

Q. And you mention a less quantity of oil that should be used, upon what theory; that is the less quantity according as the oil is heavier?

A. The heavier grades of oil or oils of different bases, such as the asphalt base oil is different from the paraffine base oil—the asphalt base oil contains a larger proportion of non-gaseous matter than the other oil and a larger proportion of solid hydrocarbons, a larger proportion of mineral matter in the oil itself. These solid hydrocarbons and the mineral matter are the elements that contribute to the clogging up of the equipment. In proportion as the quantity of the oil is much or less, in such proportion will your deposit of foreign matter in your equipment be found. So that good gas prac-

tice would suggest to the manager that when he got an oil of this heavy type he would shorten the quantity per M so as to obviate or minimize if possible the deposit in the system.

By Mr. Hill:

Q. I will ask you as to the 1919 oil consumption, assuming a b. t. u. or a candle power standard of gas, as shown by exhibits 17 and 16.

A. It is a fairly constant gas. Based upon these figures
1575 b. t. u.'s principally, the item .343 of a gallon per M is indicative of good operation.

Mr. Moran. How about the candle power? I mean you said principally you have taken into account the b. t. u.'s.

The Witness. The b. t. u.'s show a gas of almost constant quality. The variation in the candle power is much greater than in the b. t. u.'s, and from a gas engineer's standpoint I do not think that candle power has anything like the relative value in determining a gas that the b. t. u.'s have.

Q. That is not from the standpoint of the statute of the State of New York, I take it?

A. The gas units.

Mr. Moran. Judge, would you mind, on the 1920, the quantity given there is an average for the six months.

Mr. Hill. What is that?

Mr. Moran. He said four months.

Mr. Hill. What about the oil for four months?

Mr. Moran. No, he has given us that.

Mr. Hill. That is all right. You say for two months it is that, is that right?

Mr. Moran. He says that for two months they could have made gas with a good oil, the quality of gas that appeared there, with a good oil. What would he say about it for the six months?
1576 Mr. Hill. I will ask that question that Mr. Moran asked, looking at it with the candle power and b. t. u. test, as shown by Exhibits 17 and 18.

Mr. Moran. And taking into account the quality of oil that he saw there.

Q. All right, if you saw it in 1920—oh, yes, you did see it in 1920.

A. Looking at the b. t. u. results for 1920 for the first four months and assuming that the oil the company used during these four months was the oil or similar to the oil used in 1919, there is no reason for an increased quantity per M for the first four months of 1920 above 1919.

Q. That is, there is a fifth of a gallon more in 1920 than there was in 1919?

A. .17. For the two months of May and June the b. t. u. content of the gas would imply that a lesser quantity of oil would be neces-

sary to make a gas of this character. If the question you asked, Judge, was as to the average for the six months, I would say that the 3.6 shows something more than would be necessary to produce gas of this kind.

Mr. Moran: With a good oil?

The Witness: With oil of a—with a good oil, with a suitable gas oil.

Mr. Moran: Yes, but you know in the last two months, May and June, the oil was not good.

1577

The Witness: Yes.

Mr. Moran: And do I understand you to say you cannot express an opinion as to the reasonableness of the quantity used?

Mr. Jackson: I object to the form of the question. I do not like it under any circumstances.

Mr. Moran: I won't ask any more questions. Now go on.

Mr. Jackson: I object to the form of the question.

The Master: He has withdrawn the question.

Mr. Moran: I withdraw the question.

Mr. Jackson: As against another one of the same sort, I won't have to object again,—asking the witness to testify to what Mr. Moran wants to understand. Now, subject to that, ask all you like.

Q. I call your attention to the boiler fuel appearing on Exhibit 13, and considering that there was used 898 tons of anthracite, 1114 tons of bituminous, 8,311 tons of barley—and the barley, I assume, includes some screening—what would you say?

A. I notice in that connection a price of $4.84. That price would indicate to me, Judge, that the coal was of poor quality and

1578

did not have the evaporating efficiency of what we would like to call good boiler fuel.

Q. Then apply the cents per thousand which appears there, if you will—which appears on Exhibit 13.

A. Yes, it seems high.

Q. How much in cents per thousand would it appear high?

A. I would say 1 and a half.

Q. What?

A. 1 and a half cents.

Q. I will ask you to look at the labor of 1920 and tell me what you say as to that?

Mr. Moran: Gas making labor?

The Master: We discussed that labor.

Mr. Hill: In 1920?

The Master: Yes, that is the only one we referred to, 1920.

Q. Then I will ask you to look at the labor in 1919.

The Master: That is Exhibit 6; if you will turn to Exhibit 6.

Mr. Moran: Do you want to segregate it?

The Witness: No, I guess I have it all right, because I have an idea from the other.

The Master: You are looking at Exhibit 6 and Exhibit 7?

Mr. Moran: No, he is looking at Exhibit 2 and Ex-
1579 hibit 6.

A. These labor costs are reasonable to me, Judge.

Mr. Hill: That completes my examination.

The Master: Have you got any further questions, Mr. Jackson?
Mr. Jackson: Yes. I would like to confer with my expert.

Cross-examination.

By Mr. Moran:

Q. Mr. Merrifield, in reference to the consumption of oil, the amount of oil consumed—

The Master: Just a second, will you? Are you finished with him on direct?

Mr. Jackson: Yes.

Mr. Moran: Yes, he said so.

The Master: I beg your pardon. I did not hear that.

Q. With reference to the quantity of oil, gas oil, used per thousand in 1920, can you express an opinion as to the reasonableness of the figure, considering the quality of the gas made in the whole six months' period and the quality of oil that we have had to make it with.

A. Yes, the gas oil that has been procurable for some time back is to me a rather indefinite quality, and judging by its appearance and an analysis of it I would not expect that it had the same
1580 heating contents or power, gas content, as the other oil. That would naturally mean that to produce the same quantity of oil gas, as compared with the first four months of the year, would require a larger quantity of oil to make a gas of the same value. The gas being of a different value, however, would indicate that the larger quantity was not used. The gas being of a lower value would indicate that the larger quantity was not used. And also, Mr. Moran, I might say that as a gas man, if I were operating with an oil of that kind, ignorant of its possible behavior, I would reduce the quantity per M rather than increase it, until I had found out what the conditions were going to be, so that I would expect that the amount per M, even with the bad oil, would not be greater than the amount used of the good oil prior to that time.

Q. You have been down there at the plant when they experienced difficulty with the oil?

A. Yes, sir.

Q. And was the quantity put in reduced, do you know, did they experiment along the lines you have suggested, to your knowledge?

A. Yes, sir, they did.

Q. Did you follow the experimentation to the point so that you could tell how it worked?

A. No, I did not.
Q. You examined the machines, or you saw the machines anyway?
A. I saw the machines.
1581 Q. And I think you have said that they ran for a too long a period without being overhauled?
A. Yes, sir.
Q. Does that condition affect the quantity of oil that might be used?
A. Unquestionably, yes.
Q. More oil?
A. More oil.
Q. That might account for the quantity of oil there?
A. It may explain part of it, yes.

Mr. Jackson: Surely, explain it in detail.
Mr. Moran: What is that?
Mr. Jackson: I say I would like to have him answer or explain in full detail.
Mr. Moran: He did not say anything like that.
Mr. Jackson: Didn't you say you would explain?
Mr. Moran: No, he did not.
Mr. Jackson: What did you say?
The Witness: I said it may explain it.
Mr. Jackson: I understood you to say you wanted to explain: I did not catch the witness' answer.

Q. How does it come about that to produce the same quantity of gas, with a dirty machine, I would call it, you use more oil?
A. A dirty machine loses its temperature very quickly. To understand the production of water gas, there are three units in the gas generating machine, a generator, carburetor and superheater. The generator is the only unit that contains fuel, the carburetor
1582 and superheater are cylindrical shells fitted on the inside with loose brick. The process of gas manufacture involves the raising of the fuel in the generator to a point known as the efficient point for the decomposition of steam. To produce this effect a blast of air is turned on the generator, the product of combustion passing from the generator, going through the carburetor and superheater before being exhausted into the atmosphere. These products of combustion carry with them the products of decomposition and eat up the heat that I mentioned in the carburetor and superheater, and after a certain period when the point of efficiency is reached in the generator this particular process is stopped. Steam is turned on then in the generator or rather before that the valve opening to the atmosphere is closed, steam is turned off the generator, which upon coming in contact with the hard carbon is resolved into its original elements, hydrogen and oxygen, and the blue water gas passes over the generator into the carburetor. This blue water gas carrying with it some heat also is met in the carburetor by a spray of oil. The quantity of oils that may be used depends in great part upon the *east of* difficulty with which these gases may pass through the carburetor and the gasification of the oil depends upon the contact that

it has with the heated surfaces of the brick, plus the heat of
1583 the blue water gas. If a machine is foul and there is not sufficient space for these gases to pass through, it is necessary to take advantage of the heat from the blue water gas and inject a quantity of oil so as if possible to gasify your oil at the first point of contact.

That explains in a sense why it is necessary with a foul machine to inject more oil than would be necessary if the machine was in proper working order. Now, the building up of a pressure caused by a foul machine results in the throwing down of decomposed hydro-carbons. The gas does not pass through freely enough on quantities of the oil or decompose into the solid hydro-carbons as the result of this longer contact, by reason of the difficulty of passing through, due to the closed passages between those brick. That is the reason why an increased quantity of oil would be necessary with a foul machine.

Q. The machine down there was foul—the machines were foul as you have seen them?

A. Very foul.

Q. Do you know the reason why?

A. Long continued operation without recheckering.

Q. Do you know any reason for long continued operation?

A. None except what I have been told by the management, that the exigencies of the service require the continuous operation
1584 of the equipment.

Q. The demand on the plant for gas?

A. The demand on the plant for gas.

Q. That is, all the machines had to be used to meet the momentary demand?

A. That is as it was explained to me.

Q. And in order to clean them you have got to take them out of service, and in order to have them taken out of service you should have reserve capacity?

A. Yes, if the need for their capacity is present.

Q. You are familiar with the plant and the output, are you not?

A. Yes, sir.

Q. Have you given consideration to the need of additional equipment there?

A. Yes, sir.

Q. What is your position about that?

A. The need of additional equipment just now?

Q. Well, I do not mean for the supply of gas today, but I mean for the plant, to make it a suitable plant for the yearly service required of it?

A. Oh, the plant should have at least a generating capacity of four millions more than it has today.

Q. That would require what work to be done?

A. Well, it would require the installation of generating equipment.

Q. A couple of gas generators?

A. Yes.

Mr. Jackson: Let him specify.

Q. Well, specify.

A. You can get generators that would produce three million
1585 cubic feet of gas per day. One generator with that production would relieve the situation down there. Now, in addition to that you would want the auxiliary apparatus necessary for the purification of the gas and the condensing of the gas, such as increased condensing capacity, increase exhaust capacity, increased purification capacity, and increased piping, works piping capacity.

Q. Is more boiler capacity needed?

A. Well, yes.

Q. Mr. Merrifield, just how far have you considered this matter; have you taken any action in respect to it in the line of your duties as gas engineer?

A. I have recommended to the Public Service Commission the installation of auxiliary equipment in that plant for the purpose of putting it in shape to meet the demand of the district.

Q. Did you specify to the Commission what ought to be done?

A. Yes.

Q. Are you familiar with the fact that they have made an order in respect to this matter?

A. I am familiar with it, sir, yes; but I have not read the order.

Q. You knew they had made an order?

A. I knew that they had made an order.

Q. Will you just glance at the order here, which is our exhibit 32, and see if the equipment specified in that order is the
1586 equipment that you in the discharge of your duties recommended to the Commission be installed? (Handing exhibit to witness.)

Mr. Jackson: Is that order in evidence?

Mr. Moran: Yes.

A. Might I explain preliminarily to studying this?

Mr. Jackson: If counsel permit you.

Q. Yes, surely.

A. This recommendation of mine was based upon the development of the district; also in connection with the condition of the plant. A district such as the Kings County Lighting Company supplies is a growing district, and good gas practice would suggest or require that a continuous program of increase be adopted in the plant and the other items in connection with the business. When I made this recommendation to the Commission I had in mind the fact that for some two or three years back no additions have been made to take care of the normal growth of the district, and I in my recommendations to the Commission included the deferred additions with those that would normally belong. So that these recommendations of mine are in excess of what I stated just now, which was simply based upon the need of the moment.

Q. The need of the moment now, how urgent is it?

A. Most urgent.

1587 Q. Can it wait until next summer?

A. I would say not.

Q. Is there some particular danger lurking about in deferring this work?

A. There is a possibility of the district going out of gas during the coming winter.

Q. There is a possibility?

A. There is.

Q. And it is a decided probability if we have a cold winter and nothing is done?

A. It is.

Q. And that is a serious matter, is it not?

A. Oh, it is serious.

Q. To the public and to the Gas Company?

A. Yes, sir. I think I know this thing pretty well, this order.

Q. It is the work that you have described in this order, Plaintiff's Exhibit 32, that you have recommended to the Commission?

A. Yes, sir.

Q. In the past winter the company ought to have had additional plant capacity?

A. The company struggled through last winter, and it would have been more comfortable for the company to have had additional equipment; but, nevertheless they did fairly well with their equipment.

Q. Well, good gas practice would require that they should have had last winter a reserve capacity to the extent of one or two generating units with all the necessary auxiliaries, so as they could have taken these machines out and repaired them?

A. Yes.

1588 Q. You would advise going ahead with the increase of the manufacturing works before putting in the holder?

A. Yes, sir.

Q. That can be done first?

A. That is the quickest way of doing it.

Q. Going back one moment to the matter of oil, the consumption of oil in 1920, I want to find out if you want to be understood here as expressing the opinion that under all circumstances, as shown by the record here, the evidence and the testimony you have given, as to the condition of the plant, the demand that was on it, its lack of capacity, the character of oil it received, whether the company used an excessive quantity of oil in the six months ended June 30th, 1920, as shown by its Exhibit 13?

Mr. Jackson. I object to the question as incompetent and immaterial.

The Master. Objection overruled.

Mr. Jackson. Not the proper basis laid before the witness. Exception.

A. Well, that question, Mr. Moran, is rather a difficult one to answer.

Q. No, it is not, now. Pardon me, I just asked you—I want you to understand the question if you want the Court to understand———

1589 Mr. Jackson: Don't you want to repeat the question—have the stenographer read it?

Mr. Moran: If you please, let me have the witness a moment.

The Master: Let Mr. Moran.

Mr. Jackson: If he is going to abandon his last question, your Honor, it may get the question complicated. That is all I had in mind—so the witness may see the full question before him.

The Master: He can restate it.

Mr. Moran: The witness says to me it is a difficult question to answer.

Mr. Jackson: Then you abandon it?

Mr. Moran: No.

Mr. Jackson: Well, let him answer just to your heart's content, if you will be fair to him.

The Master: He is answering the other question that it is difficult to answer, and now, Mr. Moran, go ahead.

Mr. Jackson: If he is going to propound a new one, all right.

Q All I want to say is, do you want the Court and the other parties interested in this case to understand that you have expressed the opinion that under all circumstances here the quantity
1590 of oil we used was excessive?

A. No, I do not.

Q That is all. And to go a little further, I think you say that it is almost impossible for a gas man to express an opinion on that matter?

A Yes, sir.

Q Considering everything?

A Yes, sir.

Mr. Moran: Now, I am not through. Will you please let me take the witness through?

Mr. Jackson: Go ahead.

Mr. Moran: You were squaring yourself there. Perhaps I misjudged you.

Mr. Jackson: It was an involuntary movement when a thought occurred to me.

Mr. Moran: You drew my thoughts out of my mind.

Q Going to boiler fuel, in considering the quantity of boiler fuel used we have to take into account that the boiler fuel is used to produce the steam that is used to manufacture the gas in the generators?

A. Yes, sir.

Q. Now won't the condition of the generators and the fact that they have been overworked, to use a farmer's expression, have something to do with the quantity of steam that might be consumed and, consequently, the amount of boiler fuel?

A Now, of course the efficiency of the machine, the condition of the machine, has a direct bearing upon the quantity of fuel and the quantity of steam necessary to produce a certain amount of
1591 gas. When a machine is in operation for a period longer than is considered normal, the efficiency of the machine de-

teriorates. That means it does not get the results per pound of coal, nor per pound of steam. In 1920 the condition of the machines has been improved considerably, since March, and the month of—if I recall it correctly, in the month of May I think the plant was operating with a 65% per cent efficient machine in operation. There was 1 a fuel machine. Two machines in operation clean. Conditions in the month of May were somewhat better than in April, and April was somewhat better than in March. The presumption is that when the plant was shut down for the necessary repairs and cleaning that their foulest machine was shut down, so each month of 1920 should show a reduction in the quantities per M necessary for the production of gas.

Q. As you progress through the months?

A. As you progress through the months. Now, I have simply before me the quantities per M for the six months period. If I had the monthly quantities, why, then I could possibly answer the question more clearly.

Q. Well, under the conditions under which this company operates it would take more than what we might call the normal amount of boiler fuel?

A. Yes.

1592 Q. When it was obliged to run its machines for these longer periods and use foul machines, it was necessary to use more steam than ordinarily?

A. Yes.

Q. And this plant being overcharged, as I will say again, also required additional steam for power purposes to pull the gas around through, did it not, there was back pressure, was there not?

A. Yes.

Q. That boiler fuel would be consumed in that respect?

A. Yes.

Q. And then have you considered in connection with this plant that this boiler equipment and this boiler fuel is used to pump the gas out to the holders a mile and a half distant under high pressure?

A. No, I did not consider that.

Q. Well, that takes a considerable quantity of steam, does it not?

A. Well, not a considerable quantity, Mr. Moran. It takes about three and a half to four pounds per thousand.

Q. Of generator fuel?

A. Yes. Boiler fuel.

Q. Of boiler fuel, I beg your pardon. Of boiler fuel under normal conditions it would take about three and a half to four pounds of boiler fuel about to do that work?

A. To meet the conditions that your transmission system imposes upon it.

1593 Q. But when you were giving amounts of boiler fuel you were giving them as boiler fuel used in a plant exclusive of gas storage requirement?

A. No, not entirely exclusive, but exclusive of high pressure transmission such as you have. The gas plant as a storage system, which is part of its equipment, and your storage system involves the use of

a high pressure system, which requires more steam than an ordinary plant would, which would have the holders on the ground.

Q. You have been down there frequently considering the large amount of work you had to do in supervising all these gas companies; I would say you have been there frequently in the last six months?

A. Yes, sir.

Q. You are not in the habit of visiting your friends so frequently as you have this gas company in the last six months?

A. I am in the habit of visiting my friends much more frequently.

Q. Well, I mean your gas friends, your gas plants; are you?

A. No.

Q. Well, there was some particular occasion for that, was there not, going down there so often?

A. Yes, sir.

Q. It was a sort of critical condition that this plant was operating under, was it not?

A. Yes.

Q. And you have made quite a careful study of the situation in the discharge of your official duties?

A. Yes, sir.

Q. You have made recommendations of things they might
1791 do to pull through?

A. To the plant officials?

Q. Yes.

A. I have made suggestions.

Q. Suggestions, yes. And you ought to know whether the management down there is efficient or inefficient, ought you not?

A. Yes, sir.

Q. And what would you say about it?

A. Well, I would say that there has been an improvement in the management with this last few months.

By Mr. Jackson:

Q. How many months?

A. Five or six months.

Q. Since they had these abnormal conditions of stress and there was less demand upon efficiency and management; is that the time you are mentioning?

A. I can say now, General, that the condition of the plant as I last noted it indicated an intelligent supervisory management.

Q. Since when?

A. Well, since March of this year.

Q. That was since you were called down there with the expert Klumpp and the expert Searle and several other experts to advise the manager of the Kings County Lighting Company—since that period?

Mr. Moran: Won't you let me finish this examination?

A. Since the trouble with the heavy oil, General, which I think was in the latter part of March or the beginning of April.

1595 By Mr. Moran:

Q. Now, you got down there in March, I think it was, first, when they were having trouble with their oil?

A. Yes.

Q. And you say they are managing that situation better now than they did when you found it there in March?

A. Yes.

Q. Yes, that is it. That is what you mean to say when you say there has been an improvement in the management?

A. Yes, sir.

Q. And you say now it indicates an efficient management, supervisory management?

A. Yes.

Mr. Jackson: Well, you ought to let him answer.

Mr. Moran: Now, I object.

Mr. Jackson: He seemed to—there was some expression that was not articulate.

The Master: You bring it out.

Mr. Jackson: But just right there it was the record. I did not know as the witness's opinion was strong enough for him to articulate it or not.

The Master: I heard it.

The Witness: That was a repetition.

Mr. Jackson: I beg your pardon, then.

The Witness: It was a repetition of another similar question.

1596 Mr. Jackson: I thought I saw a sign.

Q. You meant to draw a comparison between the situation when you first saw it and when you saw it in March?

A. Yes, sir.

Q. Do you mean to reflect on the management in 1919?

A. Partly.

Q. To what extent?

A. Well, it has never been clear to me why the equipment was permitted to get into this foul condition. It has never been clear to me why it was necessary to run a machine for five thousand hours, which would indicate that the machine was running from the summer of 1918 to the winter of 1919.

Q. That is what you mean?

A. Yes. There may be ample reason for it on the part of the management, but it is not apparent to me.

Q. That is what you referred to, the running of these machines?

A. Yes, sir.

Q. You do not mean to say they are generally inefficient down there?

A. I am not sufficiently familiar with that plant prior to March to know that, but I would not make that statement as to the conditions now.

Q. Then you do not want to make it as to 1919; you say you are not sufficiently familiar with them?

A. Well——

Q. The point that has to be made clear to you is why they
1397 had to run these machines so long?

A. Yes, sir.

Q. If they had a demand upon their plant during the winter, we will say, and during last fall, which in order to keep the gas on the town, to use the expression, they had to keep the machine going, that might explain it, might it not?

A. Yes, it would explain it if they had such a demand.

Q. If they had such a demand?

A. Yes, sir.

Q. Have you studied into it?

A. Yes, sir.

Q. And you do not think they had such a demand?

A. I do not.

Q. This is getting interesting. Tell us wherein they could have taken them down?

A. I have not got the figures in my mind now, but according to my recollection——

Mr. Hill: Pardon me. Do you want the output and the make? It is here in evidence.

The Witness: I would like to.

Mr. Moran: He has to have the hourly sendouts and the peaks and so forth.

The Witness: My recollection is the conditions during September, October and November were not such as to necessitate the operation of the entire group of generators. So that it does not appear to me clear why any machine should have been in continuous operation for five months.

1398 Q. That is you take the months, I think, of September, October and November of last year?

A. Yes, sir. And I will take August and also July.

Q. Yes, but you say at that time they did not need their whole five machines?

A. No, sir.

Q. They could have been rechecker ing them then?

A. Yes, sir.

Q. Did you know that at that time they had two machines out of service for rebuilding, in enlarging their capacity?

A. For how long?

Q. Started in the latter part of September and ended along in January or something like that.

A. No, I did not know that.

Q. That would alter your opinion?

A. Not entirely.

Q. Well, some?

A. That would mean that during that period they could not rechecker the other machines.

Q. Yes.

A. But it would not mean that the machines which had been in action from June up to that period should have been carried along

Mr. Jackson: Without repair, you mean?

The Witness: Without rechecckering and putting them in shape. I had in mind, Mr. Moran, a machine that was in operation from June until sometimes this spring without being let down for rechecckering. If I am wrong, correct me.

1599 Q. That is five thousand hours.

A. It was put in operation during June, as I recall it, and was in operation until the spring. I cannot understand why that was necessary.

Q. They only had three machines to operate while these other two were out and they did not get back until January?

A. They had these two machines in operation up to the latter part of September. If they were going to leave those two machines down for a protracted period, why, it would seem only good management to have the remaining machines in apple-pie order, as the saying is, when it came to shutting down these two machines for extensive repairs.

Q. But you know that the demand on this plant was a good deal more last winter than it had ever been before?

A. Yes, sir.

Q. And probably it was more than might have been expected?

A. Yes, sir.

Mr. Jackson: One moment. Do you have in mind the winter of 1917?

Mr. Moran: What?

Mr. Jackson: When the witness makes that answer does he have in mind the winter of 1917 and 1918?

The Witness: Yes, sir, General, I have.

Mr. Moran: No, we did not have as large a population and
1600 it did not last as long. And the coal consumption—coal was easier to get for domestic uses.

Mr. Jackson: All right, but I was speaking merely about the climatic condition. Wasn't that a harder winter, comparatively?

The Witness: The increase—the climatic conditions were harder, but the quantity of gas utilized by the consumers in Kings County was greater in last winter than it was in the winter you mentioned.

Mr. Jackson: I see.

Mr. Moran: It was what you call a pronounced increase?

The Witness: Not over 1917 and 1918, but yes over 1918 and 1919.

Mr. Moran: Now, just a moment. I don't want to take the time here—I have every confidence in Mr. Merrifield, in his integrity and in his intention to do what is right by both parties. I don't want any reflection on my people unless it is justified and warranted. I would like to have Mr. Merrifield get any facts from Mr. Elsman,

and come back to the stand in a few minutes and tell us about these machines.

Mr. Hill: And I would like to have the daily make and
1601 output go in that appears on those three sheets.

Mr. Moran: Can you do that?

The Witness: Certainly.

The Master: Well, we will suspend for five minutes and let him talk with him.

Mr. Moran: Talk with him.

Mr. Hill: Will you get the daily make and output?

The Master: Then you can ask your questions more intelligently, of course, it all has to be supported by the previous testimony. If Mr. Merrifield had read the previous testimony he would be able to answer your questions more intelligently.

(Examination of witness suspended during a short recess, after which the witness resumed the stand.)

By Mr. Moran:

Q. Now, Mr. Merrifield, in respect to this matter that we were inquiring about, with respect to the cleaning of the machines, are you now possessed of any additional facts that enable you to either change your expression or to make a more positive expression about it?

A. No, sir, I am still in the same position.

Q. Well, explain to us.

A. My idea is—I have an idea fixed in my mind that one or more of these machines was operating for a period prior to Sep-
1602 tember, the latter part of September last year, for a period long enough to have them foul, long enough to necessitate letting down for cleaning.

Q. That is, that they had run prior to that time, you mean?

A. Prior to that time.

Q. So that they might have been taken down in September?

A. Yes.

Q. Or should have been taken down in September? Yes.

A. There is nothing that has occurred in Mr. Elsman's explanation that would change that opinion. But I may have been mistaken in it, and the fact that I examined your cleaning records might clarify my mind and straighten the thing up.

Q. Well, now, as I get it, you feel that under proper management there they could have had every machine cleaned at a period not—they should have state up on its winter run, I should say, at a period not earlier than September, the latter part of September?

A. No, I do not say that, Mr. Moran, but I do say that with the fact of two machines being let down for extensive repairs, and the knowledge that those machines would not be available for service for two or three months—that good judgment would require the putting into proper shape of the other machines.

1603 Q. Just before they took this out of service?

A. Immediately before, if possible, as close as possible to the time that these were dropped from service.

Q. Yes. Well, you don't know but what that was done?

A. My idea—the idea in my mind is that one or more of the machines was running for two or three months prior to September; and that is what I have in mind when I say that they did not approach that period with proper judgment.

Q. Yes. Then as I get it again, if they had a foul machine they should have taken it out of service for the couple of weeks that is required, and got it cleaned up before they took down the two machines that they were going to repair?

A. Yes, sir.

Q. And put it in—now, that is the extent of your adverse criticism about the matter?

A. Yes, sir.

Q. Well, now, I presume that only Mr. Elsman or somebody connected with the plant can enlighten us about that, as to why they did not do it?

A. The plant required——

Mr. Jackson. Mr. Merrifield has suggested one way you might enlighten him. What was your suggestion? Repeat it.

The Witness. The plant cleaning records.

Mr. Moran. The plant cleaning records,—we have not got
1604 them here. That means when each machine got down and out of service——

Mr. Jackson. You have the plant cleaning record.

Mr. Moran. Yes, surely.

Mr. Jackson. He has suggested he might look at it and help him to——

Mr. Moran. Well, it is not here. I do not consider it a—well, that might be.

Q. Suppose such a thing did happen, could you attribute it to any greedy disposition on the part of anybody, to get the advantage of anyone,—consumers?

Mr. Jackson. Oh.

Mr. Moran. Well, wait a minute. I want to find whether this was a matter of judgment or whether there is some motive back of it, if such a thing did occur.

Mr. Jackson. Have you asked your question?

Mr. Moran. Why, I tried to ask a question, and then I answered you and made a speech, and now I am ready to have the record read and hear what I did say.

Mr. Jackson. If you have a question I would like to object to it.

The Master. I think he has stated that he thought it was an error in judgment, at any rate.

The Witness. That is what I have in mind.

1605 The Master. You mean an error in gas management, gas judgment? You mean, when you say "Gas judgment," or "an error in judgment"—you mean bad gas management or an error in gas management, do you not?

The Witness. Bad gas judgment, I would put it

The Master: Bad gas judgment?

The Witness: Yes.

The Master: And that is all; there is no ulterior motive?

The Witness: None whatever, beyond the operation of the plant itself.

Mr. Jackson: Well, you mean by that, you don't ascribe any criminal motive?

The Witness: No.

Mr. Jackson: That is all, but you meant to say that you did not regard it as efficient management?

The Witness: Exactly.

Mr. Jackson: And you regard it as positive evidence of inefficiency?

The Witness: Well, perhaps the word "positive" is too strong, sir.

Mr. Jackson: Well, as evidence of inefficiency?

The Witness: As evidence of lack of perspicacity.

Mr. Moran: That is on the assumption that——

Mr. Jackson: Well——

1605¼ Mr. Moran: Wait a moment now.

Mr. Jackson: Let me finish, while I am about it. As evidence of ordinary business prudence in the gas business?

The Witness: As evidence——

Mr. Jackson: As evidence of lack of ordinary business prudence and foresight in the gas business?

The Witness: Yes, sir, I would say that.

By Mr. Jackson:

Q. And now, to make it plain to a layman, if a gas company having five machines finds it necessary to take two of them out of service for the purpose of enlarging their capacity and overhauling them, requiring that they be out of service for a couple of months, that the other three machines should be cleaned, and at the commencement of that period of repairs should be in good condition?

A. Yes, sir.

Q. Yes; but now if there is some reason why that could not be done—and you say in this case there was one of those machines did not meet that requirement, did not meet that situation?

A. That is my impression, yes.

Q. That is the impression, of course. Now, if that machine did come into that period—if they did have these three ma-

1605½ chines cleaned at that time, then you have no criticism?

A. I withdraw my impression.

Q. Yes; you would also withdraw it if there was some good reason, controlling reason why the three machines were not in that condition—where the extra machine was not in that condition?

A. Well, I would want to be sure of the controlling reason.

Q. Yes, I say it must be a controlling reason, yes.

A. Yes.

By the Master:

Q. Let me ask you one question, Mr. Merrifield. We have had a considerable amount of testimony here about this question of unaccounted for gas. Now, I don't want to go into its causes. We have had all that at great length.

A. Yes.

Q. But I recognize you as a man who has been in the business here for a number of years, and is a public official now, and as familiar as any of the experts with the conditions under which the gas company operate. I call your attention to Plaintiff's Exhibits 6 and 13, with particular reference to the percentage of unaccounted for gas which appears on those records. For the year ending December 31, 1919, the unaccounted for is stated to be 17.2 per cent?

A. Yes.

Q. And for the six months period ending June 30, 1920, 1606 the unaccounted for is stated to be 14.83 per cent. Now, without going at all into the question of how gas is lost or unaccounted for, what is your opinion as to the percentage of unaccounted for that this company report-?

Mr. Jackson: May I please interrupt?

The Master: Just let him——

Mr. Jackson: And just specify an objection? I would like to object to it upon the ground that I think it is impossible to have the question of unaccounted for gas considered by any witness without respect to the possibilities in the particular plant under consideration.

The Master: But I don't mean to limit the question in that way.

Mr. Jackson: The loss is due to different causes.

The Master: The loss is due to different causes, but I am assuming that he is familiar enough with the general operating conditions of this company to be able to give us his conclusion with respect to that question, without going into great detail on the record. He can think of all those questions, all those matters; he is an expert gas operator, he can think of all the reasons for unaccounted for, and the particular situation of this plant. He 1607 is the gas expert of the Public Service Commission, and I think he is qualified to answer that question.

Mr. Jackson: If your Honor don't think I mean——

The Master: Categorically.

Mr. Jackson: If your Honor will absolve me from any intention of interruption—but it seems necessary to put the situation properly. Would your Honor think that this witness, with his slight observation of the plant, would be better competent upon that, to determine the wherefore of the unaccounted for gas of this plant better than the manager, Mr. Elsman, who has worked all these years and says he has not been able to find out about it?

The Master: Well, let us see what the witness answers. If the witness can't answer the question, he can say no.

Mr. Jackson: I would like just to take an exception.
The Master: If I am limiting the witness to too great an extent, he can say so. Objection overruled and exception.

1608 A. Well, taking into consideration the conditions under which the Kings County serves the territory, I would say that if I were operating that plant I would not feel comfortable unless I had my unaccounted for down to about 12 per cent.

The Master: That is sufficient.
Mr. Jackson: Has your Honor finished?
The Master: Yes.

By Mr. Jackson:

Q. And why wouldn't you feel comfortable as a gas manager?
A. Because I think the 12 per cent ought to represent the losses in the territory of the Kings County.
Q. And you mean to say that you were not fully satisfied that you had performed your duties as a gas manager efficiently until you had reduced it to 12 per cent?
A. I would not feel that everything had been done.
Q. Until that result had been attained?
A. Until a result approximating that had been obtained.
Q. And possibly a lower result might be obtained?
A. Well, I would be very well satisfied with 12 per cent in that section.
Q. Are you acquainted with the results in other companies next adjoining the territory on Long Island?
A. I am acquainted generally with the conditions throughout the First District of New York.
Q. And do you know that the result of some of those adjoining companies are 8 per cent?
1609 A. Some of them are, yes. Some of them are more, some of them are fourteen.
Q. Some throughout the state in the other districts are down to four?
A. Yes; in some; yes, sir.
Q. And some companies are down to nil?
A. I don't know of——
Q. (Interrupting.) That is, zero.
A. I don't know of any company——
Q. We had a witness here who said his company was down to zero.

Mr. Moran: I don't think——
The Master: That is all in evidence. I don't want to extend this witness's testimony with reference to that. I think he is perfectly competent to answer the question as he has answered it. He has shown and extensive knowledge of the subject; and his position, his present public position entitles his opinion on that subject,

backed up by his practical experience as a gas man, to a considerable amount of weight.

Mr. Jackson: I was not disputing it, not in the slightest particular; I wanted to explain it in full and bring it out in full, so we could have his whole opinion on the whole subject. We produced Mr. Merrifield for anything that he would say in this case, so far as an expert might testify.

1610 By Mr. Moran:

Q. You say that if you were manager, you would not feel comfortable until you had it down to twelve; is that the idea?

A. Yes, sir.

Q. How would you get it down?

A. Well, I would go over every part of the system that is responsible for gas shortage.

Q. And just what parts are those?

A. I would begin with—begin at the meter.

Q. In the works?

A. In the works, and find out if my meter was registering accurately.

Q. Yes.

A. I would assure myself of that.

Q. Yes.

A. I would be——

Q. By the way, is it possible to get a meter that will register accurately?

A. I have never found one, but——

Mr. Jackson: Well, you found a meter——

Mr. Moran: Now, this interruption can't be tolerated another minute, from my point of view. Wait a minute.

Mr. Jackson: I know, but I want his testimony explained. You found a——

The Master: Just a minute. Strike that out and let him go ahead.

Mr. Jackson: Then I will step out.

1611 A. (Continuing:) When you speak of measuring gas through a gas meter, there are a number of conditions governing the measurement of gas which tend to prevent the meter from being at all times a hundred per cent accurate. In a station meter, where the water level determines the capacity of the meter, we approach closer to an accurate measure than in the other types, I believe. Now, nevertheless the gas as measured is measured under certain temperature and pressure conditions. Gas——

The Master: Please just stick to the question that was asked you, Mr. Merrifield. What would you do to correct——

The Witness: I was explaining the inaccuracy of the meters. All right, sir.

The Master: Because, you see, we have had a great deal of testimony on many of the subjects, and I want to limit it as much as I can.

The Witness: Then I finished with the meter.

The Master: Just say what you would do to——

The Witness: I would examine my piping system from the meter to the storage holder, examine the storage holder, keep track as close as possible to the variations in temperature between various points in the system from the meter at the plant to the consumers' premises, making various temperature tests of atmospheric
1612 conditions or atmospheric temperature at the point where gas was measured for consumers.

Q. To ascertain what fact?

A. To ascertain what percentage of my unaccounted for was due to the variation of temperature between the point of measurement and the works and the point of measurement at the consumer's meter.

Q. But you could not help that,—what you would lose there, you could not help that? That is a condition of nature that you can't change, isn't it?

A. Well, that cannot be changed, but it is explanatory in the losses.

Mr. Moran: Yes.

Mr. Jackson: Well, is that true, that it can't be changed?

Mr. Moran: Well, your witness says so, and I agree with him.

Mr. Jackson: Well, has he in mind——

Mr. Moran: Yes.

Mr. Jackson (continuing): ——what the purpose of the condensor is?

Mr. Moran: This is not a condensor.

Mr. Jackson: If you have an efficient condensor, that is efficient for the plant, why, you can reduce the temperature of the
1613 gas, can't you, and that reduces the temperature that the gas may bear after it leaves the plant?

The Witness: Generally gas is corrected to a temperature of 60 degrees Fahrenheit and 30 inches barometric pressure at the plant.

Mr. Jackson: It should be?

The Witness: It is.

Mr. Jackson: I- should be?

The Witness: Or should be.

Mr. Jackson: Well, is that so?

The Witness: Yes, sir.

Mr. Jackson: I only want to know the fact.

The Witness: In my experience it always has been.

Mr. Jackson: At this plant, Kings County plant?

The Witness: I presume they are following that, yes. They have an instrument for measuring gas there which automatically produces that figure, I understand.

Mr. Moran: You are correctly advised about that. That is true, we correct it to sixty.

The Witness: I am not sufficiently familiar with the Thomas meter to pass upon its merits. I am just speaking from the
1614 prospectus of the Thomas meter people themselves and the statements of the works management of the Kings County Lighting Company.

Mr. Jackson: Well, they have two meters down there.

Mr. Elsman: We have three.

Mr. Jackson: All three, are they all Thomas meters?

The Witness: No, they have one station meter there, and they have a Thomas meter, and I think a Venturi meter.

Mr. Elsman: Proportional meter.

The Witness: Proportional meter. That is a new meter that you had put in lately, wasn't it?

Mr. Elsman: No.

The Master: Now, have you completed your answer to what you would do?

The Witness: In the unaccounted for?

The Master: To check the unaccounted for?

The Witness: Yes, sir.

The Master: Go on. What is the next question.

Q. Well, would you examine the meters to see if they were running slow or fast?

A. In so far as it was possible, with the operation of the company.

1615 Q. Yes, and you said you would go over the transmission system that carries the gas to the holder. Would you go over the distributing system that carries it to the consumer?

A. Oh, yes.

Q. You spoke about that, did you, or intended to?

A. I do not think I spoke about it, but I had it in mind.

Q. Anyway you would go over that. What would you do there?

A. Well, I would make an exhaustive survey of it if my unaccounted for was sufficient in warranting me in assuming that it was greater than it should be. I would tap the streets at various points in the customary method, looking for leaks.

Q. That is expensive.

A. Yes, sir.

Q. It is so expensive it would take a considerable amount of money?

A. If you organized a gang for that particular purpose, yes; but I have not in mind any such elaborate scheme.

Q. Yes.

A. I would utilize my force when available during the off periods.

Mr. Jackson: For instance, the promotion force, when it was not working a promotion.

The Witness: A promotion——

Mr. Jackson: For instance, a promotion force or a com-
1616 mercial force, when it was not working at commercial or promotion?

The Witness: No, sir, a commercial force would not be——

The Master: Let me ask you, when you gave your answer to my question, you took into consideration, didn't you, the question of expense of correcting the unaccounted for, when you said that if it got above twelve you would feel that there was an excess of unaccounted for?

The Witness: Yes, sir.

The Master: Of course, I realize that there is considerable excess in correcting the unaccounted for, but there is also excess in losing the gas. Now, what the condition is, is something a little to- intricate to go into at this hearing. I am simply asking your judgment as a gas man, familiar with the conditions at this plant, as to what—at what point, in your judgment, the unaccounted for should be, at what percentage the unaccounted for should be held down to. That was what my question was meant to have.

The Witness: That is what I had in mind, your Honor, when I said 12 per cent.

The Master: Yes, that is what I understood.

1617 Q. Well, suppose you did all these things that you have mentioned, and got all through and found that you still had fourteen or fifteen per cent; then what would you do?

A. That is purely a supposition, Mr. Moran.

Q. I know.

A. I would have to think up some other scheme then.

Q. Well, it is not entirely a supposition. The company, I think, has been doing everything that you have mentioned.

A. The company may, but I have not.

Q. Oh, I see the difference. Well, the Brooklyn Borough Company, in adjoining territory there, have a thirteen per cent.

A. Somewhat about that, thirteen to fifteen.

Mr. Elsman: Fifteen.

Q. Yes, and other companies run much higher than this?

A. Not much higher, Mr. Moran.

The Master. I do not think you had better go into that any more. There is so much evidence in the record about various companies all over the country.

Q. Speaking about the oil that was received by this company this spring and at the present time, you said that you saw the oil of one hundred companies, I think, that was better and one worse?

A. The Brooklyn Union Company, I saw the oil there which was somewhat similar to the oil of the Kings County.

1618 Mr. Hill: Your assumption that one was worse is wrong.

Mr. Moran: Then maybe I am wrong.

Q. Then there was one that was getting fairly good oil?

A. The Consolidated and the New York & Richmond.

Q. The Richmond got its oil from the Consolidated, didn't it?

A. The New York & Richmond, yes—not from the Consolidated, it got from the Standard Oil Company a diverted cargo consigned to the Consolidated.

Mr. Jackson: That was only one cargo?

The Witness: Oh, several cargoes.

Mr. Jackson: But to what total extent?

The Witness: What?

Mr. Jackson: Total extent.

The Witness: I think six hundred thousand gallons, if I remember rightly.

Mr. Jackson: That was an emergency.

The Witness: That was to tide them over until they could negotiate, get a contract for a supply of oil themselves.

Q. The Brooklyn Union Company had difficulties in running their plant, the same as the Kings County?

Mr. Jackson: Oh, I object to that.

Q. Did it?

1619 Mr. Jackson: That is too comprehensive, to say that it had the same difficulties. The witness could not possibly know that, or answer that.

Mr. Moran: Well, I will take the witness's answer.

Q. Do you know whether they had any difficulties with this oil?

Mr. Jackson: Well, that is another question.

A. I do.

Q. Well, did they?

A. They did.

Q. What kind of difficulties did they have?

A. Difficulties approaching in appearance the difficulties the Kings County had.

Q. Now, did the Consolidated Gas Company—do you know where they get their oil, what company they get their oil from?

A. Standard Oil, I understand.

Q. The same one as ours, Standard Oil of New Jersey?

A. Standard Oil of New Jersey, I believe. I could not say, Mr. Morgan, really.

Q. Well, there has been—hasn't it been generally hinted around, a rumor in the air, that most gas companies were getting inferior oil this spring? Have you heard anything like that?

A. Hinted?

Q. Yes.

A. It has been positively stated.

Q. That they have been—everybody has been getting poor oil?

A. Yes. It has been stated not any good oil available.

1620 Mr. Moran: I see.

The Master: Are there any more questions from this witness?

Mr. Jackson: Yes, please.

By Mr. Jackson:

Q. I would like information, and perhaps the Court would. There is a provision of the Public Service Commission to the effect that meters should be brought in once at least during seven years, is there not?

A. Yes, sir.

Q. What is the purpose underlying that provision?

A. The assumption that a meter would not register accurately after it had been seven years in service.

Q. And that the inaccuracy in registration will be generally in favor of the gas company or in favor of the consumer?

A. I don't think that there was any question as to who the inaccuracy would favor when the order was promulgated, but the experience of the Public Service Commissions of that end of the business indicates the reverse, that the inaccuracy is in favor of the consumer.

Q. What is the fact as to the tendency, if you know, of a new meter? Is the tendency to run slower when it is new or run faster?

A. The tendency of a new meter is run accurately. As
1621 the meter is in service the tendency is to run slowly.

Q. And the longer a meter is in service, is the tendency of the meter to run slower?

A. Yes, sir

Q. That is the general tendency?

A. That is the general tendency, on account of the parts, the meter parts. For example——

The Master: You don't need to go into all that. We have had that.

The Witness: All right.

Q. Well, I had had a theory that the tendency of a meter——

The Master: If you are simply going to explain why the tendency of the meter is to run slow——

Mr. Jackson: Yes, I had it in mind that the tendency of any mechanism was, after it got any friction, original friction in any of the parts, movable parts—that after the friction was eliminated it would run smoother, and therefore would run faster. If I am incorrect upon that theory, I would accept your statement.

The Witness: These parts are governed by a chamber which has a defined capacity when new. This chamber is constructed of tin sides and leather diaphragm. The tendency of the leather is to
disintegrate and to become pitted—the formation of holes—
1622 and the gas, instead of all passing through this, cores through it and is by-passed without moving the mechanism, as it was intended.

Q. I can understand that explanation perfectly. It has not been explained to me before by any of the plaintiff's witnesses. You were asked by Mr. Moran to this effect: You were asked if from all the circumstances that are presented to you, as they have been by the schedules of the plaintiff in evidence, together with such inspections of the plant as you have mentioned—if you say that it is impossible for you to say that the quantities as summarized by those schedules are unreasonable? Did you get that?

A. I did not quite catch that, sir.

Q. Basing your opinion upon the basis as I gave it, you were asked

if it was not impossible for you to say from these summaries presented to you, and from the inspection of the plant as you have made it, that these summary figures upon these schedules are unreasonable?

Mr. Moran: Well, just a moment.

A. I don't recall being asked that question.

Mr. Moran: No, I think not. No such question was asked.

Q. Well, I may not have remembered it prefectly. Do
1623 you want to take the time to go back and ask to see the question that Mr. Moran asked?

A. I was asked a question similar to that, as related to oil.

Mr. Moran: For 1920.

Q. Was it just oil for 1920?

Mr. Moran: Just oil for 1920.

Q. Well, it was to the effect—without repeating the basis that I have stated, but having that in mind—that it is impossible for you to say that that quantity as shown upon the summary was unreasonable?

A. Yes, sir.

Q. Was that the question?

A. Yes, sir.

Q. And you answered that it was impossible for you to say that it was unreasonable?

A. Yes, sir.

Q. To an equal extent would you say that it was impossible for you to say that it was reasonable?

Mr. Moran: Oh, now, I object. That follows as the night the day. I object to this argument between the——

Mr. Jackson: I want to have the witness to say.

Mr. Moran: I object to it.

The Master: Let him answer, and then that is all.

A. I would say it was equally impossible.

Q. Now, in every year's operation of a plant like that, there may be certain parts of the operation that show efficiency and
1624 economy, while there may be other parts of the operation that show*n* inefficiency and excessive cost, may there not?

Mr. Moran: I object to that as——

The Master: Objection sustained. We must devote ourselves to some specific items from this witness. He is perfectly competent to go into these specific items, and I think it leads to confusion if we ask hypothetical questions.

Mr. Jackson: It was in justice to the general value of general opinion as to summaries, my point being that summaries do not—and averages do not give a true test for the questions at issue in this case, necessarily; that they disregard certain considerations that the people consumers, have a right to have credited to their advantage.

That is, if some portion of the operation is efficient, quite efficient and economical, and money is saved in that part of the plant, while in another part of the plant there is waste and inefficiency, the summary would show an average which one looking at the summary would say was reasonable upon the whole, but the people, the consumers, the rate payers are entitled to have efficiency and good management or economy in every part.

The Master: But this is a detail summary, and he has
1625 gone over it with Judge Hill, and Judge Hill asked him to pick out particular items which he thought were unreasonable or which he thought were reasonable. It is a summary only the sense that it summarizes each item.

Mr. Jackson: Well, my question is directed to show that from those summaries, as they summarize each item and as each item is set forth upon the summary,—it is impossible for a witness, testifying as these expert witnesses have testified to testify conclusively upon the question that is to be really determined in this case, and that is, what is the efficient, competent, economical management of every part of this plant; because the people, in having this rate established, are entitled to have efficient and economical management in every part of it, and not an average summary.

The Master: The objection has been sustained, and you will have to ask it in some other way. You will have to proceed to some other inquiry. The objection to that line of testimony has been sustained.

Mr. Jackson: Does your Honor mean that I should ask my questions in this more specific, taking up the summary of oil and coal and so on?

1626 The Master: Yes. It has already been gone into. I do not promise that I will let you go all over it again.

Mr. Jackson: Well, I would like to refer, perhaps, just to the main items then.

Q. Taking, for instance, this Exhibit 6, cost of production, generator coal 32.30 pounds. It is possible, when you look at that summary for the year, the average amount for the whole year of 32.30 pounds per thousand cubic feet of gas made, that you can determine as to whether or not in every part of that operation during the year that resulted in that average there was efficiency and economy?

A. Yes, sir, I could from a figure of that kind covering the entire year.

Q. Now, understand my question.

A. Yes, sir.

Q. Could you tell from that figure that there had been at all times during every period of the year, and as to every part of the management and operation of the plant that went to contribute towards the formation of that average—could you tell as to each one of those items that there was efficiency in management at that time and that part?

Mr. Moran: I object to it.

The Master: It is obvious that —

1627 Mr. Moran: I object to it.

A. No.

The Master: Just a minute. It is obvious that he could not. The gas business is not a static business. At one day of the year it may possibly have been 40 pounds, or one hour of the day it may have been 40, at another hour and another day it may have been 25 pounds. But it is the only understandable method of arriving at this conclusion, to take a unit period, say a year, and average over the period of the year the amount of coal per thousand cubic feet used. Isn't that so?

The Witness: Yes, sir, and taking into consideration the quality of the gas made.

The Master: Yes.

The Witness: If the gas made had a higher candle power value you would have a lesser quantity of generator coal. This figure is—strikes me as being a reasonable figure per thousand cubic feet of gas made, taken in connection with the quality of gas as furnished for the year.

The Master: That is a very complete answer.

Mr. Jackson: Will you permit me to follow it a little further to express my idea?

1628 The Master: I know what your idea is, and I think the witness has——

Mr. Jackson: The witness has answered the question.

The Master: The witness has answered the question just as fully as he could.

Mr. Jackson: I want to see it—if the witness will adopt as his answer what your premise was before you put the question, then I will proceed further; but the witness did not adopt the premise necessarily. And I would like to have it, instead of your other statement, I would like to have it from the witness as a part of the testimony. And will you read back just the first part of the Master's question, and I will point out what I had in mind. I ask to have the first part of the Master's question repeated to the witness.

The following was read to the witness by the reporter:

("The gas business is not a static business. At one day of the year it may possibly have been 40 pounds, for one hour of the day it may have been 40, at another hour and another day it may have been 25 pounds.")

Q. Is that true?

A. Well, not exactly true.

Q. State the fact, in your own way, of doing it.

1629 The Master: That is meant to be simply a generalization, to bring out your point.

Mr. Jackson: I know.

A. The 25 pounds is rather a low figure when you are speaking in connection with a thousand cubic feet of gas. 10 pounds is rather

a high figure when you are speaking of carburetted water gas, which implies the use of some oil.

The Master: My question simply meant to bring out the point which I suppose Mr. Jackson has in mind; that is, that at certain periods of the year the plant might have been run—or certain periods of the day it might have been run at a more economical rate, and at other periods it might have been run at a more extravagant rate.

Q. Is that true?
A. Yes sir.

The Master: But this average that you consider, that you have taken, that they show here for the whole year, as I understand it, you stated was reasonable?
The Witness: Reasonable, yes.

Q. Now, where there are variations during the year and at some point it is shown that it is not efficient by the result, when you take an average at the end of the year such as this, the number of times and the extent to which there was inefficiency has disappeared
1630 and is lost track of; isn't that so?

Mr. Moran: Just a moment now. I object.

Q. So far as—let me finish the question——

The Master: Objection sustained.

Q. So far as this average is concerned.

The Master: Objection sustained and exception.
Mr. Jackson: I have in mind asking the witness with like import as to all these other summaries, the summary for boiler fuel coal 18.50 pounds, the summary for boiler fuel water gas 45/100ths of a gallon, summary for gas oil of 3.43 gallons—on the schedule of 1919, and the like items upon the schedule of 1920. Will you- honor rule the same way as to that?
The Master: The same way.
Mr. Jackson: And give me an exception.
The Master: Any further questions of this witness?
Mr. Jackson: Just till I glance at this. I think that is all, your Honor.
The Master: All finished?
Mr. Moran: Yes.
The Master: That is all, Mr. Witness.
Mr. Jackson: Much obliged to you, Mr. Merrifield.
The Master: Are there any further witnesses?
Mr. Jackson: Oh, I would like to identify this lump. I had it brought down here.

1631 By Mr. Jackson:

Q. Mr. Merryfield, I don't remember the name of this exhibit, but there is only one lump in evidence, I think, of this character.

Now, from all your experience—and it is generally conceded that you are a qualified man in the gas business—do you recognize that as you see it here?

A. Yes sir.

Q. You can identify it without any trouble?

A. Without any trouble, yes sir.

Q. Well, what do you say it is?

The Master. Where did you get it, first? Have you seen it?

Q. Are you responsible for the production of that, for getting that lump on its way towards this court room?

A. I am responsible for its conveyance, but not for its production. This was given to me by the superintendent of the Kings County plant, Mr. Ohnemuller; and while I did not see him remove it from the machine, I saw a mass of similar material in the machine that I inspected.

Q. This was about what time of the year?

A. About June, I think.

Q. 1920.

A. 1920.

Q. Did he tell you as to what it was or where he got it?

A. He told me where he took it from, yes.

1632 Q. And what did he say about that?

A. He said it was found as the accumulated solid matter in the carburetor.

Q. Well now, I took a hammer myself and knocked part of it off. Was that lump larger when you brought it over here?

A. Yes.

The Master. Don't be hampering with the evidence.

Mr. Jackson. No, no, before I brought that here, though. It did not interfere with the quality of it, though, I think.

Q. Now, did you see other specimens of like nature there as large or larger than that?

A. I saw the entire interior practically of a carburetor solidified with this matter.

1633 Q. To what thickness?

A. To the thickness—the thickness was governed by the spaces between the brick. I don't know, really, what the spaces are. They may be three and a half by four inches, or something of that kind.

Q. Well, the spaces between the bricks—they varied to what extent in thickness?

A. Well, the brick is the standard brick, two and a half by four and a half by nine, I think; and then these bricks are so spaced that there is a space between each brick about three and a half to four inches—a gas space between the brick.

Q. And do you mean to say those spaces were filled with this material?

A. Yes, sir.

Q. And of course this piece here is larger than three and a half or four inches in diameter?

A. There are certain parts of the machine—for instance, take the space and sides—where there is a much larger area than represented by four and a half by nine by two and a half.

Q. About what thickness?

A. 30 inches.

Q. 30 inches thick?

A. 30 inches space.

Q. I know there is 30 inches space, but what was the thickness of the material, the incrustation?

A. Oh, I should think the thick*ness* part of the incrustation was about 12 or 14 inches.

Q. Do you know what that came from?

A. Well, it was one of the products of combustion, or one
1634 of the products of gasification.

Q. Well, was it, to be brief and not to lead you—was it one form that was evidenced by this residue in this porter quality of heavy oil, as it went through the gas machines?

A. The heavier oil, in my opinion, is largely responsible for it.

Mr. Moran: It is made with any oil, isn't it?

The Witness: Yes, but not in such——

Mr. Moran: That is it. It is made as the product of any oil in the carburetter.

The Witness: The carburetter contains matter of this kind, and the quantity in it is in proportion to the length of time the carburetter has been in use.

The Master: Ask him what it is: that is what you want.

Mr. Jackson:

Q. Well, I want to get just the material.

Q. Now, you saw some other material in the yard, that has been referred to here—you have not heard the testimony, but it has been referred to here as an emulation or sludge—that was the residue of this heavy oil?

A. Yes, sir.

Q. Was that called to your attention down there?

A. Yes, sir.

Q. And is this the same residue or sludge, only as mani-
1635 fested in the carburetter?

Mr. Moran: Oh, now, wait, I object to that.

A. Yes, sir.

Mr. Moran: As leading.

Q. Well, state——

Mr. Moran: Wait.

Mr. Jackson: Well, perhaps it appears sufficiently.

The Witness: No, I would not say that this is the solidified result of the stuff I saw in the yard.

Q. Well, it is the stuff that you saw in the yard as it would be influenced passing through the carburetter?
A. No, because this——

Mr. Moran: I object, now, further. We had several hours yesterday——
The Master: What is this?

Q. State what it is, then.

Mr. Moran: He has stated it.

A. This is a combination, as I take it, of the solid hydrocarbon contained in the oil, plus a certain —plus the mineral matter contained in the oil, plus a certain proportion of an ash, carried forward from the generator during the process of gasefication.

The Master: Is it commonly known as a clinker?
The Witness: No, it is not a clinker. We don't
1636 & 1637 know what that is. We will have to invent a name for that, your Honor. It is something in the nature of a slag, I would say. The general——
The Master: That forms in the carburetter?
The Witness: That forms in the carburetter. Now, this is not baked, this mass this is simply an accumulation of particles. The decomposed hydrocarbon from gas oil are decomposed, not in flakes or in streaks or in layers, but in particles; and this here, if we could subdivide it into its atomic condition, why, we would have portions of gas oil and some ash from the oil itself and some ash from the generator fuel.
The Master: I think we have had enough testimony about that piece.
Mr. Moran: But it is not the sludge?
The Witness: It is not the sludge, no.
Mr. Moran: That is it. We had two hours yesterday trying to prove it was the sludge.
The Witness: Trying to prove it was the sludge?
Mr. Moran: Yes, counsel was trying to insist——
Mr. Jackson: No, I did not attempt to prove it was the sludge at all.

The Master: Well, let us pass on to something else.
1638 The Master: To some extent.
Mr. Jackson: I just wanted to understand it. It is hard for me to understand a thing like that.

Q. But this is a greater extent than was——
A. Oh, yes.
Q. And the greater extent was due to the heavier oil?
A. Presumably, yes.

Mr. Jackson: That is what I wanted to get at.
The Master: Is there anything further from this witness?

Mr. Jackson: Just a moment, please.
Mr. Moran: The greater extent was due——
The Master: I am going to cut off on this stuff.
Mr. Jackson: No question in your——
The Master: We have had plenty of evidence. I don't want any more questions on that piece of material.
Mr. Jackson: Not at all. I won't touch it again except to carry it away.
Mr. Moran: I object to further examination now. It is not cross-examination, it is not redirect any more.
The Master: What is your question?
Mr. Jackson: I want to ask a question. The witness is here, what will I do?
1939 The Master: Go ahead and ask your question.

Q. I want to know the dimensions of the carburetter out of which you took this.

Mr. Moran: I object, now. That is under the ruling of the Court.
Mr. Jackson: I want to know the size of it.
The Master: Go ahead; give it if you know it.

A. It was not taken by me from the carburetter, your Honor, it was given to me by the superintendent of the plant.
Q. What was the dimensions of the carburetter from which it was supposed to come?
A. A 12 foot machine, I understand, with a carburetter of approximately half that diameter, say. The Williamson Machine has a carburetter on top of the generator, occupying approximately one half of the interior shell, or four feet and a half in diameter by six feet long in cross section, and approximately eight and a half feet high.
Q. Can you tell from the thickness of that encrustation as to about how long it had been since that carburetter had been cleaned?
A. No, sir.

The Master: I think that is all, Mr. Witness.
Mr. Jackson: That is all.

(Witness excused.)

The Master: Any further testimony?
Mr. Jackson: Yes, sir.
1940 The Master: Call the next witness.
Mr. Jackson: Mr. Howard.

M. S. HOWARD, called as a witness in behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Jackson:

Q. Where do you live, Mr. Howard?
A. 321 West 178th street.
Q. And what is your occupation?
A. I am an economist.
Q. I did not hear it?
A. Economist.
Q. Are you employed?
A. By the Public Service Commission, yes, sir.
Q. First District?
A. First District.
Q. And for how long have you been employed?

Mr. Moran: That will be wholly unnecessary. Come to the point. What are you going to prove?
Mr. Jackson: I am going to do it my way.
The Master: Go ahead.

A. Since 1914.

Mr. Jackson: You interrupted my question.
The Master: He said since 1914.

Q. You were in charge of some department there at the Public Service Commission?

A. Oh, I did have, for two or three years, charge of the ex-
1641 amination of the annual reports that these companies rendered. I had charge of the correspondence relative to the correction. I had charge of the abstracting of those reports which make up the third part of the annual reports.

Mr. Jackson: What I understand by your interruption—am I correct—that you do not question the qualification of this witness?
Mr. Moran: I should question his qualification if he was going to tell us how much it cost to make gas. If he is going to say——
Mr. Jackson: I am not going to ask about that.
Mr. Moran: If he is simply going to say that he had some figures from annual reports, I will not question his qualifications.
Mr. Jackson: Then I won't spend any further time on that.

Q. You are informed generally as to the budget, sums available and working force of the Public Service Commission for the First District?
A. Of our bureau.

Mr. Moran: Just a moment. I object.
The Master: Objection sustained, unless it is connected with this company.

Mr. Jackson: I am going to connect it with this company.

1642 The Witness: Did you get my answer to that question? I said of the Bureau, of the Bureau of Statistics and Accounts.

Q. What?

A. Not of the Commission generally, but of the Bureau of Statistics and Accounts I am generally informed of the amount of the budget.

Q. Yes, and about how many public utility companies has the Public Service Commission jurisdiction over in this district?

A. About 100.

Q. Gas and electric corporations and transit?

A. And street railway and so forth.

Mr. Moran: I will be satisfied to reduce that number by three or four.

The Master: Go ahead, Mr. Jackson. Mind you, I don't see what possible evidence there is, of possible relevancy at this hearing; but you go ahead, if you have got something very important, otherwise, I am going to call a halt on it.

Mr. Jackson: Yes, I have.

Q. From your knowledge of the funds available to the Public Service Commission, and of the working force in the department with which you are connected, what do you say as to whether it is possible for the Public Service Commission to make an examination, and the extent of the examination, of every one of those public utility corporations?

A. Well, that is absolutely——

1643 Mr. Moran: Well, now, I——

The Master: I won't accept that evidence, whether the other side objects to it or not.

Mr. Moran: I was just going to say I don't see any place for that in this record. If they want to tell their secrets, I would be glad to have them come to my office and tell me about it. I don't see where it comes in here. If you want to enlighten me about it, send me a letter.

Mr. Jackson: My primary purpose was to enlighten the Court.

The Master: We can't go into the question here as to whether the Public Service Commission has got enough appropriation to carry out its functions given to it by Statute.

Mr. Jackson: It is not the question at all, sir; it is the question as to whether any such function was intended by statute, and whether the possibility of the Public Service Commission to——

The Master: I don't think there is any possible evidence that this witness can give, which can enlighten us on that subject. We don't know what the purpose of the thing is behind the Legislature when it makes an appropriation for the Public Service Commission. We can't possibly go into that.

1644 Mr. Jackson: Well, I am not asking these question to ascertain the purpose of the Legislature at all; I am asking these

questions to ascertain the possibilities of the exercise of any powers of the Public Service Commission which it might have.

The Master: Well, I will not accept the testimony on that offer of proof.

Mr. Jackson: May I have an exception?

The Master: Exception.

Q. Now, you have made some examination of the accounts of the Kings County Lighting Company?

A. Some examination.

Q. And to what extent have you made an examination?

A. Why, we looked at the general books, checked up the postings of the journal books, too—I won't attempt to say what fraction of the total postings, but several hundred among the more important books.

Q. And when did you start any such examination?

A. Probably four weeks ago.

Mr. Moran: I object to that. Just a moment. I object to when it started. If you have any results here, bring them forward. I object.

Mr. Jackson: It is not upon that question at all.

The Master: You are simply re-enforcing the ground that I have taken for permitting the books in evidence.

Mr. Jackson: Well, whatever reinforcements there may be, your Honor, I am satisfied that it should exist; but I don't view it in the same light that your Honor has apparently viewed it at this time.

1645

The Master: I will let him answer the question.

The Witness: I did answer it.

Mr. Jackson: I am perfectly willing that the facts should appear, but I don't want any deduction made from the facts further than the facts are entitled to have deduced from them. That is all the purpose of this evidence.

Q. And when did you begin any such inquiry?

A. About four weeks ago.

Q. And that was an inquiry directed to ascertaining some facts with regard to this litigation?

A. Yes, sir.

Q. Had you made any investigation of the company's books before that?

A. No, sir.

The Master: You are speaking of yourself—you personally?

The Witness: No, I have not. The employes of the Commission, of course, at various times, I believe, have in connection with the other cases, but I personally have not done anything except on the annual reports which have been rendered by this particular company.

Q. What does your work consist of, that you have mentioned, upon the annual reports of this company?

A. I have charge of the examination of those reports,—
1646 for, I think, three years, and also the letters written concerning those reports to the company.

Q. And what did you do when you examined those reports?

A. We make an attempt—the primary purpose of the examination is to see if there is anything in those reports that discloses lack of conformity with the uniform system of accounts. Then, of course, there is the various clerical examinations, like addition of cross checking, and so forth.

Q. Cross checking what?

A. The various facts in connection with that report.

Q. That is, as shown on the report itself?

A. The report, yes, sir.

Q. And then what else is done with the examination?

A. That practically constitutes the whole of the examination of the annual report.

Q. That is, your examination is of the report, nothing else?

A. Just the report, not the books supporting it.

Q. And that is the practice of the Commission as to all these reports of the plaintiff that have been filed?

A. That has been the regular procedure of the Public Service Commission, so far as the examination of reports is concerned,—that is, the books is concerned of these various companies, except when cases came up.

Mr. Jackson: Yes.

1647 The Master: That is the procedure that they have adopted of their own volition, and not because of any action of the company, is it?

The Witness: No, that is the procedure that has been adopted on account of the availability of funds.

Q. And of the possibilities of the extent of the working force?

A. Yes, sir, on account of the limitations of the working force.

By Mr. Moran:

Q. What did you ever do before that, when you had lots of money and lots of force?

A. What did our Bureau do?

Q. Yes, what did you do with respect to annual reports?

A. Oh, I think our Bureau has been pretty well busy ever since it has been over there.

Q. I know, but what more did you do with annual reports, when you had lots of men and lots of money?

Mr. Jackson: Did you ever do anything different, he wants to know?

Mr. Moran: Just wait a moment.

A. Why, we have been doing the same thing now—let us see—from 1908 to date. I think the field of work covered by our bureau has been the same.

By Mr. Jackson

Q. And that is so far as these annual reports of these public utilities corporations, all that is purposed by the Public Service Commission to do is to examine the reports and see that they conform to the uniform system of accounts and see if they cross check upon themselves?

1648

A. Yes, sir.

Q. You do not attempt to check those reports even against the company's books, do you?

A. Not currently.

Q. And then the only time that it is customary to make any inquiry at all as to the company's books is when there is some such litigation as this pending?

A. That is correct.

Q. In view of this litigation, or rather in view of the litigation of this same company in the State Court recently, there was some examination made by the books then?

A. I believe there was.

Q. And did you have anything to do with that?

A. No, sir.

Q. Did you know about it? Were you in the Public Service Commission's office then?

A. In general—I was there, yes.

The Master. We will cut off this examination, unless it is directed to some specific fact; but we have got enough on the general system of the Public Service Commission. I think we had better direct ourselves to some specific fact as disclosed in these reports of 1919 and 1920 if you have that in mind.

Mr. Jackson. Yes.

1649

The Master. But please do not ask any more questions about the general practice. I think we have not enough of it.

Mr. Jackson. Well, I shall be content to take a ruling upon that, but if it is possible that my question which is directed to the specific——

The Master. Well, ask your question and I will.

Mr. Jackson. (continuing) ——fact overlaps the other question, it will be entirely unintentional.

Q. When this first litigation came up, you were aware that the immediate object of inquiry was principally directed by the plaintiff to the operating expenses of 1919 and 1920?

A. Yes, sir, the six months of 1920.

Q. And there were submitttted by the plaintiff some exhibits that have subsequently been offered in evidence here?

A. Yes, sir.

Q. These schedules, Exhibit 6 and other summaries?

A. Yes, sir.

Q. And what did you do with reference to those exhibits?

A. We went over to the company's offices to check up those two exhibits against the company's books.

Q. And I want to be just as brief as we possibly can——

Mr. Moran: He just went over, he says.

Mr. Jackson: What?

Mr. Moran: He says he just went over to do it. He does
[650] not say he did it.

The Master: Don't interrupt. Let us get this, please.

Q. You went to the company's offices?

A. Yes, sir.

Q. And you examined some entries upon the books?

A. Yes, sir.

Mr. Moran: That is leading.

Mr. Jackson: I don't want to lead. I refuse to follow examples I have seen here.

Q. What did you do when you got to the company's offices?

A. We continued that checking.

Q. What do you mean by checking? What did you do?

A. That is, the comparison of these two exhibits with the company's books.

Q. What parts of the company's books—the various books, there?

A. Various books, the books that are in evidence.

Q. And how far back in the company's books toward the underlying data did you go?

A. We did not — beyond the—with the exception of a very few vouchers which my two assistants examined, we did not go beyond the books which have been entered here in evidence.

Q. And you had assistants with you upon that?

A. Two.

Q. And for about how long altogether were you examin-
[651] ing over at the company's offices their books and checking against these exhibits?

A. Why, as an estimate, I should think there would be the equivalent of one man for 20 or 25 days.

Q. Now, with all the work that the accounting department and the Public Service Commission has to do, was it possible, in the time that was pending before this litigation came to trial——

The Master: Don't answer this.

Q. (Continuing:) For you or your assistants to have done any more than you did?

The Master: Don't answer it. I won't take any more testimony on that.

Q. (Continuing:) In that respect?

The Master: It is utterly immaterial as to whether it was possible or not for the Public Service Commission.

Q. Were you able, with the time that you had and the accounting force that you had at your disposal, to make a complete checking of these exhibits against the company's books?

Mr. Moran: I object to that.
The Master: Objection sustained. Just ask him whether he did or not.
Mr. Jackson: I will take an exception to that.

Q. Now, did you?
A. We did not make a complete check.
Q. By what proportion towards completeness did you fail?

1652 Mr. Moran: Well, I object to that, as long as he did not complete it.

Q. Have you any idea?

Mr. Moran: Just a moment.
The Master: Do not answer it.
Mr. Jackson: Very well, I will pass it, then.

Q. Now, you have had some schedules prepared by Mr. Ross under your general direction?
A. Yes, sir.
Q. And Mr. Ross is one of the assistants in your department?
A. Yes, sir.

Mr. Jackson: That is all.
The Master: Have you any questions, Mr. Moran?
Mr. Moran: No.
The Master: That is all, Mr. Witness.

(Witness excused.)

The Master: The next witness.
Mr. Jackson: All right. Mr. Ross.

Louis Ross, called as a witness in behalf of the defendants, being first duly sworn, was examined and testifed as follows:

Direct examination.

By Mr. Jackson:

Q. Where do you live, please?
A. 1180 President street, Brooklyn.
Q. And what is your occupaion?
A. Accountant for the Public Service Commission, First
1653 District, in the Bureau of Statistics and Accounts.
Q. And how long have you been employed in that capacity?
A. Seven and a half years.
Q. Now, you assisted Mr. Howard in this examination or checking of some exhibits in this case against the books of the plaintiff recently?
A. Yes, I have.
Q. And you heard him testify?
A. Yes.

Q. Just now?
A. I did.
Q. And you agree with him as to the general facts that he stated as to the opportunity you had for examination and the extent of the examination that you made?
A. I do.
Q. Now, you have prepared some schedules here?
A. Yes, sir.
Q. They have been prepared from what?
A. From the books of the company and the reports of the company to the Public Service Commission.
Q. These schedules which have been prepared were taken from what?
A. From the books of the company and the reports of the company to the Public Service Commission up to and including the year 1919.
Q. Now, those are schedules. Just state what those schedules are?
A. General balance sheets, December 31, 1918 and 1919, and June 30, 1920; a statement of operating revenue, expenses
1654 and taxes for the years ended December 31, 1918 and 1919, and six months ended June 30, 1920.
Q. That is a second sheet?
A. That is the second one.
Q. And the third sheet is what?
A. Disposition—that covers—well the second sheet, disposition of gross corporate income for the years ended December 31, 1918 and 1919, and six months ended June 30, 1920.
Q. Fourth sheet?
A. Details of operating expenses for the years 1918 and 1919 and six months ended June 30, 1920.
Q. A fifth sheet?
A. That covers two sheets. Taxes charged to income for years ended December 31, 1918 and 1919 and six months ended June 30, 1920.
Q. Next sheet?
A. Then the last sheet, signi-cant operating data for the years 1918 and 1919.

The Master: Well, is there any objection to these, Mr. Moran, going in evidence?
Mr. Moran: There is one there I have not got.
The Master: You are going to offer them in evidence, aren't you?
Mr. Jackson: Yes.
The Master: Is there any objection to these, Mr. Moran?
Mr. Jackson: I offer those in evidence.
Mr. Moran: These are duplicates of what we put in evi-
1655 dence, so far as they relate to operating expenses for 1918, 1919 and 1920—duplicates of ours. There is some minor——
The Master: Well, in every particular?

Mr. Moran: Practically every particular.

Mr. Jackson: Are they regroupings?

Mr. Moran: No, they are not; precisely the same as ours, except they have got in here some accounts of accruals which we did not put in ours.

Mr. Jackson: If I may be allowed to offer them, and put them in evidence, I will consent that upon inspection if that appears these be eliminated and plaintiff's exhibits be taken instead.

The Master: I should not think it would be very difficult to find out whether they were duplicates or not.

Mr. Jackson: I have not had time.

The Master: We don't want to cumber up the record, if they are the same identical thing. Of course, the defendant is entitled to put in his compilations in any form he wishes to put them in.

Mr. Moran: There is no difference so far as they relate to the operating expenses of this company for 1918, 1919 and six
1656 months of 1920, with the simple exception that they have in the accrual of legal expenses, which has never been paid in this rate case, in all the three years. I don't think there is anything else in there, is there? No, they are absolutely a duplicate of them. Isn't that right?

The Witness: Well, to a large extent, but these are from the books—the revenues are different from yours.

Mr. Moran: Now, wait a minute. I am not talking about revenue at all.

The Witness: Well, you mean expenses?

Mr. Moran: I mean expenses.

The Witness: Well, substantially, they are bound to be if they are taken from the same sources yours were.

Mr. Moran: Of course, they are the same.

Mr. Jackson: Now, will you——

Mr. Moran: Let me finish. That is what they are.

Mr. Jackson: Well, I am going to stop the——

The Master: I just asked Mr. Moran if there is any objection to them, and he has pointed out an objection that he makes. Let him continue to point out, and you can——

Mr. Jackson: He says they are the same, and the witness was speaking of some differences.

1657 The Master: We will suspend for five minutes and inquire if they are the same. Have the witness look at the exhibits put in evidence, and see if they are the same. Of course, if they are the same thing they can't go in evidence, because it will simply duplicate. If they are different compilations and you wish to offer them in evidence, they will be received in evidence.

Mr. Jackson: I would like to ask the witness upon that subject.

Q. How is that?

A. Well, I remember the exhibits. This is a statement of the income of the company beginning with the revenues——

Mr. Moran: No, we are not talking about that.

A. (Continuing:) And running right through. And it is necessary to have the statement of expenses included in order to have a complete income statement.

The Master: Well, is there any objection to that sheet, Mr. Moran?

Mr. Moran: Which sheet are you referring to now?

The Master: That he just referred to.

The Witness: That is the income all the way down, this second one; is that what you mean?

Mr. Moran: I have not talked about that at all; that is another matter.

1658 The Master: Separate them.

Mr. Jackson: Now, if your Honor please, these schedules are a continuation of other schedules which were offered upon the former trial, and were in evidence upon the former trial. They were put in evidence by Mr. Moran, by Mr. Frank, and it was a regrouping that was put in. It was a grouping and regrouping of figures taken from the plaintiff's books and the plaintiff's reports to the Public Service Commission. In some respects, as I understand it—although I would not wish to misstate it—they are different in figures from the plaintiff's figures; and this re-grouping shows another phase of those figures.

The Master: If they are such——

Mr. Jackson: Well.

The Master: If they are a regrouping, you are entitled to have them in evidence. So, do not let us argue about this.

Mr. Jackson: Well, there is not the slightest question about it; they are a regrouping of the figures, are they not, Mr. Moran?

Mr. Moran: I don't think so.

Mr. Jackson: They do not duplicate the form of your exhibits?

Mr. Moran: I don't think so.

1659 Mr. Jackson: Well, you have stated it and now you say you don't think so.

Mr. Moran: The account is here, and he states it is a fact.

The Master: We will suspend for five minutes, and Mr. Gonmond and the witness can compare these and see if we can reach any agreement.

Mr. Moran: There is no doubt about it.

The Master: We will suspend for five minutes to hasten this inquiry. Now, my ruling will be that those which are identical will not go in evidence, as it will simply encumber the record. Simply those that are different will go in evidence.

(A short recess was taken, after which the witness resumed the stand.)

By Mr. Jackson:

Q. Do you agree that they are identical?

A. With the exception of the item of legal expenses, general legal expenses, which, on my statement, includes general law expenses, which——

Q. Oh.

A. My statement shows the segregation between rate litigation and other litigation.

Q. Now, these schedules that you have are in a certain form, from the top of the page to the bottom, and the items are set off in a certain order?

A. Yes, sir.

1660 Q. And the order is different from the plaintiff's schedules?

A. About the same—the same.

Q. About the same?

A. About the same.

Q. I see. Now, then, these schedules that you have made out are schedules that were designed to—carried forward for the years 1919 and 1920 certain other schedules that were put in evidence in the former trial, that set forth the same items in the same order for what years?

A. Do you mean the years that I have here?

Q. The years that the other schedules were?

A. Oh, the other schedules covered the period 1904 to 1919.

Mr. Moran: 1909?

The Witness: What?

Mr. Moran: 1909 to 1919.

Q. Well, have you the schedules there?

A. (Witness produces papers.)

(Discussion off the record.)

The Master: So far as 1916, 1917, 1918, 1919 and 1920, the papers that you are offering in evidence are the same as those already in evidence; is that not right?

Mr. Jackson: Perhaps I had better—I have been talking off the record, and so there isn't anything on the record as to what I am offering.

Mr. Moran: He is asking a question.

The Master: I am just asking a question.

1661 Mr. Moran: All right.

The Master: So far as the papers you are offering in evidence relates to the years 1916, 1917, 1918, 1919 and 1920, they are identical?

Mr. Hill: You have not 1916 in, your Honor.

The Master: Well, so far as 1917, 1918, 1919 and 1920 are concerned, they are the same as papers already in evidence, are they not?

Mr. Jackson: I will answer that in just a moment. Are 1917, 1918, 1919 and 1920?

Mr. Moran: Yes; that is true.

Mr. Jackson: Well, here, here is one part.

The Master: Well, just answer that question, please.

Mr. Jackson: Yes. Let me show counsel first, before I answer—if I show him a sheet here which says:

"Kings County Lighting Company, significant operating data for the years 1918 and 1919"—is that in one of your exhibits?

Mr. Moran: It is in there. That is in there, but it is not in that form—that particular thing.

The Master: Except for that sheet, are they all in there in the same general form?

Mr. Moran: That is another sheet, your Honor, entirely.

1662 The Master: I understand.

Mr. Jackson: I *will* you, your Honor, the trouble with that is this: You see, I will show you that sheet——

The Master: Let me rule this way: So far as any of these papers are concerned which antedate 1917, I will not receive them in evidence, and I will give you an objection and exception to my ruling. So far as any of the papers which you offer in evidence relate to transactions—relate — the books of the company for the years 1917, 1918 and 1919 and 1920, and are the same compilations as those already made or put in evidence, I will not admit them in evidence for the reason that I do not wish to cumber the record. So far as they are different compilations of facts stated in the books of the company, I will admit them in evidence. Now, if you will make your offer according to that point, have such as relate to the periods which I have excluded marked for identification, you may preserve your rights by an exception to my ruling. So far as they are different compilations, different groupings, if you will offer them in evidence they will — marked in evidence. I think that is clear, isn't it? My ruling is clear?

Mr. Jackson: I think so. I would like to have it made 1663 clear, though, by a specific offer. That will be the end of it.

The Master: All right.

Mr. Jackson: I understand your Honor's ruling.

Mr. Hill: Well, you want to take an exception to the——

Mr. Jackson: Not yet, because I am going to continue my offer. Well, I will take an exception to the statement so far as your Honor has made it.

The Master: Yes, so far as my ruling does not meet with your wishes, you take an exception.

Mr. Jackson: But I will take a specific exception in a moment. Now, I have here what I believe to be a schedule, which is a copy of an exhibit that was offered in evidence in the trial of the Kings County Lighting Company's case in the State Court before Justice Greenbaum, and it was there introduced in evidence through the testimony of a witness named Frank. This schedule is in a cover that is labeled: "Comparative Statement Showing Operating Results and Financial Conditions, 1904-1918. Accountants' Schedules Prepared by Charles Frank of the Bureau of Statistics and Accounts, and introduced as exhibits in the Supreme Court in suit of company to set aside the Eighty Cent Gas Act of 1916."

This copy that I have here is a typewritten copy or mimeo- 1664 graphed copy, and it has on the margin—in order to carry out the 1918 figures, into 1920—it has memorandum of the accountant who was working on them, Mr. Koss, in lead pencil. I

haven't a copy here in the court room without those lead pencil figures upon them, which are meant to carry out the column as 1920.

The Master: Well, you don't offer that?

Mr. Jackson: And I would like to have the exhibit considered without reference to those lead pencil figures. Now, I have not produced Mr. Frank here, assuming that so far as the authenticity of this paper is concerned, and so far as the correctness of the transcribing of the figures herein contained from the plaintiff's books and from the reports of the plaintiff to the Public Service Commission, that they would be assumed or conceded by counsel to be correct.

Mr. Moran: I never saw the papers you hold in your hand.

Mr. Jackson: Then you will note concede so far as——

Mr. Moran: The Court has excluded the proof.

Mr. Jackson: It has not yet.

Mr. Moran: I believe it has.

Mr. Jackson: I want to get a more definite ruling; and if not, I am going to insist on taking up time and bringing the wit-
1665 ness here and offering the schedule in proper shape so that it will not be subject to that objection.

Mr. Moran: I have not objected to it at all. The Court advised you——

Mr. Jackson: I know, but I ask you now. I hand you this exhibit and ask you if it is a copy of it. It is one of the mimeographed copies of the exhibit.

Mr. Moran: I would not pass judgment on it now.

Mr. Jackson: Then I ask time until tomorrow morning to come in with this in proper shape, because I have not raised any such question as to any of counsel's figures that his accountants have taken. I have assumed them to take them correctly from their books when they made these schedules, and when they said so. We have accepted them as correct.

The Master: I will treat it as an offer of proof, and have it marked for identification, and reject it.

Mr. Jackson: Oh, I have not offered this proof in a perfectly competent form yet and I wish to remove that element of objection.

The Master: I will take it as an offer of proof.

Mr. Jackson: These schedules in this form?

The Master: Offer of proof of these schedules in that form, and I will reject them, according to my ruling and give you an exception.

1666 Mr. Jackson: Now, then, these schedules that this witness has just testified to are in—the items are arranged in the order of the schedules in the other case.

The Master: Well, they are not in——

Mr. Jackson: And they are simply carrying out those columns and lines under the years 1918, 1919 and 1920, so that it *be* may be easily compared for the Court.

The Master: Well, so far as the papers contain figures relating to 1917, 1918, 1919 and 1920 which are not already in evidence in this case, you may put them in.

Mr. Jackson: But the point is this, your Honor——
The Master: So far as they do not——
Mr. Jackson: No.
The Master: So far as they contain figures contained in other exhibits that are in evidence, I will not receive them, for the simple reason that it is obvious they will encumber the record.
Mr. Jackson: The point is this——
The Master: Now, I understand what you mean but your first offer is rejected.
Mr. Jackson: May I just——
The Master: The first offer is rejected.
1667 Mr. Jackson: May I just explain my purpose, just a moment further, and then we will pass it finally? Plaintiff has offered here several different groupings of the same figures, to show certain illuminating effects as he considered it would be for the Court. Now, we have made one form here of a schedule, that has brought down to date a schedule that was put in evidence in the other trial, for such information, comparing the expenses of 1920 with prior years back to 1904. We believe that that is valuable upon the issues in this case, for the Court to have before it a grouping of the expenses, for convenience in looking those over, to have it in this form. I think that the mere matter of the arrangement of expenses in this form for the convenience of the Court is a privilege that should be allowed, as long as it is not indulged in to too great an extent, to a party. This is——
The Master: Oh, your own witness has stated that they are the identical figures.
Mr. Jackson: But even if they were the identical figures, that they group those figures so as to show——
The Master: He doesn't say they are grouped differently, except for the fact that as far as legal expenses are concerned, in his figures, appear the legal expenses of this rate case, while in plaintiff's
1668 figures those do not appear. Isn't that so, Mr. Witness?
The Witness: Yes, sir.
Mr. Jackson: In the first place——
The Master: Now, in his own statement—please ask the witness that question. He has answered affirmatively my question.
Mr. Jackson: If your Honor please, in the first place these exhibits that the witness has made himself and which we are attempting to introduce here, were merely supplemental to the exhibits in the other case, and they carry out the columns of the other case, so as to make the whole schedule illuminative to the Court. Now, if we want a schedule that is all one piece of paper, don't you see, instead of having the Court look back to those figures of 1904——
The Master: I know, but I am not going to look at those figures at all.
Mr. Jackson: Pardon?
The Master: I am not going to look at those figures at all.
Mr. Jackson: You are going to exclude as to this exhibit that was in evidence in the other case—you are going to exclude the proof and all the figures that were shown on this exhibit, and every

item of them during the years 1904, 1905, 1906, 1907, 1908,
1669 1910, 1911, 1912, 1913, 1914, 1915, 1916 and 1917?

The Master: 1916—up to 1916.

Mr. Jackson: Up to 1916. All from 1916 and prior to that time you will exclude?

The Master: Yes, sir.

Mr. Jackson: And I would like——

By the Master:

Q. These papers you have during the interval gone over with plaintiff's accountant, have you not (handing papers to witness)?

A. No, not at all—just the items pertaining to detail of operating expenses.

Q. Well, now, which ones of those papers that I give you do you claim are different from papers which are already in evidence? Please hand them to me.

A. These, with the exception of these two (indicating).

Q. Now, which papers are different?

A. The one entitled "Details of Operating Expenses for the years 1918 and 1919, and for the six months of 1920."

Mr. Moran: Are different?

The Witness: Oh, no, they are not; those are identical. I mean The others——

Q. Those are identical?

A. Yes, the others are different.

Q. The other are different?

A. The others are different, with the exception of the
1670 item of——

The Master: They are excluded for the reason that they will simply cumber the record.

Q. These papers, describe them, please (handing papers to witness)?

A. Yes, sir. General balance sheet, December 31st, 1918 and 1919 and June 30th, 1920.

Q. Go ahead and describe the rest of them?

A. Statement of operating revenues, expenses and taxes for the years ended December 31, 1918 and 1919, and the six months ended June 30, 1920. Disposition of gross income for the years ended December 31, 1918 and 1919, and six months ended June 30, 1920. Taxes charged to income for the years ended December 31st, 1918 and 1919 and six months ended June 30, 1920. Then, significant operating data for the years 1918 and 1920.

The Master: Those are admitted in evidence.

Mr. Moran: If your Honor please, will you hear me on this?

The Master: What?

Mr. Moran: We have been keeping things out—those things all during this trial.

The Master: What for? Why?

Mr. Moran: Why?

The Master: Aren't these compilations from the plaintiff's books?

Mr. Moran: But they have nothing to do with our expenses
1671 at all.

The Master: Well, the defendant regards them as significant data upon which to——

Mr. Moran: Oh, no, he does not—I beg your Honor's pardon, he does not regard them——

The Master (continuing): —predicate argument on the operating expenses of the company.

Mr. Moran: Oh, no, he does not at all—not at all, your Honor.

The Master: What are they offered for?

Mr. Moran: Let me call your Honor's attention. The first is a balance sheet of the company which contains the capital account of the company, bonded indebtedness, stock issue, surplus and everything like that. It does not contain a single fact on there that is pertinent to this case in the view of the way we have handled it,—not a thing on that sheet. There isn't an operating expense on there, not a thing on there, that is not already in the case, that is pertinent to the case.

(The Master examined the papers offered in evidence with the exhibits in evidence.)

Mr. Moran: The first sheet is a balance sheet, that I have mentioned that does not add anything to the case. The next
1672 one——

The Master: So far as the balance sheet is concerned, if the defendants wish it in evidence, it may be received, with the warning from the Master that so far as it refers to fixed capital, debt, stock——

Mr. Moran: Surplus?

The Master: Corporate surplus—it will be disregarded by the Master in any findings of fact, due to the stipulation. If you wish it in, you can have it in. I see no real objection to it.

Mr. Jackson: Exception, please, to any limitation.

The Master: Yes.

Mr. Moran: The next sheet——

The Master: The next sheet, I see no objection to putting it in, in the way you wish it in, if you wish to put it in in that way.

Mr. Moran: Will you please let me call your attention to the fact that it is a fictitious figure based upon a 95 cent rate—talks about a statement of operating revenues, expenses and taxes. It is all figured at 95 cents. It is going to be absolutely——

The Master: If they want to figure it in that way they can
1673 do so. It is going to be confusing, no doubt, but if they wish to put it in that way, they can put it in.

Mr. Moran: I see. The third sheet is analysis of corporate surplus, which is on the balance sheet——

The Master: The third sheet, which refers to a compilation, as I understand it, of final surplus, can't be material to this inquiry, because in the determination of the surplus, the capital account neces-

sarily must be considered, and I am not disposed to let that sheet in, Mr. Jackson. I do not think it is material under the stipulation. The fourth sheet——

Mr. Moran: Well, of course, the value of that would be in——

The Master: What possible value could that give

Mr. Jackson: In carrying out the other schedule, that is all, and as a part of the schedule.

The Master: I am not going to judge these exhibits on that schedule, because that schedule I have specifically left out. I am not going back of 1917 for any purpose.

Mr. Jackson: Yes. May I have an exception as to your ruling on that, your Honor?

The Master: Yes. But the next sheet, the one relating to taxes charged to income, if you wish it in, I will let it in.

1674 Mr. Moran: That is already in, your Honor, on the last page of our exhibit.

The Master: Well, if they want it in in that form they can have it in. It is not worth fighting about. And the last sheet, the significant operating data for the years 1918 and 1919 may be admitted also. Now, that disposes of those.

Mr. Moran: Well, I will have to call Mr. Gonnoud to the stand to explain some of these things.

The Master: Now, mark that.

(The paper was received in evidence and marked Defendants' Exhibit D-23, D-23-A, D-23-B for identification, D-23-C and D-23-D.)

The Master: With reference to this, it can be marked for identification only.

(Paper marked Defendants' Exhibit D-24 for identification.)

The Master: Now, so far as this exhibit marked for identification refers to 1917, the same ruling will apply to its schedules, as applied to the schedules Defendants' Exhibit D-23 and sub-schedules.

Mr. Moran: As the ruling now stands, we have a balance sheet for 1917, 1918, 1919 and 1920, we have a statement of operating

1675 revenues, expenses and taxes for the same period, we have taxes charged to income for the same years, and we have significant operating data for the same years. Now, I think those ought to be put on—I think the year 1917 ought to be put on here.

The Master: I think it would be simpler——

Mr. Moran: Instead of having to go to this great big book that has been excluded.

The Master: I think it would be much simpler if you can have that done. It can be dug out from the record, but it is very much simpler to put the year 1917——

Mr. Jackson: To rearrange the schedule.

The Master: To put the year 1917 on the schedule.

Mr. Jackson: To rearrange the schedule in accordance with your Honor's ruling.

Mr. Moran: That means simply putting 1917 on Exhibit 23.

Mr. Jackson: Whether you said it differently or not, it means the same thing.

The Master: Yes, that is the same thing.

Mr. Jackson: Prepare a schedule in accordance with your ruling, leaving out the exhibit—I understand one of these sheets your Honor excluded.

1676 The Master: It is only for identification, yes.

Mr. Jackson: Surely we will. You understand, don't you?

The Witness: Yes, sir.

Mr. Jackson: Now, I would like to note an exception to your Honor's ruling in respect to——

The Master: You can have an exception to all the rulings which are adverse to you, to your offer of evidence.

Mr. Jackson: Good. I think that covers that. And we will have these figures rearranged so that, so far as the showing may appear in accordance with your Honor's ruling we will show it in that way, in compact form, so we will put it as compact as we can. I think that is all, Mr. Ross.

The Master: Is that all? Are there any other questions of the witness? Then that is all then.

(Witness excused.)

The Master: Have the defendants any other witnesses? Any other evidence?

Mr. Jackson: I had in mind calling Mr. Mitchell, the engineer, very briefly.

The Master: Well, where is he?

Mr. Jackson: He had to go. He has been waiting her for two days.

1677 The Master: Have you anything else?

Mr. Jackson: I have these letters

The Master: Well, with Mr. Elsman?

Mr. Jackson: Yes.

The Master: All right. Mr. Elsman, take the stand.

RALPH ELSMAN, recalled in behalf of the defendants, testified as follows:

By Mr. Jackson:

Q. Mr. Elsman, referring again to the correspondence which you have produced here, you say that this is all the correspondence you have had with oil companies regarding your supply of oil during the years 1919 and 1920?

A. All the correspondence, yes

Q. I said that, my dear boy.

A. Inviting bids.

Q. Well, didn't I ask you to produce here all your correspondence with all the oil companies that you corresponded with during the years 1919 and 1920, regarding or in reference to your supply of oil?

A. Yes, sir.

Q. Not only as to the bids from those companies, but as to any complaints that you had to—that you made to them regarding the quality of your oil, or upon any other subject whatever?

A. No, you did not ask me to submit that correspondence.

1678 Q. What correspondence do you say that I excluded?

A. That in reference to any other subject regarding oil other than bids.

Q. Well, in what way did you understand my request?

A. That you wanted all correspondence that I had in my possession—

Q. No, no.

A. (Continuing.) Wherein—

Q. Well, go ahead, if you are going to state it that way.

A. Wherein I invited bids for the supply of oil to the Kings County Lighting Company for the years 1919 and 1920.

Mr. Moran: Well, not only invited bids, but relating to contracts for oil?

The Witness: Relating to contracts for oil for that same period.

Q. And including any correspondence that you had relating to the quality of oil, either complaints or asking for a better quality, or anything of that nature—didn't you understand my question included that correspondence?

A. I have already answered that question that I had no such correspondence.

Q. Well, then, my request for correspondence included any correspondence that you might have had to that effect, didn't it?

A. I did not so understand.

Q. What?

A. I did not so understand.

1679 Q. Well, if you did not—did you have any such correspondence?

A. No.

Q. Then it would not have made any difference in the volume if you had brought that correspondence along?

Mr. Moran: I object.

Q. Now, then, did you understand my question to be limited by the correspondence that was in your possession?

A. That is all the correspondence we have.

Q. Then I am satisfied. So this is all the correspondence that you have upon the subject that you have mentioned?

A. Yes, sir.

Q. Now, first there is a letter here, December 7th, 1918, to Mr. Higgins.

A. Yes, sir.

Mr. Jackson: Will you mark it for identification. I am marking these in evidence as I go along, and ask the stenographer to mark them in evidence.

Mr. Moran: I object.

Mr. Jackson: Wait a minute. Are you going to object to them?
Mr. Moran: Yes, I am.
Mr. Jackson: Well, mark them for identification then.

(The letter was marked Defendants' Exhibit D-25 for
1680 identification.)

Q. The next is a letter dated December 7, 1918, addressed to Dr. B. W. Dudly, President, Prudential Oil Company, Incorporated, 17 Battery Place, New York City, which you wrote as General Manager, did you?
A. Yes, sir.
Q. And the letter is the same in substance as the letter we have just mentioned?
A. Yes.

Mr. Moran: I object. Just a moment now, I object.
Mr. Jackson: To my statement as to the substance of it?
Mr. Moran: I object to the whole question as incompetent, irrelevant and immaterial.
The Master: Objection overruled.

Q. The next is dated November 21, 1918, addressed to the same Mr. Dudley?
A. Yes, sir.
Q. And is different from the other letter?

Mr. Jackson: I would like that marked for identification.

A. The same man, the same thing.

(The letter was marked Defendants' Exhibit D-26 for identification.)

Q. From your correspondence would you say that those letters to Mr. Dudley were unanswered?

A. Yes, sir, if no answer appears there with them they are
1681 unanswered.

Mr. Moran: Well, he is asking you if you received any reply at all. I don't think it shows——
Mr. Jackson: I am talking about the written correspondence.
Mr. Moran: It sounds as though they ignored the letters. Now, business people in this community do not do that, they write by return mail.
The Witness: I had a reply, but not in the form of a letter.
Mr. Moran: I would make it clear then that you did not get a reply, they called you on the telephone.
Mr. Jackson: The witness did not say that, he said some companies they wrote to——
The Master: He said he did not receive a written reply to it, and that now he received a verbal answer.
The Witness: I had many conversations after that.
Mr. Jackson: I want the fact, don't you see.

The Master: That is what he said. Let us go along to the next letter.

Mr. Jackson: But he has not stated it all, your Honor, and if Mr. Moran had not interfered———

1682 Q. You have said before that some of these oil companies you wrote to never replied to your letter and never paid any attention to them at all, didn't you?

A. They did not reply, and I followed them up by telephone conversations and personal visits.

Q. In each and every case?

A. Each and every one.

Q. Of every oil company that you ever corresponded with upon this subject during 1919 and 1920?

A. Oh, except those that were outside of New York City.

Q. But as to all that had a representative in New York City you did that?

A. Yes, sir.

Q. When they ignored your letter so far as written responses?

A. Yes, sir.

The Master: That is far enough.

Mr. Jackson: I think I ought to go far enough with them, because———

The Master: You can have your exception, that is as far as you can go.

Mr. Jackson: I don't want to go any further than to bring that out, because that is different from his testimony that he testified last, and it is upon counsel's prompting at the present hearing.

The Master: That will speak for itself, if he contradicted himself.

1683 Mr. Jackson: I want that to appear upon the record.

Q. The next is a copy of a letter dated December 7th, 1918 written by you to E. A. Lyon, as District Sales Manager, Gulf Refining Company.

Mr. Moran: I object to the question as incompetent, irrelevant and immaterial.

The Master: Objection overruled.

Q. Is it?

A. Yes, sir.

The Master: The same as any other letter that has been offered?

Mr. Jackson: It is different.

Mr. Moran: Practically.

The Witness: The same thing.

The Master: Substantially the same?

The Witness: Yes, sir.

The Master: I mean, Mr. Jackson. If there is any change in it, please point it out.

The Witness: The same thing as these other letters?

Mr. Jackson: Now, I told your Honor when I started out that this objection and conversation with the witness, and whether it is the same thing, is going to take more time.

The Master: Mr. Jackson, I am the one that is doing it now.

1684 Mr. Jackson: All right, but it is going to take some time.

The Master: And I insist upon proceeding this way. Is it the same letter?

Mr. Jackson: It is not.

The Master: All right, point out the difference.

Mr. Jackson: Well, I will show it to your Honor, that will take less time than to read it on the record. It refers to different things. It refers to whatever correspondence he may have had, communications he might have had with them in the meantime. It is an answer, refers to something else; it is not a circular letter at all.

The Master: It is a different letter. Go ahead.

The Witness: May I see the letter, please?

(Witness refers to letter.)

(Letter marked Defendants' Exhibit D-27 for identification.)

Q. The next, dated December 14, 1918, is a reply to your letter of the date of December 7, 1918?

A. Yes, sir.

(Letter marked Defendants' Exhibit D-28 for identification.)

Q. Here is a letter from you as General Manager to the

1685 Gulf Refining Company, 21 State Street, dated November 21, 1918?

A. Yes, sir, similar to the letter of Defendants' Exhibit D-26 for identification.

Q. That is what you say, identical in wording?

A. I have not read it over.

Q. Well, look at it.

A. The substance is the same.

The Master: It is the same.

Mr. Jackson: All right then, we will say it is identical in wording as what?

The Master: It is in evidence what it is identical with.

Mr. Jackson: Well, the exhibit.

The Master: He has already testified.

Mr. Jackson: All right.

Q. And this letter dated November 25, 1918 from the Gulf Refining Company to the Kings County Lighting Company,—is it a reply to that letter?

A. Yes, sir.

(Letter marked Defendants' Exhibit D-29 for identification.)

Q. There is a letter of November 21, 1918 addressed to Mr. C. E. Woodbridge, Texas Oil Company, 17 Battery Place, New York City,

and is the wording of that letter identical in wording with Exhibit D-26 for identification?

A. Yes, sir.

Q. And this letter from the Texas Company, dated Novem-
1686 ber 23, 1918, addressed to you, is a reply to that letter?

A. Yes, sir.

(Letter marked Defendants' Exhibit D-30 for identification.)

Q. Here is a copy of a letter dated December 7, 1918 to Mr. L. O'Mally, of the Texas Company, 17 Battery Place, New York City, in which the first paragraph reads: "I regret that we have not been able to get in touch with one another for the past week, and I would therefore like to confirm our various telephone conversations with reference to supplying this company with gas oil for the year 1919."

The Master: Otherwise the letter is the same as Defendants' Exhibit D-27 for identification.

Mr. Jackson: Is that true?

The Master: Yes.

Q. And here is a letter dated November 27, 1918, from the Texas Company to you, is it?

A. Yes.

Q. In reply to the last letter?

A. Yes, sir.

(Letter marked Defendants' Exhibit D-31 for identification.)

Q. Here is a letter dated December 12, 1918 from the Texas Company to you, is that true?

A. Yes, sir.

(Letter marked Defendants' Exhibit D-32 for identification.)

1687 Q. And this is a copy of a letter dated December 14, 1918, replying to that last letter?

A. Yes, sir.

(Letter marked Defendants' Exhibit D-33 for identification.)

The Master: Now, so far as the rest of them are concerned, Mr. Jackson, you may ask the witness if he did not write substantially the same letters to the other companies named,—to half a dozen more companies named, with substantially the same replies, other than that in some of the cases they stated that they could not supply oil to this company in barge lots; but I am not going to admit any further documentary proof along this line. We have had sufficient. That is final, and you can have your exception.

Mr. Jackson: Yes, sir. And may I have these marked for identification?

The Master: Yes, but without describing them.

Mr. Jackson: May the reporter mark them for identification? And where will they stay?

The Master: That is up to the reporter.

Mr. Jackson: May I keep them in my possession, or the reporter, until we have further occasion?

The Master: Let the company keep them. They will be
1688 at your disposal. He will mark them all here, and they can be identified at any time.

Mr. Jackson: Well, why not leave them in an envelope in our office? Do you want to use them? Just in an envelope in our office.

Mr. Moran: I think the company is entitled to its papers. You can have them and put them in an envelope——

Mr. Jackson: No, here is the correspondence produced by this witness. It seems to me——

The Master: The company can produce them at any time. They will be all marked for identification, and if the company does not at any time produce a paper marked for identification it will have the burden of any inferences that may be drawn against them.

Mr. Jackson: All right, then.

(The letters, 44 in number, were marked Defendants' Exhibits D-34 for identification, D-34-A, and so forth.)

The Master: The ruling on it is final, so far as I am concerned.

Mr. Jackson: I will except, your Honor. I will try and get further, with all deference.

The Master: Oh, there are some people above me in this, I recognize that.

1689 Mr. Jackson: I am through with Mr. Elsman.

The Master: I guess the Judge is through with you also.

Mr. Jackson: I think so.

(Witness excused.)

The Master: Now, let us see. Is your other witness here?

Mr. Jackson: Is Mr. Mitchell here?

The Master: Let us have Mr. Mitchell.

ROBERT H. MITCHELL, called as a witness in behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Jackson:

Q. Where do you live, Mr. Mitchell?
A. In Brooklyn.
Q. What is your occupation?
A. Electrical engineer.
Q. Where?
A. With the Public Service Commission.
Q. First District?
A. The First District of New York.
Q. How long have you been in that capacity?
A. Well, that is my official Civil Service classification.

Q. Yes.

A. But my position is engineer in charge of the Appraisal Division of the Commission.

Q. State briefly your qualifications.

A. I graduated in 1907 with the degree of——

1690 Mr. Moran: May I ask what the witness is for? I know Mr. Mitchell.

Mr. Jackson: Then we will pass the subject of your qualifications at the present time.

Mr. Moran: No; I am just inquiring.

Mr. Jackson: I have not time to explain everything I have in advance. It duplicates things.

Q. Have you ever made a study of the gas company's records as to the cost of repairs per thousand cubic feet?

A. No, I have not had the opportunity in this case.

Q. Well, why haven't you had the opportunity?

Mr. Moran: Well, I object now.

The Master: Objection sustained. He may state whether the company has prevented him in any way. You are a part of the official staff of the Public Service Commission?

The Witness: I am.

The Master: Has the company prevented you from making an appraisal?

The Witness: No, sir.

The Master: Of this particular item?

The Witness: No, sir.

The Master: Well, then I do not think it is material why he has not.

Mr. Jackson: Then I was going to get it shorter and I
1691 will try to get it another way.

Q. Are you informed as to the funds available to the Public Service Commission and as to the force in the department that you are connected with for investigating public utility companies within the First Division?

A. Yes, sir.

The Master: I am not going to let you proceed on that theory. You remember I stopped you before.

Mr. Jackson: Exception, please.

Q. When this litigation came up, of the Kings County Lighting Company, were any of the plaintiffs' exhibits submitted to you for examination?

A. No, sir.

Q. Were you requested to make an examination of any of the figures in regard to the plaintiffs' exhibits?

A. No, sir.

Q. You were requested to do some work. What was it?

A. To look over the general proposition and to ascertain what steps were necessary to be done in order to properly prepare a case for the defence.

Q. What did you do?

A. I made an effort, by sending one of my assistants down there, to look over the proposition in general, and refresh my recollection of the books of the company which I had gone over a number of years past but which was rather vague at that time. He reported to me his findings and refreshed my recollection of the situa-
1692 tion, and I came to the conclusion it would be impossible to undertake to do what I would like to do in order to properly present figures for the attention of the Court.

Q. And how much time did you spend upon that study?

Mr. Moran: Just a moment, I object to that.

The Master: Oh, I will let him state.

A. My assistant that I sent down there spent two days actually, and I spent perhaps one day myself going over the situation.

Q. And you are acquainted with the plaintiff's plant there and business in a general way, are you not?

A. Yes, I have resided in that same ward for over twenty years.

Q. And can you state, in reference to this litigation, how long it would take for you, with say two assistants, to make a complete investigation of the company's accounts for the purpose of informing yourself properly upon litigation of this kind?

Mr. Moran: I object to that.

The Master: Objection sustained.

Mr. Jackson: Exception.

Q. Now, what did you ascertain? Did you ascertain anything in regard to the repairs of the plaintiff?

The Master: He has just stated personally that he only spent a
1693 littple part, a small part of a day, as I understand it, considering this question, and gave it up. So I don't suppose that his testimony can possibly be of any assistance to the Court in this case.

Mr. Jackson: Perhaps he might have discovered something in that time.

Q. Well, now, what steps do you consider should have been necessary?

Mr. Jackson: Was that ruled out?

The Master: Yes, it is going to be ruled out.

Mr. Jackson: Then I will state it in full.

Q. What steps do you consider necessary and proper in analyzing and ascertaining the reasonableness or unreasonableness of expenditures, and in addition what factors do you take into account in carrying on any such investigation?

The Master: Do you object, Mr. Moran?

Mr. Moran: Oh, I don't see what it has got to do in the record.

The Master: Objection sustained.

Mr. Jackson: Exception.

The Master: It has not got anything to do with this case, in my opinion, Mr. Jackson, so it will save your time for me to rule the same way on every question of that sort that you ask.

1694 Mr. Jackson: One more I will ask.

Q. Have you made a detailed examination of the charges to repairs made by the company during the years 1918 to 1919 and the first six months of 1920?

The Master: You can answer that.

A. I have not. It is impossible, as I have stated before, to undertake a thorough analysis along the lines of proper procedure, which requires not only analyzing operating expenses, but analyzing the fixed capital accounts to find out that the items included in operating expenses are properly chargeable to operating expense, that they are reasonable and necessary.

Mr. Moran: Just a moment, Mr. Mitchell. I move to strike out the answer, and I object to the question.

The Master: I will let him state that he has not, and that it is impossible to do it within the day's time that he spent on the case.

Mr. Jackson: Well, yes. Well, will you allow the witness to complete his answer? I do not know what he is coming to.

The Master: No; he has stated he has not done it, and he can't do it in the time that he has spent on the case, as I understand it.

1695 Mr. Jackson: Now, of course, that is limited—your Honor limits it to the time that he has spent on the case.

Q. Was it possible to do that within the time that has been available to prepare this case?

A. Absolutely impossible.

Mr. Moran: I object to that.

The Master: Objection sustained. There is no evidence before the Court as to how much time there was available to prepare for this case. As far as I can see, the matter has been in litigation for years.

Q. May I ask you, how long would it take to make such an examination?

Mr. Moran: Objected to on all the grounds, and I ask the Court to admonish counsel to cease to take any time of the Court and counsel in this matter.

The Master: Oh, I will let him state that, from such an examination as he has made.

A. To properly conduct an examination of the operating expenses, and correspondingly and concurrently to carry on an investigation of the fixed capital expenditures for the years 1918 and 1919, and the six months of 1920, would take three engineers approximately four months working continuously.

1696 The Master: You have had just about that time since this case was brought?

The Witness: Just off the record, if your Honor will——

Mr. Jackson: No, put it on the record, please.

The Master: I say, you have had just about that time since this case was brought? Isn't that true? I mean, the case was brought in May, as I understand it.

The Witness: Well, your Honor, if I may be permitted to state that we have been under undue pressure, with the limited appropriation and with fifteen cases pending in the courts involving gas rate litigations, and in addition before the Commission,—Long Island Railroad rate case, the Manhattan & Queens Traction Corporation——

The Master: Well, I do not think you need to go——

The Witness: And several other railway and lighting matters within this city.

The Master: You see, that hasn't anything to do with the issues involved in this action, that I see.

Mr Jackson: I will take an exception to the Master's statement.

Mr. Moran: Mr. Mitchell, you have in your office an ap-
1697 praisal of this case, probably made by Mr. Hine a year ago, haven't you? Answer yes or —. Hasn't Mr. Hine, the gas engineer that preceded Mr. Merrifield, appraised this property and had it already to testify to before Justice Greenbaum? Isn't that so?

The Witness: That appraisal was never put in before Judge Greenbaum.

Mr. Moran: I know, but Mr. Hine prepared it and got it already to testify on it.

1698 The Witness: But that element, Mr. Moran, is a question——

Mr. Moran: Oh——

Mr. Jackson: Let him answer, please.

The Witness: That question of valuation is a question that is entered into in the stipulation, which is not the question at all that I am talking about.

The Master: That will be eliminated then.

The Witness: I am not discussing the question of the rate base. These are elements involving the question of whether operating expenses——

Mr. Jackson: I think, if the Master please——

The Master: Just a minute. I insist upon being allowed to ask my question I please.

Mr. Jackson: I object to the witness being stopped, either by counsel or the master, before he can answer the question.

The Master: Your statement then, when you said you have to analyze capital account, would be unnecessary in this case, wouldn't it?

The Witness: Except to the extent to find out and ascertain whether there had been an inflation in operating expenses and a

corresponding deflation in fixed capital, due to the company
1699 charging into operating expenses items of cost of physical property which were properly allocatable to the other class.

The Master: Well, you could examine that by looking into your operating expense. You don't have to into capital expense. You would not object if they charged into capital expenses operating expenses, would you?

The Witness: Well, your Honor, you do not find right on the face of the records of the company. A value is given showing repairs to an account. In order to properly analyze that money value, it is necessary to identify the property represented by that expenditure which requires——

The Master: Well, I am not going into that.

The Witness: Which requires going back through this system of records. This is just a general line, following the records right back to the original source, consulting the men that were on the ground when the construction work was performed, and ascertaining if the particular work was done and whether it is put under a name that it should not be put under, like repairing mains when it is constructing new mains.

1700 The Master: I am not going into the question of whether there has been adequate time to prepare this case any further. That is something entirely foreign to the issues which have been referred to me by the District Court, and you can have an exception to my ruling.

Mr. Jackson: I will state, your Honor, just the point so there won't be any question. There has been a suggestion by counsel, several times repeated—there has been a suggestion in the case also by your Honor—that the authority give to the Public Service Commission to examine the books of any one of those companies raised some presumption in some manner affecting the correctness of these accounts or the correctness of any item. I contend that it did not. As against any such presumption we are entitled to rebut it by positive evidence, don't you see, that will clear any such untruth from the record,—either from the mind of the Master or from the mind of the counsel, if that is possible.

The Master: This evidence has not——

Mr. Jackson: Especially from the mind of the Master and the mind of the court.

The Master: This evidence has not got anything to do with that issue, or a ruling of law, that I can see.

1701 Mr. Jackson: It has got me that it is designed toward that end. I think it is very material.

The Master: By his own statement, Mr. Jackson, taking your own witness' statement, he has had just exactly the amount of time that it would be necessary for him to prepare this case for the court.

Mr. Jackson: Is your Honor going to exclude all other considerations than the fact that he said it should take four months? Did your Honor also consider that it would take two engineers with him, and that there are 18 rate cases pending, and that there is not any

such force at the command of the Public Service Commission? Now, that is what I offer.

The Master: I also considered the fact that he included 1918, which is not pertinent to this inquiry.

Q. Then I will limit you. I will ask you a question within, and limit your considerations to the years 1919 and 1920.

The Master: I won't take any further evidence from this witness on this point.

Mr. Jackson: Then I will take an exception.

The Master: You will have an exception.

Mr. Jackson: I am perfectly willing, as long as I am content that I have made my full offer, to take your Honor's ruling.

The Master: I understand your offer.

Mr. Jackson: But I don't want to fail in having expressed my idea and offering to show in accordance with what I believe is the fact in this respect, to rebut any such evidence or any such presumption that may arise in this case or be taken. It has been expressed in other courts and other cases. It is a false situation.

The Master: As I understand Judge Hand's ruling on the Consolidated Gas case, with reference to the admission of the books in evidence, it is based on entirely different considerations from what you have advanced.

Mr. Jackson: We don't feel ourselves bound by Judge Hand's ruling, finally.

The Master: I am bound by it.

Mr. Jackson: We must expect your Honor might be, but we are going up with every case, expecting to settle all the cases, and that case as well as this, finally in some other court.

The Master: Well, I think you have got enough.

Mr. Jackson: So you see, as far as we are concerned we are being hampered in presenting this case in this court by some ruling in the District Court, which if overruled will simply send this case, of course, of necessity; and as long as we — our rights in this case and have those offers fully made. Of course, naturally it damages a case, because any court on appeal—it is a whole lot easier, I think, to let the evidence go in and let the court pass upon it and cut it out if it chooses on appeal. A court is somewhat reluctant, after a case has gone all through the trial and the hearing, to go up and reverse it because some perhaps minor matters of evidence were not allowed in.

The Master: Well, I think you have got enough in the record to raise your question, and it would be my opinion——

Mr. Jackson: If I have, I am perfectly satisfied.

The Master: And it would be contempt of court on my part if I did not follow Judge Hand's ruling.

Mr. Jackson: Your Honor, you are seeking to come within your full duties and come up to them.

The Master: The next man higher to me.

Mr. Jackson: And I am trying to do that too toward my client,

that is all; and I don't want to lumber up the record for one paragraph if I can have my contention set forth.

1704 The Master: I think you have got enough now.

Mr. Jackson: As fully as I should have made it.

The Master: I think you have got enough now.

Mr. Jackson: That is all I want.

The Master: I think you have got enough.

Mr. Jackson: I don't want the slightest dispute with you otherwise, and I recognize the full right of your Honor to fully disagree with me, and with a great many probabilities that you are right rather than I am; but I just want to raise the point in behalf of my client.

The Master: The only consolation that I can have is that I will probably be right in the District Court.

Mr. Jackson: Yes, anyway. All right.

The Master: Are there any other questions from this witness?

By Mr. Jackson:

Q. You have made an investigation regarding this plaintiff in regard to its repairs per cubic foot, as stated upon its schedules in evidence.

A. I have examined the schedules.

Q. And what is the result of that, please.

Mr. Moran: Oh, just a moment now.

Q. What do you find in regard to it?

Mr. Moran: The exhibits speak for themselves.

1705 Mr. Jackson: Oh, they speak part way and part way they are silent. Now I would like to give another opportunity for them to speak through this witness.

Mr. Moran: Well, I object. The witness has not shown himself qualified at all to speak with reasonableness of repairs to gas property.

Mr. Jackson: Well, we will have to go back and qualify him. I thought you said you were satisfied about him.

Mr. Moran: You will never qualify Mr. Mitchell on that.

The Master: Let us see if you can qualify him a little more.

Mr. Moran: And your own witness has already said the repairs were reasonable. Mr. Merrifield, their gas engineer, has said so,—decidedly reasonable.

The Witness: If your Honor will permit——

Mr. Moran: Well, wait a minute, Mr. Mitchell.

The Witness: I would like to save the time, if there is a question in your mind, and counsel then could proceed with questions along the line, to give you what I thought would enlighten the record on some of these questions. My testimony naturally would be as an engineer who has been identified through all the phases of

1706 examination of capital and operating expenditures for the Commission, to find out whether they are properly includable, to find out whether they are deferred repairs or excessive repairs due

to the abnormal conditions that prevailed, such as occurred in the gas companies in the last winter,—frozen mains and subway construction requiring relocation of mains, and several other exceptional items that come up. Now, as the result of that, in all this extensive work of many hundreds of millions dollars worth of expenditures handled by this Commission, we have collected data showing the repairs per thousand. Some of these companies' expenditures have been closely analyzed, others are not. Official records filed with the Commission show certain costs per thousand cubic feet.

Now, differences in those costs have naturally led us to analyze to see what a figure really means, when you say repairs per thousand, and likewise investment per thousand cubic feet. It has led to conclusions which show that it is unsound to rely on any such data which does not exactly represent a condition that can be used as a basis and taken judicial notice of and subsequently used in a late proceeding. Now, if——

Mr. Moran: Well, just a moment now, I object.

1707 Mr. Jackson: Well, you have not finished your answer.

The Witness: No, I have not.

Mr. Moran: There is no question, he is enlightening us now, Mr. Mitchell is.

Mr. Jackson: Well, you are stopping him.

Mr. Moran: I do not want it. I say, I ask to strike it out and I object to his going further. Now, this is not the place to criticize courts for their decisions.

Mr. Jackson: No, not about that, but you are interrupting the witness.

Mr. Moran: I am objecting to it now.

Mr. Jackson: I know you are, but I want it to appear that you are interrupting the witness, and the witness had not finished. If you want it to stand that way, that you are stopping the witness, all right.

Mr. Moran: Yes, I will put it down that I am stopping the witness,—within my rights. I do not consider him a witness, he is volunteering his ideas about rate valuation, which are probably all right and sound; but he has not testified to anything important in this case.

Mr. Jackson: I do not think he is corrupting the mind of the Master very much.

1708 The Master: Ask him any question you wish.

Mr. Jackson: I would like to have him continue.

The Master: Ask him some questions. I don't want just a general dissertation on the question. I want it by question and answer.

Mr. Moran: Will you strike that other statement out?

The Master: No, I will let it stand, and give you an exception.

By Mr. Jackson:

Q. Now, Mr. Mitchell, your study of this matter as to the rate per thousand cubic feet, apply to any items that you have in mind—repairs, say, of the plaintiff—showing for the expenses of either

1919 or 1920, whichever one you have in mind, and tell us what the result will be.

Mr. Moran: I object. The statement of the witness, if it amounts to anything, is to the effect that cents per thousand are unreliable and that he would not tell—he could not tell whether expenses were reasonable or not by rate of cents per thousand, because he has investigated it thoroughly and he says he has come to the conclusion that it is bunk so far as repairs are concerned, anyway. Now, Mr. Mitchell, you and I will have this some other time.

1709 Mr. Jackson: No, wait a moment. You asked him a question, and he opened his mouth to answer, and you don't want a word of it upon the record.

Mr. Moran: I state my objection to the court.

Mr. Jackson: You asked Mr. Mitchell, and he opened his mouth to answer, and you said, "Wait a minute, we will have this some other time."

Mr. Moran: No, I did not.

The Master: Go ahead and answer. We will give you an exception.

A. Well, counsel for the defendant started out to state, and has stated to a certain extent, my views in regard to repairs per thousand.

Mr. Moran: Counsel for defendant or counsel for plaintiff?

The Witness: For plaintiff. Excuse me.

Mr. Moran: Thank you. I got you. I knew I was right about that.

Q. Go ahead, Mr. Mitchell.

The Master: Well now, what is the question? There is no use asking him about repairs per thousand of this company, because he says he finds it unreliable. Now, if you want to pursue it along that way, let us see what it leads to.

1710 Mr. Jackson: No, I do not think I will ask the question any longer, because your Honor is making it too difficult to bother with. I have asked the question of the witness, and counsel for the plaintiff interrupts and twists the question to something else. The witness had partially answered and had not completed his answer, and when I ask him to continue your Honor picks up another construction of his answer which was not what he said and puts it to me to ask another question when my first question was not answered.

The Master: Read the question.

Mr. Jackson: And that is altogether too difficult and complicated for me to bother with.

The Master: Read the question and let him answer.

Mr. Jackson: I would rather forego the inquiry. I was trying not to lead the witness, I was trying to give him full swing of all his observation without leading by counsel whatever. That does not seem to be appreciated.

(The question was read by the reporter as follows:)

"Q. Now, Mr. Mitchell, your study of this matter as to the rate per thousand cubic feet, applied to any item that you have in mind—repairs, say, of the plaintiff—showing for the expenses of either 1919 or 1920, whichever one you have in mind, and tell us what the result will be?"

1711 The Master: Answer the question.

A. Well, for example, repairs to meters of this company as shown in the annual reports to the Commission for the year 1919, were $22,900.98. In the year 1918 the repairs were $11,595.55, or an increase of approximately 91.5 per cent. in actual dollars. Now, in examining to find out what is a fair amount for repairs for meters, when you eliminate it to a specified period of time, necessarily calls for an inquiry into the fact, "Were these meters meters which were necessarily repaired in that year, or did they include a great number of meters which the company had deferred repairing due to the peculiar economic conditions existing?" If such a fact exists, it produced an abnormal figure in this particular year.

Likewise, the same might be said of any other item. Now, if the repairs in this particular year had increased 15 per cent., the corresponding increase in sales might be entirely out of proportion. The year does not represent a normal year unless it is examined and found to be. The cents per thousand cubic feet for repairs is dependent upon the condition of equipment at the beginning of the particular year,—whether there has been deferred repairs, whether there has been exceptional repairs which can be explained

1712 away due to the two factors which is increase in labor and material, and also another factor which is the personal efficiency of the working force at the present time.

Briefly, I mean to say simply this: You may find in a particular year, considering the plant operating normally and in a good operating condition and with the company having looked forward with every adequate equipment such as reserve generating equipment, with capacity of mains, capable of carrying ten times the amount of gas, and in good repair,—that the sales may increase 30 per cent. and the repairs over the whole system might not increase 10 per cent. And that would be dependent on studying and seeing what the actual conditions are. Likewise, I believe, to draw an analogous case, on the question of fixed capital in the same way,—and plant.

Mr. Moran: Well, we haven't got anything of that here, Mr. Mitchell, at all.

Mr. Jackson: Mr. Mitchell is explaining the——

Mr. Moran: Oh.

The Witness: I would like to make it simply clear, if it is not clear.

Mr. Jackson: It does not damage you in any way.

The Master: Go ahead.

Mr. Moran: Now, you are opening up the door of investigat-

1713 ing 4,000 cubic feet, and if you do I am going to call witnesses here and show——

The Master: Don't open that door. Let him go ahead and explain, simply as an analogy.

The Witness: Simply as an example. If we found this particular company at this time with per cent. excess generating capacity and with equipment maintained in the best operating condition, and correspondingly the rest of the investment in underground system, mains, services, meters,—with the mains laid out so that they are adequate to take care of the growth for years to come—which is always the effort of a company, to try to anticipate future growth—if a condition like that exists, that there is an investment there which will be able to take care of the company's gas consumers for a number of years with a slight increase in the investment.

So that, whereas today you may find as a matter of fact that the investment is $5 per thousand cubic feet sold, we will say, inside of the next year the sales may increase 25 per cent., but due to the adequacy of the generator equipment and the adequacy and capacity of the mains for carrying a given volume of gas within distribution pressures permitted by this Commission, that for the increase of 25 per cent. in sales there may be 5 per cent. or 10 per cent. of
1714 even smaller a corresponding increase in the investment.

So, as the ratio is a fluctuating ratio and at one time may mean nothing, and further taking this company right under the present conditions that exist today, any figure predicated upon an investment per thousand cubic feet at this time—and I do not happen to know offhand what was the sales last year, or the generator—but you are, as I understand, from the testimony of previous witnesses, which has been fairly well substantiated all through the record—that you are up to the limit of your rated capacity and almost reaching the point where it is difficult to maintain the adequacy of your service and reliability of your service. Now, you are about to—and if conditions permit you would like to make a big additional investment in generating plant equipment in the next year. What would happen with a *growth* expenditure of many thousands of dollars to increase your generating capacity, perhaps increase your holder capacity, restrengthen your distribution network of mains, by making extensions, and increasing sizes perhaps in certain sections? A big expenditure like that amounting to a great deal of money, incurred in
a particular year and with a very slight increase in sales,
1715 would be working an injustice to the company if predicated at the present time on an investment per thousand.

Now, I have gone a little further than I intended on investments, but the same general theory of repairs per thousand applies, in my mind, and has been the result of my comparison of statistics of the various companies throughout this district and outside of this district.

And without analyzing the conditions that exist, that the results are unreliable, and if figures were put before me of three cents in this company and five cents in another and ten cents, I would not attempt to pass upon them without knowing the conditions under which the work was done, the conditions existing at the time and the necessity for them.

Mr. Jackson: I think that is all, if you have finished, Mr. Mitchell.

By Mr. Moran:

Q. You have looked over a good many plants in your day?
A. Yes, I think I have visited most all of them.
Q. And you have looked at a good deal of statistical data concerning gas companies?
A. Yes sir.
Q. If you had had four months, or whatever it was, with your staff down there, do you feel that you could come here and
1716 give testimony to show that this company at the present time, or in the year 1919, could manufacture gas profitably at 80 cents a thousand cubic feet

Mr. Jackson: Well, he has not attempted to testify to that, Mr. Moran. Is that proper cross examination?
The Master: He did not say he had testified to that, he is just asking that question.
Mr. Jackson: No, I am objecting to it as not proper cross examination.
The Master: Objection overruled.
Mr. Jackson: Exception, please.

A. Mr. Moran, unfortunately I have not analyzed the income account of this company or looked into the operating conditions, what operating expenses really are and what your revenues have been. Anything that I have heard is purely hearsay. I say it is unfortunate, because I have heard a great deal about the condition of your company, but personally I have not, as I said, had very little intimate contact with the case.
Q. Well, are you—you are in contact with the gas situation generally, aren't you?
A. Yes sir.
Q. Well, would you expect from your contract you had with it, if you had the time down there, that you could come here and give testimony which would show that this company could make
1717 gas for 80 cents profitably at the present time?
A. I could not answer that positively.

The Master: I think it is going too far.

A. (Continuing:) I say, in my mind it is very questionable. I will put it that way.
Q. Very questionable?
A. Yes.

Mr. Jackson: Now, wait a mainute. What is very questionable? Explain your answer.
The Witness: And I mean that that can be taken one or two ways. Anything is a question in my mind where you do not know the facts, and I believe the question is rather unfounded where I have not the facts before me to answer.
The Master: It is impossible.

The Witness: I would rather withdraw, if your Honor permit, such an answer as I have just made to that question.

The Master: We recognize it is impossible.

The Witness: Much as I feel thoroughly qualified and have testified before the Commission on points that have been put to me by the Commission on the issue of securities and on valuation, which they have relied on my ability to testify and express an opinion; but in this case I have not got the facts upon which to properly draw a conclusion, and as to anything I say—may say—is purely hear-
1718 say.

Mr. Jackson: You were not brought here——

Mr. Moran: Just a moment. You have not——

Mr. Jackson: Let me ask a question while I am asking it

Mr. Moran: You have not been——

Mr. Jackson: You were not produced here to testify to anything of that kind, were you?

The Witness: No sir, not as I understood.

Mr. Jackson: Now, if counsel wants any information from you, he is at liberty to ask you, as far as I am concerned, with great pleasure.

Mr. Moran: Well, I asked him a question.

By Mr. Moran:

Q. You have not heard then,—or have you heard—that it costs more to make gas than it used to?

A. I am very well aware of that.

Q. Very well aware of that, are you.

The Master: Are there any further questions?

Mr. Jackson: Yes sir.

Mr. Moran: Well, that is all.

The Witness: And I might say very pronounced increases, counsellor in the cost of coal, labor and material But how in this particular company the increase in sales offset the increase in
1719 materials and labor costs, I am unable to say.

Mr. Moran: Well, does it cost one company much more than it does another?

The Witness: Do you refer entirely to production expenses, or total operating expenses per thousand cubic feet sold?

Mr. Moran: Well, take it broadly.

The Witness: Well, there is a variation of a few cents, depending upon the size of your plant. The Brooklyn Union Gas, for instance, are producing gas at a lower figure per thousand than you people are.

The Master: Are there any further questions from this witness? Have you finished, Mr. Moran?

Mr. Moran: Yes, I am through.

The Master: That is all.

Mr. Jackson: Thank you.

(Witness excused.)

The Master: Let us have the next witness.

Mr. Jackson: No, I haven't here plaintiff's exhibit 52, which was a statement, as I recall it, prepared by Mr. Hopson, of unaccounted for gas during the year 1919, abstracted from sworn reports of companies filed with the Public Service Commission, Second District.

He had another exhibit for the year 1917, and we, as against
1720 that, offered in order to show the unfairness of Mr. Hopson's selection—we prepared a full list; and I see that he also has put in a list here of a few companies, 12 companies, I think—in Long Island, 3 companies, for 1919.

I would like to submit as an exhibit in evidence for the same purpose a contrary exhibit which we will prepare, subject to counsel's check, from the reports of the Public Service Commission, showing a full list of those companies.

Mr. Moran: For the Second District?

Mr. Jackson: Just to balance this exhibit right here.

Mr. Moran: That is in. It is already in.

The Master: I think you had one.

Mr. Jackson: No, I thought it was the year 1917.

Mr. Moran: No, it is all in. That has been supplemented.

The Master: You can put it in, but my impression is it was in.

Mr. Jackson: I don't recall. If we have not, may I have the privilege of adding an exhibit, subject to counsel's check?

The Master: Yes.

Mr. Jackson: To make that more complete for the year 1919.

1721 The Master: I think there is one in.

Mr. Jackson: I intended to for 1919, but my impression was that it was for 1917 and not 1919; but if I may have an exhibit, I will submit it to counsel for his checking.

(Exhibit No. D-35 is reserved for the foregoing exhibit.)

Mr. Jackson: I think that is our case, your Honor.

The Master: Then the defendants rest?

Mr. Jackson: This defendant rests. The other defendant rests.

The Master: The defendants rest. Is there any rebuttal?

Mr. Moran: Mr. Gonnoud, will you take the stand.

1722 ANDREW J. GONNOUD, recalled in behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Moran:

Q In the figures for 1919, about the gas sold and the gas made, of comparison there, the gas made is the gas made in the 365 calendar days of 1919, is it?

A Yes.

Q. And the gas sold is what gas?

A. It is the gas that has been registered on the meters and been read during the year.

Q Between the same 365 days?

A. In some cases, no. In the case of 1919 we had 361 days of readings versus 365 days of send out.

Q That is, you read meters, I understand, every——

Mr. Hill: It already appears, Mr. Moran.

Mr. Moran: I do not think it does.

The Master: I think it does.

Mr. Hill: At great length.

Mr. Moran: I made the statement, but there is no evidence of it. I want to correct that. It is in the affidavits, but not in the record. I discovered that afterwards.

Q. You have 361 days?

A Yes.

Q You read meters from day to day right along?

A. From day to day, yes.

1723 Q. And you stop on some particular date at the end of the year?

A. Yes.

Q. In 1919 what day did you quit reading?

A. In 1919 we stopped on the 22nd.

Q. Of December?

A. December.

Q. And in 1918 what day did you stop?

A We stopped on the 26th of December.

Q. So then the gas between the 28th of December—well, you did not read any more in that year?

A. No.

Q Then you commenced reading in 1919?

A. Yes.

Q. And you picked up the gas after the 28th of December, 1918 and carried it down to December 22, 1919?

A. That is correct.

Q And if you had read on now, of course, down to the 31st of December, 1919, you would have had a greater quantity of gas sold for that year, according to your reports?

A. Yes.

Q And what would be the—What is the volume there that has been probably missed?

A 22 million, approximately.

Q. Now, that of course is picked up in the next year?

A Yes.

Q. Would you say that that is what accounts for the difference in percentage of unaccounted for, for 1919 and 1920, largely?

A. Largely,—partly.

1724 Q. Partly?

A. Partly, I would say.

Q Well, 22 million, we know what that would be—that is about——

A. Oh, about 1 and a half per cent. between that and two per cent.

Mr. Moran: Yes.

Mr. Hill: Pardon me, but you said four days, and you have used two days. You said December 26th and December 22nd.

Mr. Moran: Well, we should say 22nd and 28th.

The Witness: 22nd and 26th.

Mr. Hill: That is what I thought.

Q. Oh, 22nd and 26th makes four days?

A. Yes.

Q. That is right. Now, some Exhibits have been put in here, Exhibit D-23 and letters after it. I want to ask you in the statement here of expenses—of revenue, rather, which is taken from your books; your revenue on your books is treated, according to your actual collections and billing, is it not?

A. Yes.

Q. At the 95 cent rate?

A. At the 95 cent rate.

Q. This is not revenue at the statutory rate at all?

A. No, it is not.

Q. And the surplus and all that on the balance sheet there, that is, your financial condition on the assumption that you have got 95 cents and are going to keep it?

A. Yes.

1725 Q. And you have a contingent liability?

A. Yes.

Q. Of how much?

A. The figure we have—we gave in here as of March 29, 1920, the differenes of 15 cents covering impoundment was $608,554.12.

Q. That would wipe out your surplus?

A. Absolutely, and leave a deficit.

Q. In 1916 you had a surplus?

A. Yes.

Q. When this rate went into effect?

A. Yes.

Mr. Hill: I object to that as incompetent, irrelevant and immaterial.

The Master: Objection sustained.

Mr. Moran: You put the thing in here, and I just want to explain. Exception. I want to explain the matter that has gone in evidence, that is all I want to do. I quite agree that it is improper.

Q. Now, they have here on this balance sheet—they put in an item of accrued amortization of capital. Do you carry any such thing on your books?

A. No, we don't.

Q. Do you carry any such item as fixed capital net on your books?

A. No, we do not.

Q. You do not do it?

The Master: Well, there is no use asking questions about that, because they are all excluded from evidence anyway, with reference to capital account, under my ruling.

1726 Mr. Moran: Well, I understood it would be disregarded, but I did not want it to appear——

The Master: It will be disregarded.

Mr. Moran: It will be disregarded, but couldn't I correct it? I have been asked to accept this as a statement from our books. Now, it is not a statement from our books.

The Master: Well, it is a statement that you made to the Public Service Commission?

Mr. Moran: No, it is nothing; it is just their own information that they get up every year.

The Master: Well, you can ask him if they are on the books.

Q. I have asked you. That is not on the books?

A No, it is not.

Q. And accrued amortization of capital is not on the books?

A No, it is not.

Q You have on your books other items,—contingent fee reserve you have on the books?

A. Yes.

Q That is not on the balance sheet in the accounts, is it?

A. No.

Q. Exhibit 23, is it?

A. Well, it is included in this reserve, in one of the reserve accounts here.

Mr. Moran: Where is it? It is not.

1727 Mr. Jackson: Mr. Moran, is this going to complicate and hide a fact, or are you making it more clear?

Mr. Moran: Oh, that is a matter of opinion.

Mr. Jackson: Yes, but be perfectly fair, because our accountants have gone and your witness can testify just exactly as to that.

Mr Moran: What?

Mr. Jackson: Your witness can testify exactly to that, and I think in answering your question he does not state the full truth.

Mr. Moran: What is my question?

Mr. Jackson: We would have to bring a witness here and rebut it.

Mr. Moran: What is the question?

Mr. Jackson: You said those figurees do not appear from your books. They were taken from your books. They are not as set forth there, but they were taken from your books; and if you ask him I think he will say it was in accordance with the Public Service Commission uniform system of accounts, whether you carried it that way or not. There isn't any false statement there from your our books. Now, I say they are not, and they have not been your questions as he does there is liable to be that inference,

1728 and of course we will have to correct that, we will have to try to.

Mr. Moran: Now, I will repeat again.

Q Do you have any account on your books, accrued amortization of capital?

Mr. Jackson: That is a quibble.

Q. Do you?
A. No.
Q Do you have any fixed capital net?
A. No.
Q Do you have on your account, on the liability side, other accounts than what appear here on this Exhibit 23?
A. Yes.
Q What are they?

The Master: Well, the books speak for themselves. I don't think we need any more about this.

Mr. Moran: Then I disavow that these are correct statements from our books. Now, I say they are not, and they have not been authenticated as such.

Mr. Jackson: Well, they are figures under a different name than on your books.

Mr. Moran: They are not any such thing.

Mr. Jackson: They are figures that can be computed from your books, are they not, Mr. Gonnoud? Do not look to your counsel to see whether they are or not. I am asking you as the chief accountant down there.

1729 Mr. Moran: I am not through with the witness. Mr. Gonnoud, you need not answer him at all.

Mr. Jackson: As long as counsel has directed him not to answer, I will not press it.

Q This statement over here about ratio of loss to make on Exhibit 23, under the statistics, have you any explanation to make about that?

A. Why, that is of no value at all. It is not the unaccounted for, because part of the make that has not been registered on the consumers' meters is already accounted for in the amount on hand; and the amount of unaccounted for is always figured on the amount of gas sent out.

Q. And then the term "ratio of loss to make" is not correct as it is put here? You have not lost that much gas in either one of these years?

A Yes, it may be correct as placed here, but it does not tell the story.

Q. Oh, no, this says "loss to make"?

A. Ratio of loss to make. They could take the ratio of the loss to any figure and put it out here. It is correct, perhaps, as is placed here, but it carries no significance and means nothing. It is not an unaccounted for.

Q. Because it is not all loss?

A. No.

Q. Some of it is in the holders?

A. Oh, this amount of gas may be the loss, but this would be the ratio of the make, which does not mean anything. They can set up any ratio they want to on a statement—they can take
1730 any ratio, but it means nothing if they take the unaccounted for, the amount of the unaccounted for, and take that percentage of the make.

The Master. Well, I do not understand the witness.

The Witness. Well, maybe I — make myself clear. We figure unaccounted for on amount of gas that is sent out. We have a certain amount of gas on hand in the holder at the beginning of the year. Now, we make a certain amount of gas during the year. That adds to the amount that is in the holder as available gas. Now, we may not send out all we make during a year, we may send out less than we make during the year, which would leave an increase on hand. So the only ratio we figure on the unaccounted for is the percentage of the unaccounted for to the amount of gas that is sent out on the district.

The Master. I see what you mean.

The Witness. Because that is accounted for, because it is in there in the holder.

Mr. Jackson. May I ask a question?

Mr. Moran. I am through with the witness.

1731 Cross-examination.

By Mr. Jackson.

Q. Mr. Gommond, your system of bookkeeping is patented, isn't it? It is your personal property and your personal idea, and you have patented it, haven't you?

A. No.

Q. Didn't you tell me the other day that you had patented it, and when there was a form there that was going to be, perhaps exhibited to the worldly gaze, you wanted it withheld and said that it was patented?

A. No.

Q. Wasn't there a form there that you said was patented by you?

A. No.

Q. Do you recall that there was one form that you withheld and said that you did not want it to appear in the evidence in this case?

A. No.

The Master. What did you say about that form?

The Witness. I merely said that I did not want to give out too many of those forms. I had two or three of them there, and I said the defendants could have one of the forms if they wanted to go over it. It was an accounting sheet showing — it was not a form that we use for carrying on the business, it was merely a guide to the uniform system of accounts and showed the different numbers that were assigned to the accounts. I did not want to distribute it to the world at large. It took considerable time to work this matter up. It was——

1732 Q. (Interrupting.) Is that form copyrighted?

A. No, it is not.

Q. Well, there was some reference made by you, or in your behalf, that that was either patented or copyrighted, or that you had some personal right of it as an inventor?

A. There may have been some——

Q. (Interrupting.) You recall that, don't you?

A. There may have been some remark of that nature, but it did not emanate from me, however. I made no such statement.

Q. You made no such claim?

A. No, I did not.

Q. But you did not want accountants generally to get hold of your system?

A. No, that was not it. I did not care to send it out broadcast. It was something I had worked up and worked hard on, and I wanted to retain it. But it was all right to give one copy to the defendants.

Q. Then it is—this form is your invention?

A. No, it is not my invention particularly.

Mr. Moran: It is not a form at all that you are talking about?

The Witness: Oh, it is not a form.

Q. What do you call it then?

Mr. Moran: We had it here and showed it.

A. It is what we call an accounting chart.

Q. I want the name in the record.

A. It is what we call an accounting chart.

1733 Q. And it was about how long—about three feet long by two feet wide, and printed very closely upon both sides?

A. Yes. I have the form here, if you wish a copy of it. I would be glad to give it to you.

Q. I don't care about a copy of it. Now, without referring to the paper, upon this redirect examination Mr. Moran has called your attention to some schedules here that were prepared by Mr. Ross and referred to him when he was on the stand. Has he not?

A. Yes.

Q. In looking over those schedules, and as to all those matters that your counsel called to your attention—and I can't refer to them now because I haven't the minutes before me, and I did not pretend to follow him as to those items—but is there one figure there that you intend to testify was not taken from your books or from the reports of your company to the Public Service Commission?

A. Yes.

Q. That is a figure that is not based upon your books, you say?

A. I did not say "based upon my books."

Q. Well now, don't you want to testify fairly, or shall we quibble about the terms?

A. I want to testify fairly, and I will explain myself.

Q. Do you believe that there was a basis for every one of the computations upon those schedules that Mr. Ross brought in here—that there was a true basis for those figures appearing upon

1734 your books?

A. Yes. May I explain?

Q. I wish you would.

A. Some of the items have been transferred from the liability side to the asset side as a deduction——

Q. Well, that was because——

A. (Continuing:) In order to make this compilation, and it would appear that our assets, or our liabilities are less than are shown on the books of the company.

Q. But the item appears so that it is perfectly discernible to you as to what has been done with it?

A. One or two of the items appear that way, and them of course they reduced—they make the net capital, for instance, less than we show the capital on our books.

Q. Well, you know what I am getting there. Is there any deception in this——

The Master. All you want to know is, isn't it, whether there is any basis in their books for the compilations which you have? Now, the significance of the grouping or the mathematical way that they got at particular figures, you are not interested in.

Mr. Jackson. No sir.

The Master. You simply wanted to know whether he questions the figures.

Mr. Jackson. The basis in his books for any compilation that there are there.

The Master. Yes.

Mr. Jackson. And whether there is any deception.

The Master. Well, don't say "deception"; I want it limited to find out what you mean. The grouping may in his opinion be deceptive, but that is a matter of argument.

Mr. Jackson. Yes.

The Master. We are not going into that.

Mr. Jackson. All right. Well, first, perhaps it will be better not to compound it.

Q. In the first place, is it not perfectly apparent to you that every item that is mentioned upon those schedules, that is set forth upon those schedules, is based upon your books and has a true basis in your books?

A. Yes, it is.

Q. You do not question that, do you?

A. I do not question that.

Q. And everything that has been done by the accountant, Mr. Ross, in taking those figures from your books and putting them upon those schedules, is perfectly apparent, what he has done, what disposition and under what column or where he has placed

1736 the figures—you will perceive it?

A. No, it is apparent.

Q. There is nothing concealed about it?

A. It is apparent, yes.

Q. Perfectly apparent?

A. Yes.

Q. It is only his method of deducing an argument from the figures of your books, is it not, by which he claims to——

A. I don't know—I could not explain his method.

Q. I only say that it is his method of doing it, not yours?

A. Not mine.
Q. Well, won't you answer me? That is all there is to it then, isn't it?
A. Yes, as far as I can see.

Mr. Jackson: Yes. Have I covered that?
The Master: I think so.
Mr. Jackson: Without calling back Mr. Ross?
The Master: I think you have.
Mr. Jackson: I don't want to call back Mr. Ross, but I don't want it to appear that Mr. Ross put down some figures that he made up in his own mind and did not take from your books and reports.
Mr. Moran: That is just what I claim.

Mr. Jackson: Then I ask the opportunity to have that
1737 question settled, because if these exhibits are worth anything we can't be accused of having them falsely set forth here, and Mr. Ross has gone and Mr. Howard has gone, expecting that the occasion for them was over. They were dismissed, and I hadn't the slightest idea that there was to be any question about this.
Mr. Hill: I would not assume, with the witness saying one thing under oath and counsel asserting another——
Mr. Moran: Well, the difference is that the witness is not thinking of everything, he hasn't everything in his mind. I have got to bring it out from him.
Mr. Hill: Before you start, I want to ask a question.

By Mr. Hill:

Q. You have a certain amount of gas reported on No. 13 as sold during the first six months of 1920. When did you cease to measure that in June, 1920?
A. The 26th, yes.
Q. So there is in the first six months of June, 1920 what number of days?
A. There would be——

Q. That is, how much less than six months, or more?
1738 A. Well, I may explain that, four days longer that was in '20 1919.
Q. That is, there is four days more sales in the 1920 than six months would indicate?
A. Yes.
Q. All right.
A. And therefore——

Mr. Moran: That would average up that unaccounted for from 1917 to 1914. That is why that happens there.
Mr. Hill: I know.
Mr. Moran: I wanted to make it clear.
Mr. Hill: I know it.
Mr. Moran: Now, let me ask the witness a question.

Redirect examination.

By Mr. Moran.

Q. You have on your books a contingent fee reserve—contingent fees reserve?

A. Yes.

Q. You carry that on the balance sheet on the liability side don't you?

A. Yes.

Q. You have also on your liability side a reserve called "plant reserve for plant withdrawn from service," haven't you?

A. Yes.

Q. Now, hold on a minute. Listen to me now. The accumulations, or the amount that goes into the reserve for plant withdrawn from service, is charged where?

A. In the operating expenses.

1739 Q. In the operating expenses as an expense of operation?

A. Yes.

Q. Now, the amount that goes into your contingent fees reserve is it so charged?

A. No.

Q. Where is that charged?

A. Against surplus.

Q. That does not figure in your operating expense at all?

A. No.

Q. Does it? That is not amortization of capital is it?

A. No.

Q. It is included here, however, under what item?

A. Accrued amortization.

Q. Now, what basis, if you know—will you tell us what basis Mr. Ross had for putting our contingent fees reserve under accrued amortization of capital? What basis had he? You said he had a basis. What was it?

A. What I said was that he transferred certain of the accounts from the liability side to the capital account, and made certain deductions.

Q. I know, but——

A. He took that figure from the books.

Q. I know, but as an accountant, is there any basis?

A. None whatever.

Q. For taking a contingent fees reserve and putting it into accrued amortization of capital?

A. None whatever.

1740 Mr. Moran. I say so myself.

Mr. Jackson. Now, hold on a minute.

Mr. Moran. Wait a minute until I get through, please.

Mr. Jackson. Isn't it the basis of the Public Service Commission's order?

The Witness. No.

Mr. Jackson: In his prescription for a uniform system of accounts?
The Witness: No. We have two separate reserves here, you see.
Mr. Moran: That is all right, you have answered the question, Mr. Gonnoud.
The Master: Have you finished, Mr. Moran?
Mr. Moran: Yes, I think I have finished.

(Witness excused.)

(Discussion off the record.)

The Master: Mr. Gonnoud's testimony will be written out and shown to Mr. Ross. Mr. Ross' statement will be taken as though it were given under oath at the hearing and incorporated in the record.
Mr. Jackson: And the witnesses Mitchell and Howard may join, or separately, however it may be deemed advisable, in making a statement.
1741 The Master: Brief statements just upon these particular facts.
Mr. Jackson: Upon the point of plant withdrawn from service and depreciation.
The Master: Brief statements on these particular facts.
Mr. Jackson: Which will be considered a continuation of their testimony on that.
Mr. Moran: Mr. Gonnoud wants to make a statement there.
The Master: Let Mr. Gonnoud make his statement.
Mr. Gonnoud: My statement is this: That if in accordance with the Public Service Commission's rulings in matters of this kind—in this matter—they deduct anything from the capital side for accrued amortization, as they call it, they must show that amount in the operating expenses as an operating expense. In the case of the provision for plant withdrawn from service, we set up one cent, we show that as an operating expense. Now, that they deduct, but if they deduct the two cents they must show that two cents on the other side; that is, they must put the two cents over in the operating expenses because the operating expenses must take care, according to their ruling, of any depreciation of the capital, of fixed capital.
1742 Mr. Moran: I want to——
The Master: Both sides have rested now, with the exception of——
Mr. Moran: I have not, your Honor. I wanted to move to strike out this defendant's exhibit 7, being the list of the stockholders of this company, which was put in on the assurance that it would be connected up with the fact that these people named here as stockholders of this company would be connected up and shown to be very material to the case. I submit there has been an utter failure to connect them up in any way.
Mr. Jackson: I had forgotten about that list of stockholders.
Mr. Moran: And I want to say in connection with my motion at that time, the court said it would be stricken out on motion, if it was not connected.
Mr. Jackson: Just a moment about that. Now, that list of stock-

holders Mr. Moran took away with him, as I understand it, and it was not available to us. He produced it here, and when I went to look for it among my papers I did not find it. So I really have not had an opportunity to pay particular attention to that, although I glanced at it while it was here. But witnesses were being
1743 examined at the time, and I could not——

The Master: I do not see any testimony in this case which connects the stockholders of this company with the points involved in this litigation. Mr. Jackson, do you see any? Did you point any to me——

Mr. Jackson: Now, in the first place, I would like to know—and I did not have an opportunity of examining it, because I did not have the list with me, as I say, it was handed to me last while witnesses were being examined. I did not have a chance. I think I remember only one name that was on the list. I glanced over it, and I recall the name of Billings. And I did not catch any other name. I saw that the list had a heading as though there were stockholders, and the list was presented by Mr. Moran and nothing said about it, and when I went to inquire about it later the list was gone, and I have not seen it since. Now, under those circumstances I have had no opportunity even to know the names of the stockholders. I have had no opportunity to know whether that is in evidence or is sworn to by anybody as a list of the actual owners of the stock.

The Master: Well, it was introduced as evidence of——
1744 Mr. Jackson: No, I don't know as even Mr. Moran's statement would say—or was in regard to it that they were the actual owners of the stock, and I asked for the actual owners. Now, the statement said—if he will bring it out you can see, your Honor—that it was their holders, and there isn't testimony as to whether this is the list. I was going to ask afterwards that the secretary be directed to appear and put under oath. We have no oath sustaining this list—I had none. Mr. Moran——

The Master: You did not object to it at the time.

Mr. Jackson: He had——

The Master: You offered it. You offered it in evidence.

Mr. Jackson: No, no, I offered—is it in evidence?

The Master: You called for it in evidence.

Mr. Jackson: Is it defendants' Exhibit 7?

Mr. Moran: Yes.

Mr. Jackson: All right, I offered it for what it is worth then. It is Mr. Moran's, and that is all that appears. I know nothing more about it.

The Master: And I said I would entertain a motion to
1745 strike it out if it was not connected.

Mr. Jackson: While witnesses were being examined I accepted Mr. Moran's statement that he was complying with my request. Afterwards I recalled and I did not look over the list of names—I said all right, in effect that if that is Mr. Moran's compliance and his assurance I will put it in evidence as the stockholders. When I went to look for the evidence afterwards, so I could see what the evidence was in the case, Mr. Moran had taken it away with him.

I have not seen the names yet. I remember the first name on the list, Mr. Billings.

Mr. Moran: Not knowing the names on the list, not knowing who the stockholders were——

Mr. Jackson: I wanted to examine the paper. I have not had a chance to.

Mr. Moran: I know, but then you had no reason to believe that the company was linked up with gas companies through stock ownership, when you did not know the owners of the stock.

Mr. Jackson: Just a moment.

Mr. Moran: Well, that is a fact.

Mr. Jackson: Because you have a heading here on this list—a list of stockholders you call it,—number of shares. Now,
1746 that does not say even a list of stockholders, and I have nobody under oath as to whether that is a list of stockholders, of actual stock owners.

Mr. Moran: Did you ever see a list headed "List of stock owners?" I never did, and I have seen a great many.

Mr. Jackson: No; I have asked for information. If I can't get the information in this case as to who the actual owners of the stock are—the beneficial owners is what I specified—if I can't get it, I am not going to try to do anything more about it but have the hearing extended to get it.

Mr. Moran: The motion is made to strike out the stock list. I move to strike it out under the ruling of the court that it was received in evidence and that it would entertain a motion to strike it out if it was not connected, and there has not been one syllable of evidence connecting it.

The Master: Motion granted.

Mr. Jackson: I except.

Mr. Hill: I desire to renew the motion made both at the beginning of the case and at the termination of the plaintiff's case, to dismiss the complaint on all the grounds stated on page 32
1747 and the succeeding pages in the testimony.

The Master: The motion is denied and exception granted to each ground.

Mr. Moran: As I understand it, on a hearing before a master the witnesses—unless the parties waive it,—should appear and sign their testimony. I ask a stipulation of the parties on the record waiving the appearance before the Master of the witnesses and the signing of their testimony by them.

Mr. Hill: On behalf of the Attorney-General such a stipulation may be entered.

Mr. Jackson: The same on behalf of the Public Service Commission.

Mr. Hill: And you waive also?

Mr. Moran: Oh, yes, I waive the signing of testimony. There are some exhibits, originals, that it will probably be inconvenient to file—to have the Master file with his report the originals of them;

and I would ask an agreement that in case of material exhibits that it is necessary to file, that copies be substituted.

Mr. Hill: I consent on behalf of the Attorney-General

Mr. Jackson: Yes, surely.

Mr. Moran: I have submitted my——

1748 Mr. Jackson: I will bring my findings down during the forenoon tomorrow, your Honor. Will that be satisfactory?

Mr. Moran: Of course, the books that were received in evidence it will be physically impossible——

Mr. Hill: And in addition I move to dismiss the complaint upon the ground that the plaintiff has not sustained the allegations contained in the complaint, specifying particularly their failure to produce legal, competent evidence. I have in mind the fact that the books are not books of original entry.

The Master: Motion denied and exception.

Mr. Hill: Exception.

The Master: Now, Mr. Moran handed me several days ago his requests to find. Judge Hill tells me that he will send me his in the morning. When can I expect yours, Mr. Jackson?

Mr. Jackson: I prefer to join with the Attorney-General.

The Master: I understand that the defendants join—will submit findings and will join in these requests to find.

Mr. Jackson: Surely.

Mr. Moran: In reference to my requests to find, if the Master will make his report in anything like the detail I have suggested

1749 there—I say, if he should—and would want to verify all the figures, he will probably have quite a few days' work. I think we could lighten the work of the Master, so far as figures are concerned, and things like that, by getting together and on the margin of the requests O. K. ing them or something. I have not had any time so far to submit a memorandum. It will take quite a little while to get out a memorandum on the different things.

The Master: Well, here is the way I will leave that. If you can get together, if counsel can get together and check off some of these findings—some of them are almost formal—and then notify me of the ones they agreed on, it would be an assistance, of course. Now, as to the other findings, when I consider those I may ask counsel from time to time to cite me pages of the record which in their opinion support their requests, to save me the time of reading the entire record. I may—to read some of it, at any rate, probably will. But I don't know how far apart you are going to be on all these questions, but no doubt counsel are far more familiar with the record than I am and will be able to cite pages in support of their requests if asked to do so, and that will eliminate the necessity of a

1750 formal brief in support of the requests to find.

Mr. Moran: Just one matter I want to mention, and I do not expect to have an opportunity at another time. Ordinarily on a case like this briefs should be filed and arguments made before the Master. But we have eliminated some of the things, some of the

questions from the case by concession, and on other questions relating to operating expenses there were tabulations in the testimony, and the court of course is called upon to make findings concerning those operating expenses. And no valuations, as I understand it, there is no requirement for action by the court.

I feel that some questions may come into the Master's mind, and I feel that I must at this time bring up this point. Under the order referring the matter to the Master, as I understand it, the Master is to dispose of the issues framed by the pleadings and make recommendations as to the validity or invalidity of the statute in question, and as to whether the defendants should be enjoined from enforcing it at the present time, and henceforth. As to the terms upon which the court might render an injunction, if it might impose any terms, or upon what conditions the court might impose, giving the plaintiff an injunction, I don't understand that anything of that sort
1751 is before the Master. Now, if I am mistaken about that I want to be heard before the Master on that proposition.

For instance, what I allude to is what Judge Hand did in the Consolidated Gas case, saying that this law is invalid and an injunction goes on condition that this, that and the other thing follows. Now, as I understand it, nothing like this is before the Master, and if the Master's report—as I believe—won't cover that. However, if the Master entertained a different view about it, as to whether he should recommend, make any recommendations as to any terms or conditions that should be attached to any injunctive relief, why, I would want to be heard upon the master, first as to whether it comes within the purview of the Master's delegated authority, and if it does I want to be heard as to what—on the proposition that no burdensome conditions should be attached to the relief, to the injunction granted.

The Master: I have not considered that matter at all. I don't know what my duty is in the premises, but of course you will have ample opportunity to be heard on that subject if it does come up. Of course, you understand that I submit to you, before filing it with the District Court, a draft of my findings and opinion;
1752 and at that time, when that is submitted, after you have looked at it, of course I hear objections to it. As I understand, that is the procedure that you follow in these cases. So that there is always a full opportunity to be heard on that subject—all subjects, before it ever gets to the District Court.

Mr. Moran: Well, I did not know but that the Master might be spending considerable time on the question of conditions, and on the assumption that that matter was for him. Now, my calling the matter to your attention is probably not—you may agree with me: I don't know that it is not before you at all, under the order of reference, as to whether any conditions should be attached or not. I just bring it up that way.

Testimony closed.

1753 United States District Court, Southern District of New York.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

vs.

CHARLES D. NEWTON, as Attorney-General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, and Harry E. Lewis, District Attorney of the County of Kings, Defendants.

The signing of the deposition by the various witnesses and the filing of the original exhibits are hereby waived

Dated Sept 22, 1920

INGRAHAM, SHEEHAN & MORA,
Solicitors for Complainant.
TERENCE FARLEY,
By W. S. JACKSON,
Solicitor for Deft. Nixon.
W. W. CHAMBERS,
By JAMES P. HILL,
Of Counsel Solicitor for Deft Newton.

1753½ [Endorsed.] Public Service Commission, First District Sep 4, 1920 Bureau of Statistical Accounts.

1754 COMPLAINANT'S EXHIBIT 1.

COMPLAINANT'S EX 1. AUG. 10, 1920 A. J. P.

Uniform System of Accounts for Gas Corporations as Prescribed by the Public Service Commission for the First District State of New York.

Final Order and Modifying Order (Case 5578).

U. S. District Court S. D. of N. Y. Filed Sep 22, 1920.

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1756 State of New York.

Public Service Commission for the First District.

Uniform System of Accounts Prescribed for Gas Corporations, in Effect January 1, 1909.

New York City.
1908.

1757 At a Session of the Public Service Commission for the First District, State of New York, Held at its Office, 154 Nassau Street, in the City of New York, on the 8th Day of December, 1908.

Present:

William R. Willcox, Chairman;
William McCarroll,
Edward M. Bassett,
Milo R. Maltbie,
John E. Eustis,
Commissioners.

The Public Service Commission for the First District, being authorized by Section 66 of the Public Service Commissions Law, to prescribe, whenever it deems advisable, uniform methods of keeping accounts for gas corporations subject to its jurisdiction, and it appearing advisable at this time to establish a uniform system of accounts for all such gas corporations, it is hereby

Ordered: That, except as hereinafter provided:

1. On and after January 1, 1909, every gas corporation shall keep upon its books the accounts prescribed or defined in the hereto annexed schedules, marked "Schedule A" and "Schedule B," so far as the said accounts are pertinent to the facts and circumstances of the said corporation.

2. No such gas corporation shall hereafter charge to any account representing cost of property any discount or commission on securities issued by the said corporation, but shall charge all such discounts, commissions, and other expense connected with the issue of securities subsequent hereto, in accordance with the directions contained in the definitions of the account named Organization, and the account named Unamortized Debt Discount and Expense, in the said "Schedule A."

3. During the year beginning January 1, 1909, any said corporation may for purposes of comparison with prior years keep on its books any account pertaining to revenues, revenue deductions, income deductions, and appropriations (as defined in the said "Schedule B") which it had on its books during the year begun

January 1, 1908; provided, that on or before January 1, 1909, there be filed with the Public Service Commission a statement con-
1758 taining a list of the said accounts pertaining to the year begun January 1, 1908, and definitions of such accounts.

4. For purposes of improving the efficiency of administration and operation, any corporation may, unless or until otherwise ordered, keep upon its books any temporary or experimental accounts and any accounts covering particular divisions of its operations, provided that in respect of each such temporary, experimental, or divisional account, the said corporation shall file with the Public Service Commission, at least ten days in advance of the time when the said account is to be instituted, a statement showing the name of the said account, the date when it is to be instituted, the purpose for which it is to be kept, the period of time during which it is to be kept, and a clear and accurate definition of the classes of items and facts to be contained in the said account, and in case of a divisional account, the definition of the division covered. Upon compliance with the provisions of this paragraph, any account prescribed or defined in either said "Schedule A" or said "Schedule B" may be subdivided.

1759 SCHEDULE A.

Balance Sheet or Indicant Accounts.

1. Gas Corporations and Gas Operations Defined.—Section 2 of the Public Service Commissions Law defines gas corporation as follows:

Sec. 2. * * * The term "gas corporation" * * * includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, managing or controlling any plant or property for manufacturing and distributing and selling for distribution or distributing illuminating gas (natural or manufactured) for light, heat or power.

Gas operations, as the term is hereinafter used, include all acts and transactions directly connected with the operation of a plant for the production of gas (whether natural or manufactured), the transmission thereof and the supply thereof to consumers for light, heat, or power, and all operations incident thereto, including the collection of revenues therefor and the disposition of byproducts produced in connection therewith.

2. Accounts to be kept by double-entry method.—All accounts kept by any corporation or person within the scope of the present order shall on and after January 1, 1909, be kept by the double-entry method.

NOTE.—This requirement is not intended to apply to purely statistical accounts.

Capital Accounts. [Paragraphs 3-26.]

3. Capital Defined.—As the term is used herein, by capital of a corporation is meant all property devoted to the rendering of the services or the production of the commodities which are within the purposes of the corporation.

4. Fixed Capital Defined.—Capital which has an expectation of life in service of more than one year (exception being made of hand and other small portable tools liable to be lost or stolen[1]) is called fixed capital.

5. Floating Capital Defined.—Capital other than fixed capital is called floating capital.

6. General Capital and Departmental Capital Defined.—Fixed capital is divisible into general capital and department capital, general capital being that which is indiscriminately available for the uses of two or more classes of operations, while departmental capital is that assigned solely or principally to a single class of operations.

1760 7. Landed Capital and Non-landed Capital Defined.—Fixed Capital is also divisible into landed capital and non-landed capital. Landed capital includes all interests in land (exclusive of improvements thereon) the term of which is more than one year. All other fixed capital is herein called non-landed capital.

8. Intangible and Tangible Capital Distinguished.—Non-landed capital is divisible into intangible and tangible. Intangible capital comprises organization, franchises, patent-rights, and all other intangible property within the definition of fixed non-landed capital as above stated. Tangible capital comprises structures and equipment having an expectation of life in service of more than one year. Because of their liability to loss or theft, hand and other small portable tools are excepted from tangible capital, and the cost of such tools when issued is required to be treated as a part of the operating expenses.[1]

9. Further Classification of Capital.—Capital is also divisible into original capital, additions, betterments, and renewals and replace-

[1] Hand and other small portable tools liable to be lost or stolen shall, when first acquired and before issued for use, be carried in a suitable Materials and Supplies account; when issued they shall be charged to the appropriate expense account. Portable tools and apparatus of special value may, however, be charged to the appropriate tangible capital account, and remain therein so long as record is kept of the persons to whom such tools and apparatus are issued and such persons are made responsible therefor.

ments, as defined below. Charges to capital accounts shall show these divisions as set forth in paragraph 21, infra.

10. Original Capital Defined.—Original capital is that put into service at the outset of an enterprise.

11. Additions Defined.—Additions include additional structures, facilities, or equipment not taking the place of anything previously existing.

12. Betterments Defined.—Betterments include the enlargement or improvement of existing structures, facilities, and equipment.

13. Renewals Defined.—Renewals include all extensions of terms of years in land and tangible fixed capital, and all extensions of the life period of franchises and other intangible fixed capital.

14. Replacements Defined.—Replacements include all substitutions for capital exhausted or become inadequate in service, the substitutes having substantially no greater capacity than the things for which they were substituted. When a substitute has a substantially greater capacity than that for which it was substituted, the cost of substitution of one of the same capacity as the thing replaced should be charged as a replacement, and the remaining portion of the cost of the actual substitute should be charged as a betterment.

15. Repairs Defined.—When through wear and tear or through casualty it becomes necessary to replace some part of any structure, facility, or unit of equipment, and the extent of such replacement does not amount to a substantial change of identity in such structure, facility, or unit of equipment, the replacement of such part is to be considered a repair, and the cost of such repair is
1761 to be treated as an operating expense and must not be charged as a replacement in any capital account.

16. First entries must enable identification.—Throughout all capital accounts, the first entry in respect of any particular thing shall describe it with such particularity as to enable its identification, and shall give it a distinguishing name, number, or other designation by which it shall thereafter be designated in every entry in any capital account which in any way concerns it. In the case of continuous structures like railroad track, or electric line, or pipe line, such structures shall be itemized to the extent that no item shall contain more than one operating division or more than one type of construction, and the first entry in relation to any item shall describe the size, weight, type, and other principal physical characteristics of the chief constituent parts, together with their spacing if discontinuous.

17. Costs of new capital to be actual money costs.—All charges made to capital or other accounts on or after January 1, 1909, shall be the actual money cost of the things in respect of which they are made. When the consideration actually given for the thing in respect of which a charge to a capital account is made is anything other than money, the actual consideration shall be described in the

entry with sufficient fullness and particularity to identify it, and the amount charged shall be the actual money value of such consideration at the time of the transaction.

18. Discounts upon securities not to be charged to capital accounts.—Discounts upon securities and other commercial paper issued in payment for capital are to be provided for in other accounts and must in no case be charged to the capital accounts.

19. Costs of labor, materials, and supplies.—Cost of labor (employed in construction) includes not only wages, salaries, and fees paid employees, but also such personal expenses of employees as are borne by the corporation. Cost of materials and supplies consumed in construction is the cost at the places where they enter into construction, including cost of transportation and inspection when specifically assignable. If such materials and supplies are passed through storehouses, their cost entered in the account may include a suitable proportion of store expense.

20. Withdrawals or retirements.—When anything is withdrawn or retired from service, the amount at which such thing stood charged in the capital account shall be credited to the capital account in which it stood charged at the time of withdrawal, and the entry of such credit shall cite by name and page of book or other record the original entry of cost of the thing withdrawn. If there is no such original entry, that fact shall be stated in connection with the credit entry, and the actual amount originally charged shall be credited. If such amount is not known, it shall be estimated, the facts upon which the estimate is based shall be shown, and the amount thus estimated to be the original charge in respect of such thing withdrawn shall be credited.

21. Particulars required to be shown in entries.—Every charge made to a capital account on or after January 1, 1909, shall show whether the thing in respect of which the charge is made is original capital, or an addition, a betterment, a renewal, or a replacement. If the thing is a betterment, the entry shall designate the thing enlarged or improved and shall cite by name and page of book or other record the original entry of cost of such thing enlarged or improved. If the thing to which any charge hereafter made relates is a renewal or a replacement, the entry made in respect thereof shall designate the thing renewed or replaced and shall cite by name and page of book or other record the original entry or entries of cost of such thing renewed or replaced. If there is no entry in the accounts of the corporation showing the cost (to the corporation) of the thing bettered, renewed, or replaced, that fact shall be stated in the entry describing the betterment, renewal, or replacement, and the original cost of such thing to the corporation shall be stated. Such cost shall be estimated if not known, and when estimated the basis of such estimation shall be shown.

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22. Betterments involving partial destruction of thing bettered.—If any betterment involves the partial destruction or partial reconstruction of the thing bettered, only such portion of the cost of the

change shall be charged as a betterment as will when added to the original cost (estimated if not known) of the thing bettered give the cost of reconstruction or replacement of the thing as bettered, and the remainder of the cost of the change (account being taken of any salvage) shall be charged to the appropriate repair account.

E. g., a building, original cost unknown but estimated to be $15,000, is bettered by the construction of an elevator shaft, and its stairways are modified so as to be fireproof; the actual expenditure for these changes is $3,000, the estimated cost of replacement of the building (as modified) with one equally serviceable and with an equal expectation of life is $16,000, the charge to capital account as a betterment should be $1,000, and the remainder ($2,000) of the expenditure should be charged to the appropriate repairs account.

23. Plant and equipment and other capital purchased.—Where any fixed capital in the form of a going or completed plant is purchased, an appraisal of such capital so acquired shall be made, and the different constituent elements of the plant (and equipment, if any) or other capital acquired shall be appraised at their structure value, that is to say, at the estimated cost of replacement or reproduction less deterioration to the then existing condition through wear and tear, obsolescence, and inadequacy. If the actual money value of the consideration given for the plant or other capital was at the time of the acquisition in excess of such appraised value, the excess shall be charged to the account "Other Intangible Gas Capital," and the appraised values of the constituent elements shall be charged to the appropriate accounts as designated in the following definitions of accounts for fixed capital. If the actual money value of the consideration given was not in excess of such appraised value, such actual money value shall be distributed through the said accounts in proportion to the said appraised value of the constituent elements appropriate to the respective accounts. Full report of the contract of acquisition, the consideration given therefor, the determination of the actual money value of such consideration, the appraisal, and the amounts charged to the respective accounts for each plant or other such fixed capital purchased, will be required to be made [763] to the Public Service Commission, and the purchaser will be required to procure in connection with the acquisition of any such plant or other fixed capital all existing records, memoranda, and accounts in the possession or control of the grantor relating to the construction and improvement of such plant, and to preserve such records, memoranda, and accounts until authorized by law to destroy or otherwise dispose of them.

24. Definition of Fixed Capital accounts.—In the following definitions of accounts the letters and numbers prefixed to the titles are inserted solely for convenience of reference and are no part of the titles or of the definitions.

(G100.) Fixed Capital, December 31, 1905.

Charge to this account all the Fixed Capital of the accounting person or corporation devoted to gas operations as such capital stood at

he close of December 31, 1908. Such charges shall be made at the gures at which such capital was carried on the books of the said erson or corporation on that date. When any capital included in ch account is retired from service, the amount at which it is charged herein shall be credited to this account; the amount of depreciation r other amortization thereon applicable to the period subsequent to ecember 31, 1908, shall be charged to the account (No. 374), "Accrued Amortization of Capital," proper account shall be taken of any alvage, and the remainder of the amount originally charged to capital shall be concurrently charged to the Corporate Surplus or Deficit count (or equivalent account carried on the books on December 31, 908), unless there was carried on the books at that date a reserve r cover retirement of capital from service, in which case the said oncurrent charge shall be made to such retirement reserve account. f the amount at which the said capital in service on December 31, 908, and subsequently retired from service, was included in the aid account is not disclosed on the books and records of the accounting person or corporation and is not within the knowledge of such erson or corporation or officers or other employees thereof, it shall e estimated, and such estimated amount shall be treated as is above irected for the actual amount, the fact of estimation being stated n the entry.

NOTE.—Corporations will be required to carry as sub-accounts of he account "Fixed Capital, December 31, 1908," the several accounts on their books on that date which are combined to make up he said account, and to furnish information concerning such subaccounts in their annual reports.

The following capital accounts are prescribed for transactions subsequent to December 31, 1908.

(G110.) Land Devoted to Gas Operations.

Charge to this account the cost of the accounting corporation's landed capital which is devoted to gas operations as hereinbefore defined. This includes land occupied by gas works and their appurtenances and rights of way for transmission and distribution lines and other pipe lines, where such rights have lives in excess of one year from the date when such land is placed in service.

1764 Such cost includes, when assumed or paid by the purchaser in its own behalf, cost of registration of title, cost of examination of title, conveyancer's and notary's fees, purchasing agent's commissions or fees, or proportion of purchasing agent's salary, taxes accrued to date of transfer of title, and all liens upon the title acquired; also costs of obtaining consents and payments for abutting damages.

NOTE A.—Cost of buildings and other improvements must not be included in this account.

NOTE B.—If at the time of acquisition of an interest in land extends to buildings or other improvements thereon, which improvements are devoted by the corporation to its gas operations and the contract of acquisition does not determine the price of such improvements, they shall be appraised at their fair cash value for use in such operations, and such appraised value shall be charged to the appropriate structures account, and excluded from the account "Land Devoted to Gas Operations." If such improvements are not devoted to gas operations but are devoted to other operations or held as investments, the cost (or appraised value if the cost is not determinable in the contract of acquisition) shall be charged to the appropriate investment account of capital account for other operations. If the improvements are removed or wrecked, the salvage (less the cost of removal or wreckage) shall be excluded from the account "Land Devoted to Gas Operations." The entries in this account must be made in such wise as to enable the corporation to show in its annual report to the Public Service Commission the subdivision of the cost of its land devoted to gas operations into the following:

Land Occupied by Gas Works.
Land Occupied by Outside Holder Stations.
Water Rights.
Other Land Devoted to Gas Operations.

(101.) Organization.

Charge to this account all fees paid to government for the privilege of incorporation, and all other and other expenditures incident to organizing the corporation or other enterprise and putting it in condition to do business. This includes cost of preparing and distributing prospectuses, cost of soliciting subscriptions for stock (but not for loans nor for the purchase of bonds or other evidences of indebtedness), cash fees paid to promoters, and the actual cash value at the time of organization of securities paid to promoters for their services in organizing the enterprise, counsel fees, cost of preparing and issuing certificates of stock, and cost of procuring certificates of necessity from state authorities, and other like costs. Like costs incident to preparing and filing certificates of authorization of increase of capital stock, and to the negotiation and issue of stock therunder, shall be classed as additions. Cost of preparing and filing certificates of amendment of articles of incorporation shall be classed as a betterment. Cost of preparing and filing papers in connection with the extension of the term of incorporation or with reincorporation consequent upon reorganization shall be classed as a renewal. This account shall not include any discounts upon stocks or other securities issued, nor shall it include any costs incident to negotiating loans or selling bonds or other evidence of indebtedness.

1765 (0102.) Franchises (Gas).

To this account shall be charged "the amount (exclusive of any tax or annual charge) actually paid to the State or to a political sub-

division thereof as the consideration for the grant of such franchise or right" (section 69 of the Public Service Commissions Law) as is necessary to the conduct of the corporation's gas operations. If any such franchise is acquired by mesne assignment, the charge to this account in respect thereof must not exceed the amount actually paid therefor by the corporation to its assignor, nor shall it exceed the amount specified in the statute above quoted. And excess of the amount actually paid by the corporation over the amount specified in the statute shall be charged to the account "Other Intangible Gas Capital." If any such franchise has a life of not more than one year after the date when it is placed in service, it shall not be charged to this account but to the appropriate accounts in "Operating Expenses," and in "Prepayments" if extending beyond the fiscal year. Payments made to the State or to some subdivision thereof as a consideration for granting an extension for more than one year of the life period of a franchise shall be classed as renewals. Those made as a consideration for franchises or extensions thereof covering additional territory to be operated as a part of an existing system shall be classed as betterments. If the franchises cover separate and distinct new enterprises, the payments therefor shall be classed as original.

NOTE.—Annual or more frequent payments in respect of franchises must not be charged to this account but to the appropriate tax or operating expense account.

(G103.) Patent rights (Gas).

Charge to this account the cost of all rights (having a life of more than one year from the date when placed in service) acquired by the corporation in or under valid patents granted by the United States to inventors for inventions and discoveries which are necessary to the economical conduct of the corporation's gas operations. If any such right is extended to cover a further period of time than that covered by the original grant, the cost of such extension shall be classed as a renewal. A patent-right acquired for use in an existing system and necessary to the economical operation thereof shall be classed as an addition.

(G104.) Other Intangible Gas Capital.

Charge to this account the cost of all other property coming within the definition of intangible capital and devoted to gas operations. All entries of charges to this account shall describe the acquired property with sufficient particularity clearly to identify it, and shall also show specifically the principal from whom acquired and all agents representing such principal in the transaction; also the term of life of such property, estimated if not known, and if estimated, the facts upon which the estimate is based.

1766 (G121.) General Structures.

Charge to this account the cost of all buildings and other structures of a permanent character devoted to general corporate purposes, not restricted to gas operations and not includible in any of the departmental accounts; also of all fixtures permanently attached thereto and made a part thereof, such as water pipes and fixtures, steam pipes and fixtures for warming and ventilating, gas pipes and fixtures for lighting, etc., electric wiring and fixtures for lighting, signaling, etc., elevators, etc., and the engines and motors specially provided for operating them, furnaces, boilers, etc., specially provided for producing steam for such engines and for heating, electric generators specially provided for producing current for lighting such buildings, etc. This account includes such piers and other foundations for machinery and apparatus as are designed to be as permanent as the buildings in or in connection with which they are constructed, and to outlast the first machinery or apparatus mounted thereon.

NOTE A.—Among such buildings may be mentioned general office buildings, general shop buildings, general storehouses, general stable buildings, etc. Where general offices, shops, storehouses, stables, etc., are in buildings includible in a departmental account, as e. g., in a retort house no part of the cost of such building shall be charged to this account. This account is provided for structures of a general or miscellaneous character not assignable to any particular department.

NOTE B.—When furnaces and boilers are used primarily for furnishing steam for some particular department and only incidentally for furnishing steam for heating a general building and operating the equipment therein, the entire cost of such furnaces and boilers shall be enlarged to the appropriate departmental capital account and no part to the account "General Structures."

NOTE C.—The cost of specially provided foundations, not expected to outlast the machinery or apparatus mounted thereon, should be charged to the same account as the cost of the machinery or apparatus for which they are provided.

(G122.) General Equipment.

Charge to this account the cost of all equipment of general structures, as provided under the following heads:

a. General Office Equipment.—This includes the cost of all equipment for general offices, such as desks, chairs, tables, movable safes, filing cases, drafting-room equipment, and other like office appliances and equipment; also engineering instruments.

b. General Shop Equipment.—This includes the cost of all equipment specially provided for general shops, such as furnaces, boilers

gas producers, engines, electric generators, and other power apparatus used in operating machinery in such shops; machine tools, cranes, hoists, shafting, belts and the like shop equipment; also such smithing equipment in general shops as is used principally for other general purposes than shoeing horses and repairing vehicles.

NOTE.—Hand and other small portable tools liable to be lost or stolen shall not be included herein, but portable tools and apparatus of special value may be charged to this account and remain herein so long as record is kept of the persons to whom such tools and apparatus are issued and such persons are made responsible therefor.

[367] c. General Store Equipment.—This includes the cost of all equipment of general store structures, such as movable counters, movable shelving, and other movable equipment of like nature, carts, barrows, trucks, etc., and other apparatus and appliances used in handling materials and supplies.

NOTE.—Counters, shelving and the like which are permanently attached to the structure shall be charged to the account (No. 6121), "General Structures," and not to this account.

d. General Stable Equipment.—This includes the cost of all equipment of general stables, including horses, harness, drays, wagons, automobiles and other vehicles, equipment of shoeing shops, harness repair shops, vehicle repair shops, etc.

(221.) Works and Station Structures.

Charge to this account the cost of all structures at works devoted to the production of gas, including purification and all other processes performed upon such gas antecedent to its entrance into the station holder, also of all buildings and other structures at outlying holder stations except the holders and their appurtenances as provided in the following account, "Holders." Such structures include retort houses, generator houses, purifier houses, engine houses, boiler houses, meter houses, coal sheds, coke sheds, tar houses, oil tanks, tar wells, and other structures for storage of fuel to be consumed or carbonized in the production of gas and the operations auxiliary thereto; structures for residuals and byproducts; appurtenant walks, fences, drives, tramways, trestle, etc., and all fixtures permanently attached to such structures and made a part thereof.

NOTE.—Such piers and other foundations for machinery and apparatus as are designed to be permanent and to outlast the first machinery or apparatus mounted thereon shall also be charged to this account; but short lived, temporary, or specially provided foundations and settings for furnaces and boilers, steam engines, gas engines, pumps, generators, benches, condensers, washers, scrubbers, purifiers, etc., shall go with the machinery and apparatus to which they are related. Gas holders are not included in this account.

(222.) Holders.

Charge to this account the cost of all holders at works and outlyi
stations, including tanks, foundations, holders, frame work, guide
pulleys, etc., and inlet and outlet of such holders.

NOTE.—Holder housings shall be charged to the account (N
221), "Works and Station Structures."

(G141a.) Furnaces, Boilers, and Accessories.

Charge to this account the cost of all furnaces, boilers, and boil
apparatus and accessories devoted to the production of steam for u
in producing gas and in furnishing motive power in gas works a
stations. This includes boilers and valves thereto attached, appu
tenant furnaces and grates, and flues leading to smokestacks a
chimneys, and the specially provided foundations and setting
such boilers and appurtenances. It also includes mechanical stok
and other like apparatus for regulating the supply of fu
1768 etc., feed and hot water heaters and economizers, injecto
filters, feed pumps, blower engines, coal conveyors, ash co
veyors, water pipes, steam traps, drains, and separators, and pip
for conducting steam from the boiler to the engine, to condensers,
to the gas producers, exhaust pipes, etc. It does not include stea
pipes whose primary purpose is the heating of buildings.

(G141b.) Steam Engines.

Charge to this account the cost of all steam engines devoted to u
as prime movers in gas works. This includes the settings a
specially provided foundations of such engines. The engin
whether reciprocating or rotary (such as steam turbines), shall
considered to include the throttle or inlet valve and the governo
also condensers and air pumps, but not the steam pipe leading fr
the boiler, nor the exhaust pipe.

(G143.) Gas Engines.

Charge to this account the cost of all gas engines devoted to use
prime movers in gas works and stations. This includes the special
provided foundations and settings of such engines. The engine i
cludes the inlet valve and governor and ignition and starting a
paratus, but not the pipe leading from the gas holder, nor the e
haust pipe.

(G145.) Miscellaneous Power Plant Equipment.

Charge to this account the cost of all miscellaneous power pla
equipment at gas works which is not includible in any of the fo
going accounts. This includes such mechanical apparatus as bel
pulleys, hangers, countershafts, and other apparatus intermedia

between the prime mover and the apparatus operated, cranes, hoists, etc., and machine tools and such other tools at power plants as are proper to be capitalized, etc.

(223.) Benches and Retorts.

Charge to this account the cost of all benches and retorts devoted to the production of coal gas. This includes the cost of specially provided foundations and settings and auxiliary piping.

(G143*a*.) Water Gas Sets and Accessories.

Charge to this account the cost of sets and accessories devoted to the production of water gas, including the cost of specially provided foundations and settings for such sets. This account includes not only generators, carbureters superheaters, seals and piping connected therewith, etc., but also blast apparatus, oil and steam supplying apparatus, oil heaters, etc. It does not include pipes whose primary purpose is the warming of buildings.

(224.) Purification Apparatus.

Charge to this account the cost of all purification apparatus, such as condensers, washers, scrubbers, purifiers, tar extractors, etc., and their ancillary apparatus and piping, including the cost of specially provided foundations and settings.

1769 (225.) Accessory Equipment at Works.

Charge to this account the cost of all equipment at works and holder stations which is not includible under any of the foregoing accounts. This includes exhausters, station meters, governors, etc., apparatus for charging retorts; conveyors for disposing of coke and other products and residuals; tar and ammonia apparatus, pumps, pipes, tanks, etc.

(231.) Trunk Lines and Mains.

Charge to this account the cost of all trunk lines and mains in place. This includes all pipe lines from the yard connections to district holders, and from the works governor to the beginnings of services, including the cost of all trenching, etc., necessary to the placing of the pipe, and the cost of filling trenches and restoring the surface to its former condition or to that required by the municipal authorities at the time the line is installed.

(232.) Gas Services.

Charge to this account the cost of the corporation's property in service pipes and appurtenances in or leading to consumers' premises. This includes the cost of material in place, cost of trenching

for placing services, and of filling trenches and restoring surface to proper condition.

NOTE A.—When consumers are required to pay some or all of the cost of services, only that portion of the cost not chargeable to the consumer is chargeable to this account, and in all cases where only a portion of the cost of the service is chargeable to this account the entry in this account shall show the entire cost of the service as well as the amount charged to this account.

NOTE B.—Where services extending only from main to curb (or to lot line) are placed before actually required for the purpose of supplying consumers, the entry of cost must show that fact. Such services will be required to be separately reported in the annual reports of corporations to the Public Service Commission.

NOTE C.—Cost of renewing or modifying services shall not be charged to this account.

(233.) Gas Meters.

Charge to this account the cost of the corporation's property in all meters and appurtenances used in measuring the gas delivered to consumers.

NOTE A.—This account does not include the cost of the corporation's meters at the works, which shall be charged to the account (No. 225), "Accessory Equipment at Works," or to a sub-account thereunder.

NOTE B.—Cost of setting, removing, or re-setting such meters shall not be charged to this account.

NOTE C.—Upon filing with the Public Service Commission a notice thereof, the accounting corporation may also include in this account the cost of consumers' meters temporarily withdrawn from service.

(234.) Gas Meter Installation.

Charge to this account the labor and materials cost (exclusive of cock and connections) of the first setting of meters for determining the amount of gas delivered to consumers, in case it is the policy of the corporation to capitalize the cost of such setting.

1770 NOTE A.—Cost of removing such meters and of setting other meters substituted for them shall not be charged to this account but to the account (No. 634*a*), "Gas Meter and Installation Work." (See page 44.)

NOTE B.—This account must not include at any time the cost of installation of a greater number of consumers' meters than are actually in service.

(235.) Municipal Street Lighting Fixtures (Gas).

Charge to this account the cost of the corporation's property in the lamps, posts, and ancillary apparatus and appliances used in lighting streets for a municipal corporation. Such cost includes not only cost of material but also cost of first setting and coupling up. It does not include cost of removal or change of position.

NOTE.—Where the municipality requires for its special benefit the extension of mains and services for street lighting, such extensions may, so long as used solely for street lighting, be charged to this account, provided a full description of the extensions so charged and the amounts charged in respect thereof be filed with the Public Service Commission on or before the date when the entry thereof is made upon the books of the corporation.

(236.) Gas Engines and Appliances.

Charge to this account the cost of the corporation's property in gas engines leased to consumers (including municipal corporations), but not of those held for purposes of sale. Such engines include all appliances for the production of mechanical motion through the consumption of gas. Also, charge to this account the cost of the corporation's property in all gas stoves and other heating appliances leased to consumers, but not of those held for purposes of sale. This includes stoves, ranges, heaters, hot plates, sadirons, tailor's irons and gooses, and other like devices and appliances consuming gas for the direct production of heat.

NOTE A.—The cost of setting and connecting such engines and heating appliances on the premises of consumers and the cost of resetting or of removal shall not be charged to this account.

NOTE B.—Upon filing with the Public Service Commission a notice thereof, the accounting corporation may also include in this account the cost of such gas engines and appliances temporarily withdrawn from service.

(237.) Gas Tools and Implements.

Charge to this account the cost of all tools and implements coming within the scope of the definition of fixed capital (see paragraph 4, page 5, ante) and not covered by any of the foregoing equipment accounts.

(238.) Gas Laboratory Equipment.

Charge to this account the cost of all physical and chemical apparatus used in testing and other technological work, and of all equipment in laboratories used for technological work, such as calorimetry, photometry, chemical analysis, and the like; also all equip-

ment for testing building and other materials used in the engineering operations of the company.

NOTE.—This account does not include the cost of any chemicals or other supplies, such being chargeable to the appropriate subaccount in the account "Materials and Supplies"; as consumed they shall be charged thence to the appropriate expense accounts.

1771 (239.) Other Tangible Gas Capital.

Charge to this account the cost of all miscellaneous tangible gas capital not elsewhere provided for.

(G281.) Engineering and Superintendence.

Charge to this account all expenditures for services of engineers draftsmen, and superintendents employed on preliminary and construction work, and all expenses incident to the work, when such disbursements cannot be assigned to specific construction.

NOTE.—When employees enumerated above are engaged in work not chargeable to construction, their pay and expenses shall be charged to the specific work on which engaged.

(G282.) Law Expenditures During Construction.

Charge to this account general expenditures of the following nature, incurred in connection with the construction of a gas plant namely: the pay and expenses of all counsel, solicitors, and attorneys, their clerks and attendants, and expenses of their offices; printing briefs, legal forms, testimony, reports, etc.; payments to arbitrators for the settlement of disputed questions; costs of suit and payments of special fees, notarial fees, and witness fees, and expenses connected with taking depositions; also all legal and court expenses.

When any of the expenditures above enumerated can be charged directly to the account for which incurred, they shall be so charged and not to this account. Expenditures in connection with the acquisition of the right of way or other land shall be charged to the account (No. G110), "Land Devoted to Gas Operations." Law expenditures in connection with the organization of the corporation shall be charged to the account (No. 101), "Organization."

(G283.) Injuries During Construction.

Charge to this account all expenditures incident to injuries to persons when caused directly in connection with construction of gas plant and equipment; proportion of salaries and expenses of physicians and surgeons; nursing and hospital attendance, medical and surgical supplies, artificial limbs, railroad and carriage fares for conveying injured persons and attendants; funeral expenses (including payments to undertakers); proportion of pay and expenses

of claim adjusters and their clerks, and pay and expenses of employees and others called in consultation in relation to the adjustment of claims coming under this head; also witness fees and amount of final judgments.

(G284.) Taxes During Construction.

Charge to this account all taxes and assessments levied and paid on property belonging to the corporation while under construction and before the plant is opened for commercial operation, except special taxes assessed for street and other improvements, such as grading, sewering, curbing, guttering, paving, sidewalks, etc., which shall be charged to the account to which the property benefited is charged.

1772 (G285.) Interest During Construction.

Charge to this account the interest accrued upon all moneys (and credits available upon demand) acquired for use in connection with the construction and equipment of the property from the time of such acquisition until the construction is ready for use. Interest receivable accrued upon such moneys and credits shall be credited to this account. To this account shall also be credited discounts realized through prompt payment of bills for materials and supplies used in construction unless such discounts are credited to the particular bills.

(G286.) Miscellaneous Construction Expenditures.

Charge to this account the salaries and expenses of executive and general officers of a gas plant under construction; clerks in general offices engaged on construction accounts or work; rent and repair of general offices when rented, with the office expenses; insurance during construction; also all construction and equipment items of a special and incidental nature which cannot properly be charged to any other account in this classification.

NOTE A.—This account may include a suitable proportion of store expenses when such expenses are not assignable to specific materials.

NOTE B.—This account shall not include any costs of organization, or any costs or discounts connected with the issue and disposal of stocks, funded debt, or other securities, and commercial paper.

(O110.) Land in Other Departments.

Charge to this account the cost of the corporation's interests in land (exclusive of improvements thereon) devoted to operations

other than electric operations, gas operations, railroad operations, and street railroad operations.[1]

Such cost includes, when assumed or when paid by the purchaser in its own behalf, cost of registration of title, cost of examination of title, conveyancer's and notary's fees, purchasing agent's commissions or fees or proportion of purchasing agent's salary, taxes accrued to date of transfer of title, and all liens upon the title acquired. If at the time of acquisition of such interest in lands, it extends to buildings or other improvements thereon, which improvements are devoted by the corporation to operations other than the four classes above mentioned, and the contract of acquisition does not determine the price of such improvements, they shall be appraised at their fair cash value, and such appraised value shall be charged to the appropriate accounts and excluded from the account "Land in Other Departments." If such improvements are held as investments, the cost (or appraised value at time of acquisition of title if the cost to the corporation is not determined in the
1773 contract of acquisition) shall be charged to the appropriate investment account. If the improvements are removed or wrecked, the salvage (less the cost of removal or wreckage) shall be excluded from the account "Land in Other Departments".

(0102.) Franchises in Other Departments.

Charge to this account "the amount (exclusive of any tax or annual charge) actually paid to the State or to a political subdivision thereof as the consideration for the grant of such franchise or right" as is necessary to the conduct of the corporation's operations other than electric, gas, railroad, and street railroad.

(0103.) Patent-rights in Other Departments.

Charge to this account the cost of all rights (having a life of more than one year from the date when placed in service) acquired by the corporation in or under valid patents granted by the United States to inventors for inventions and discoveries which are necessary to the economical conduct of the corporation's operations other than electric, gas, railroad, and street railroad.

(0104.) Other Intangible Capital in Other Departments.

Charge to this account the cost of all property of the corporation coming within the definition of intangible capital devoted to its operations other than electric, gas, railroad, and street railroad, and not includible under any of the foregoing accounts.

[1] NOTE.—Electric Capital, Railroad Capital, and Street Railroad Capital. For the accounts to which shall be charged the cost of capital devoted to electric operations, see the Uniform System of Accounts for Electrical Corporations; for steam railroad operations, see the Uniform System of Accounts for Expenditures for Road and Equipment, etc., as established for Steam Railroad Corporations by the Public Service Commission; and for electric railroad and street railroad operations, see the Uniform System of Accounts for Street Railroad Corporations.

(0120.) Tangible Capital in Other Departments.

Charge to this account the cost of all property of the corporation coming within the definition of tangible capital devoted to its operations other than electric, gas, railroad, and street railroad.

25. Floating Capital divided into two groups.—Floating capital is divided into two great groups, of which the first is herein called Materials and Supplies, and the second, Current Assets.

26. Definitions of Floating Capital accounts.—In the following definitions the letters and figures prefixed to the titles of the accounts are no part of the titles and are inserted merely for convenience of reference.

(G10.) Materials and Supplies.

Charge to this account the cost (including transportation) of all materials and supplies acquired by the corporation, regardless of whether the same are intended to be consumed in construction or in operation, or later to be sold. Where discounts recovered through prompt payment are not credited to the particular bills, the cost at which such materials and supplies shall be charged shall be the invoice cost, and any discounts recovered through prompt payment of bills for such materials and supplies shall be credited to the account (No. G285), "Interest During Construction," or to the account (No. G852), "Undistributed Adjustments—Balance," according as such materials and supplies are intended for construction or for operation.

1774 The scrap value of things retired from service shall be charged to an appropriate sub-account in this account, while such things remain the property of the corporation. If such scrap value is not known and cannot readily be determined it shall be estimated, and errors in such estimates when determined shall be adjusted through the accounts involved if during the year in which the estimates were made; if later, then through the "Corporate Surplus or Deficit" account.

Inventories of materials and supplies shall be taken at least annually, and any shortages or overages disclosed by such inventories shall be credited or debited to this account and debited or credited to the operating expense account (No. G852), "Undistributed Adjustments—Balance," in case they cannot be assigned to specific accounts. Shortages may, however, be charged directly to "Corporate Surplus or Deficit." Where such materials and supplies have been used in construction, a suitable proportion of such shortages or overages may be debited or credited to the account (No. G286), "Miscellaneous Construction Expenditures."

NOTE.—It is not required that the transportation element of cost shall be assigned with a greater degree of accuracy than to the nearest cent per unit of material or supply. Where a single transportation

item covers a multitude of things the portion of the expense not assigned to specific things should be charged to the same account that store expenses are charged to.

(1.) Cash.

Charge to this account all money coming into the possession of the corporation and in which the corporation has the beneficial interest. This includes coin of the United States, United States treasury notes, gold and silver certificates and greenbacks, and bank bills payable to bearer. Also charge to it all bank credits, checks and drafts receivable, subject to satisfaction or transfer upon demand (whether payable to bearer or to order). Credit this account with all cash disbursements of the corporation.

(2.) Bills Receivable.

Charge to this account the cost of all bills receivable (except as below provided) which are the property of the corporation and upon which solvent concerns are liable or which are sufficiently secured to be considered good. This account includes demand notes, drafts, etc., issued by others than banks, and time notes, drafts, etc., by whomever issued. This account does not include investments (for which see page 21), nor does it include interest coupons.

(3.) Accounts Receivable.

Charge to this account all amounts owing to the corporation upon accounts with solvent concerns (other than banks); also the cost of all accounts and claims upon which responsibility is acknowledged by solvent concerns or which are sufficiently secured to be considered good, and of all judgments against solvent concerns where the judgment is not appealable or suspended through appeal. This account does not include negotiables.

1775 (4.) Interest and Dividends Receivable.

Whenever the income account is stated the appropriate sub-account therein shall be credited and this account shall be charged with all accrued but not yet collected interest upon all commercial paper and accounts considered collectible held by or for the benefit of the corporation; also all dividends declared or guaranteed by solvent concerns but not yet collected, the right to which is in the corporation.

(5.) Other Current Assets.

Charge to this account the cost of all current assets of the corporation which are not includible under any of the last four foregoing accounts. By current assets are meant only those things which are readily convertible into money and which are held with the intent of being presently converted into money and not as investments.

27. Investments defined.—By Investments, as here used, are meant all properties acquired not for use in present operations, but as a means of obtaining or exercising control over other corporations, or for income to be derived from them, or for a rise in value, or for devotion to future operations at a time when it seems probable that they cannot be so advantageously acquired as at the time of actual acquisition. By bound investments are meant those held subject to a lien of some character; by free investments are meant those held free of all liens.

(300.) Investment.

The cost of the corporation's title to any property held as an investment shall be charged to an account entitled "Investments."

NOTE.—In the annual reports to be made to the Public Service Commission by the corporations and other persons engaged in gas operations, investments, whether bound or free, will be required to be classified with at least the following detail:

Bound investments will be required to be divided into the three classes "Mortgaged or Pledged Investments," "Contractual Fund Investments," and "Other Bound Investments." Each of these three classes, and the class "Free Investments," will be required to be subdivided into the following: Funded Debt of Controlling Corporations, Funded Debt of Affiliated Corporations, Funded Debt of Controlled Corporations, Stocks of Controlling Corporations, Stocks of Affiliated Corporations, Stocks of Controlled Corporations, Advances to Controlled Corporations, Funded Debt of Other Corporations, Stocks of Other Corporations, Land, Improvements on Land, and Other Investments.

28. Special Deposits defined.—By Special Deposits, as here used, are meant amounts of money and bank credits in the hands of fiscal or other agents of the corporation for the payment of coupons, dividends, or other special purposes. Credit at banks subject to check of the corporation or its agents for general purposes, deposits at banks whether withdrawable at pleasure or after a specified time, amounts of money in safety deposit vaults, etc., so long as they are available for general purposes of the corporation, shall be excluded therefrom.

(311.) Coupon Special Deposits.

Charge to this account all moneys and bank credits specially deposited in the hands of fiscal agents or other agents of the corporation for the payment of interest coupons when presented.
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Such coupons when paid from such deposits shall be credited to this account and charged to the appropriate matured interest account. Payments to trustees (or other agents) of the holders of bonds or other securities of the interest accrued thereon which operate under the terms of the securities (or of mortgages supporting such securities) as a release of the paying corporation from further

liability for such interest shall not be charged to this account, but to the appropriate "Interest Accrued" account.

(312.) Dividend Special Deposits.

Charge to this account all moneys and bank credits specially deposited in the hands of fiscal agents or other agents of the corporation for the payment of dividends upon the corporation's stocks. Such dividends when paid from such deposits shall be credited to this account and charged to the appropriate dividend account.

(313.) Other Special Deposits.

Charge to this account all moneys and bank credits deposited in the hands of fiscal agents or other agents of the corporation for other special purposes than the payment of interest coupons and dividends. Charges to this account shall specify the purpose for which the deposit is made. When such purposes are satisfied this account shall be credited with the amount specially deposited to provide such satisfaction.

29. Prepayments.—When payments for taxes, insurance, rents, and the like are made in advance of the actual accrual thereof, the amount of the advance payment shall be charged to the appropriate account in this group. As such taxes, etc., accrue, the appropriate prepayment account shall be credited and the appropriate expense or other income account shall be charged.

NOTE.—By the accrual of taxes, insurance, rents, etc., is meant their accumulation when considered as spread uniformly over the period to which they apply. Thus, if the rent fixed by contract of lease for a certain property is $600 for a calendar year, this accrues at the rate of $50 each month (unless it is desired to base the accrual on days, when of course the varying lengths of the months would require to be considered), regardless of the actual times when the rent matures. $50 should thus (if the rent has been prepaid) be credited each month to the account "Prepaid Rents," and concurrently charged to the appropriate account in the "Income" account. Similarly in the case of other prepayments.

(321.) Prepaid Taxes.

When taxes are paid in advance of their accrual, the amount prepaid shall be charged to this account. As the taxes thus prepaid accrue, they shall be credited at monthly intervals to this account and charged to the appropriate taxes account. This account must not include any so-called taxes, like water taxes, drainage taxes, fire taxes, etc., which are payments for special benefits received. Such payments for special benefits, where finally chargeable to operating expenses, must, when prepaid, be charged to the account "Other Prepayments."

1777 (322.) Prepaid Insurance.

When premiums on insurance policies are paid in advance of their accrual, the amount prepaid (whether paid in cash or by the issue of notes or other negotiable paper) shall be charged to this account. As such premiums accrue, they shall be credited at monthly intervals to this account and charged to the appropriate expense account.

(323.) Prepaid Rents.

When rents are paid in advance of the enjoyment of the term, the amount prepaid (whether paid in cash or by the issue of notes or other negotiable paper) shall be charged to this account. As the term is consumed, this account shall be credited at monthly intervals and the appropriate rent account in the income account shall be charged.

(324.) Other Prepayments.

When prepayments are made for any other thing than taxes, insurance, and rents, above provided for, such prepayments shall be charged to this account, and as the purpose of the prepayment is satisfied, proportionate amounts shall be credited monthly to this account and charged to the appropriate expense or income account.

30. Suspense.—When any expenditure is made, the appropriate disposition of which is not yet determinable, or when any loss occurs which under the rules of the Public Service Commission may be spread over a period of time, or when any debt made for any other reason may be amortized through charges made to expense or other income accounts at intervals over a period of time, such expenditure, loss, or other debit shall, except as herein otherwise directed, be charged to an appropriate account in this group of accounts.

NOTE.—By "amortization" of any charge or credit is meant its gradual extinction. The word is broader than the word "depreciation," since the latter is retricted ordinarily to tangible property. The word "depreciation" also imports more of the idea of fluctuating value and is complicated somewhat with the question of cost of replacement at market prices. Because it is considered unnecessary in connection with the gradual consumption or expiration of life of capital to consider the question of cost of replacement until the replacement is actually made, at which time the cost of replacement is duly charged to the appropriate account, and because provision is necessary for the gradual extinction of certain charges (such as those for some kinds of capital, those for extraordinary casualties, for discount on debt, etc.), to which the term "depreciation" does not well apply, it is considered advisable to use the term "amortization" in connection with the extinction of such charges, and of certain corresponding credits, such as premiums on debt outstanding.

(331.) Unamortized Debt Discount and Expense.

When funded debt securities and other evidences of indebtedness are disposed of for a consideration whose cash value is less than the sum of the par value of the securities or other evidences of indebtedness and the interest thereon accrued at the time the transfer takes place, the excess of such sum of the par value and accrued interest over the cash value of the consideration received shall be
1778 charged to this account. To this account shall also be charged all expense connected with the issue and sale of evidences of debt, such as fees for drafting mortgages and trust deeds, fees and taxes for recording mortgages and trust deeds, cost of engraving and printing bonds, certificates of indebtedness, and other commercial paper having a life of more than one year, fees paid trustees provided for in mortgages and trust deeds, fees and commissions paid underwriters and brokers for marketing such evidences of debt, and other like expense. At or before the close of each fiscal period thereafter, a proportion of such discount and expense based upon the life of the security to maturity shall be credited to this account and charged to the account (No. 928), "Amortization of Debt Discount and Expense," in "Income" account. Such discount and expense may, if desired, be amortized more rapidly through charges of all or any part of it, either at the time of issue or later, to the account "Other Deductions from Surplus."

(332.) Other Suspense.

To this account shall be made all debits not elsewhere provided for and the proper final disposition of which is uncertain. This will include all such matters as expense of preliminary surveys, plans, investigations, etc., made for determining the feasibility of projects under contemplation. Should any such project later be carried to completion, such amounts shall be credited to this account and charged to the proper capital account; should it be abandoned, such amounts shall be charged to "Corporate Surplus or Deficit."

When the proper disposition of any matter charged to this account is determined, it shall be credited to this account and charged to the appropriate account.

31. Securities Actually Issued and Later Reacquired. For the case of securities actually issued by the corporation and later reacquired by it, the following account is provided:

(340.) Reacquired Securities.

When securities, whether funded debt or stocks, have been actually issued to bona fide holders for value (or after such issue by another corporation have been assumed by the accounting corporation), and after such issue (or assumption) have been acquired by the corporation under circumstances which require that they shall not be treated as paid or retired, they shall be charged at face value to this account.

32. Debt defined.—The word debt, as here used, covers all absolute obligations to pay money at a definite time or times, or at a time or times which are capable of being made definite by demand or other act of the creditor. It does not cover contingent obligations, such as obligations to pay rent for future enjoyment of the term, liabilities of indorsers upon paper not yet defaulted, etc.

Debt is divided into Funded Debt and Unfunded Debt.

33. Funded Debt defined.—Funded Debt comprises all debt which by the terms of its creation does not mature until more than one year after date of creation.

1779 34. Unfunded Debt defined.—Unfunded Debt comprises all debt which by the terms of its creation matures one year or less after the date of creation or after demand.

35. Funded Debt accounts.—Funded debt shall be divided in the accounts into classes, such classes being determined by the four characteristics: (1) mortgage or other lien or security therefor, (2) rate of interest, (3) interest dates, and (4) date of maturity. A separate subaccount shall be raised for each such class of funded debt, and no two amounts of debt not agreeing in respect of all four of the characteristics above named shall be included in the same sub-account. The title of each sub-account of funded debt shall express the four characteristics above stated, that is to say: mortgage or other lien or security, rate of interest, dates of maturity of interest, and date of maturity of principal; as e. g., "First Mortgage 5%, QF 10, Aug. 10, 1928," which means funded debt secured by the company's first mortgage, bearing interest at the rate of 5 per cent per annum, interest maturing quarterly on February 10th, May 10th, August 10th, and November 10th of each year, principal maturing August 10, 1928.

Where any portion of the funded debt rests only on the general credit of the corporation and is not specially secured or supported by lien of any character, it shall for the purposes of these accounts be known as a "debenture." "Debentures" thus include promissory notes unsecured by mortgage or other lien, also those securities commonly known as "plain bonds."

To the appropriate sub-account in "Funded Debt" shall be credited when issued the par value of the amount of evidences of funded indebtedness issued. The entry shall show not only the amount issued but the purpose for which issued, and shall make intelligible reference to the book, page, and account whereon are shown any discounts or premiums realized on the amount issued. If the consideration received for the issue is anything else than money, the entry shall show further the principal to whom issued, and shall describe with sufficient particularity to identify it the actual consideration received for the issue. If the issue in any case is to an agent of an undisclosed principal, the name and business address of such agent and the fact of his agency shall be shown in the entry.

36. Unfunded Debt accounts.—The accounts for unfunded debt are defined as follows:

(351.) Taxes Accrued.

Credit to this account at the close of each month the taxes accrued during the month, and make corresponding charges to the appropriate "Taxes" account. Credits to the account "Taxes Accrued" will necessarily be based upon estimate until the amount of tax levied for the tax period is known, such estimates shall be based upon the best data available, and as soon as the amount of tax for the period is known the account involved shall be adjusted to conform. When any tax is paid it shall be charged to this account and credited to "Cash" or other suitable account.

1780 (352.) Receiver's Certificates.

When any receiver acting under the orders of a competent court is in possession of the property of the corporation and under the orders of such court issues certificates of indebtedness chargeable upon such property, the par value of such certificates shall be credited to this account. Interest accruing upon such certificates shall also be credited monthly to this account.

(353.) Judgments Unpaid.

When any judgment of indebtedness is rendered by a court of competent jurisdiction against the corporation, or any fine or penalty requiring the payment of money is assessed by such a court against the corporation, and no appeal accompanied by stay of execution has been taken therefrom within the time allowed by law for such appeal, the amount of such judgment shall be credited to this account, and the entry shall designate the action or suit as a consequence of which such judgment is pronounced or such fine or penalty assessed. The designation of the action or suit shall show the court, the term thereof, the parties, and the character of the action or suit. Interest accruing upon any such judgment shall be credited monthly to this account.

NOTE.—In case of appeal and affirmance in whole or in part from which judgment of affirmance a further appeal lies, the same rule shall apply as upon entry of original judgment.

(354.) Interest Accrued.

Credit to this account at the close of each month the interest accrued during the month upon indebtedness of the corporation. When such interest is paid it shall be charged to this account and credited to "Cash" or other suitable account.

The account "Interest Accrued" does not include interest on judgments, nor that upon receiver's certificates. The interest accruing on any judgment against the corporation or upon any receiver's certificate shall be credited to the account to which such judgment or receiver's certificate stands credited.

NOTE.—When coupon interest matures it should be transferred from the sub-account "Unmatured Coupon Interest Accrued" to the sub-account "Coupon Interest Matured." When such interest is paid out of coupon special deposits the sub-account "Coupon Interest Matured" should be charged and the account "Coupon Special Deposit" credited.

(355.) Dividends Declared.

When any dividend is declared it shall be credited to this account and here remain until it is paid, when it shall be charged to this account and credited to "Cash" or other suitable account.

(356.) Bills Payable.

When any note, draft, or other bill payable which matures not later than one year after date of issue (or demand) or assumption by the corporation of primary liability thereon is issued or assumed, the par value thereof shall be credited to this account, and
1781 when it is paid it shall be charged to this account and credited to "Cash" or other suitable account.

(G357*a*.) Consumers' Deposits—Gas.

Credit to this account, as such deposits are made, all cash deposited with the corporation by consumers as security for the payment of gas bills. Deposits refunded shall be charged to this account and credited to "Cash." Deposits applicable to uncollectible or worthless gas bills shall, at the close of the fiscal year (or earlier, at the option of the accounting corporation), be credited to the account of the consumer involved and debited to this account.

(357*b*.) Other Accounts Payable.

Credit to this account when incurred all liabilities of the corporation upon open accounts, except those provided for in the foregoing account "Consumers' Deposits."

(358.) Other Unfunded Debt.

Credit to this account at face value all unfunded debt upon which the corporation is liable and which is not elsewhere provided for.

37. Reserves.—Reserves shall be classified as Permanent and Temporary.

38. Permanent Reserves defined.—By Permanent Reserves are meant those that must be maintained intact during the life of the corporation. Permanent reserves shall be classified into the two classes: Premiums on Stocks and Other Permanent Reserves.

(371.) Premiums on Stocks.

Premiums on stocks shall be sub-classified with respect to the several classes of stocks, for definitions of which see accounts under the head "Stocks." A sub-account shall be kept for each particular class of stocks, and such sub-accounts shall be severally entitled:

Premiums on Debenture Stocks,
Premiums on First Preferred Stocks,
Premiums on Second Preferred Stocks, etc., and
Premiums on Common Stocks.

When a premium is realized upon an issue of any particular class of stock, such premium shall be credited to the sub-account above provided for such class of stock, and such credit shall remain in such account so long as such stock remains outstanding. By a premium realized (as the words are above used) is meant the excess of the actual money value (at the time of issue of the stock) of the consideration received for such issue over the par value of the amount of stock issued. If the stock is issued by the corporation to its treasurer or other agent, the excess of the actual money value of the consideration obtained by such agent in exchange for such stock over the par value thereof shall be considered the premium realized.

1782 (372.) Other Permanent Reserves.

Credit to this account all reserves not above provided for created to remain intact until the dissolution of the corporation. A separate sub-account shall be created for each particular purpose for which a reserve is raised, and the purpose of the reserve shall be designated in the title of the account thereof and shall be expressed in full in the first entry in such account.

39. Temporary Reserves defined.—By Temporary Reserves are meant those that are not intended to remain intact during the life of the corporation. Temporary Reserves shall be classified as Contractual Reserves and Non-contractual Reserves.

40. Contractual Reserves defined.—Contractual Reserves are reserves necessitated by contracts of the corporation, as e. g., reserves to cover sinking funds provided for in mortgages, etc. A separate sub-account shall be raised for each particular contractual reserve, and to such account shall be credited all appropriations and accumulations made in accordance with the contract provisions under which such reserve is created. The purpose of the reserve shall be designated in the title of the account thereof and shall be expressed in full in the first entry in such account.

41. Non-contractual Reserves defined.—Non-contractual Reserves are such temporary reserves as are raised without being required under any contract. Non-contractual reserves are divided into Required and Optional.

42. Required Reserve accounts.—Required reserves are provided for in the following accounts:

(374.) Accrued Amortization of Capital.

Credit to this account such amounts as are charged from time to time to "Operating Expenses," or other accounts to cover depreciation of plant and equipment, and other amortization of capital. When any capital is retired from service, the original money cost thereof (estimated if not known, and where estimated, that fact and the facts upon which the estimate is based shall be stated in the entry), less salvage, shall (except as provided in the account (No. G100) "Fixed Capital, December 31, 1908,") be charged to this account. The amount originally entered or contained in the charges to any capital account in respect of such capital so going out of service shall be credited to such capital account, and any necessary adjusting entry made to the appropriate sub-account under the account "Corporate Surplus or Deficit."

(375.) Unamortized Premium on Debt.

When funded debt securities or other evidences of indebtedness are disposed of for a consideration whose cash value is greater than the sum of the par value of such securities or other evidences of indebtedness and the interest thereon accrued at the time the transfer takes place, the excess of the cash value of such consideration received over the sum of the par value of the securities or other
1783 evidences of indebtedness and the accrued interest shall be credited to this account. At monthly intervals thereafter a proportion of such premium based upon the life of the security or other evidence of indebtedness to maturity shall be charged to this account and credited to "Amortization of Premium on Debt" in "Income" account; or at the option of the corporation the charge to this account may be delayed to a time not later than the date of maturity of the debt, in which case the proportion applicable to the period covered by the then current income account shall be credited to the account "Amortization of Premium on Debt," and the remainder of the credit shall be to the account "Other Additions to Surplus."

(376.) Other Required Reserves.

Credit to this account all required reserves not elsewhere provided for. The first entry of a credit to this account with respect to any particular reserve shall show the purpose of the reserve, and every subsequent entry with respect to that reserve shall designate the reserve to which it relates.

43. Optional Reserve accounts.—Optional Reserves are those the creation of which is solely within the discretion of the corporation. For such reserves the following two accounts are provided:

(381.) Casualties and Insurance Reserve.

When any admitted liability arises because of loss or damage to the property of others, or of injuries to employees or other persons, the amount of the liability may (if not previously provided for by insurance or self-insurance) be charged to the appropriate operating expense or other accounts and credited to this account, against which (in such case) the actual cost of satisfaction of the liability shall be charged when the matter is determined. If the extent of the liability can not be ascertained promptly after the liability arises, it may be estimated as accurately as practicable for the purpose of determining the immediate charge to the expense or other appropriate account, in which case the matter shall be adjusted when the extent of the liability is definitely ascertained. If the loss is of such character that it is in the whole or in part indemnifiable under any contract of insurance carried by the corporation, the indemnifiable portion of the loss shall be charged to the insurer and credited to "Casualties and Insurance Reserve." Also credit to this account the amounts charged to the operating expense account "Insurance" to cover self-carried risks.

(382.) Other Optional Reserves.

A subaccount shall be raised for each particular reserve, and its title shall designate the purpose of such reserve and the first entry therein shall express in full such purpose.

44. Stocks defined.—By Stocks of a corporation, as the term is here used, are meant those securities which represent permanent interests in the corporation or interests which, if terminable, are so only at the option of the corporation.

1784 45. Stocks classified.—Stocks are classified as——
Debenture Stocks,
First Preferred Stocks,
Second Preferred Stocks, etc., and
Common Stocks.

46. Debenture Stocks defined.—Debenture Stocks are those issued under a contract to pay absolutely thereon at specified intervals a specified return.

47. First Preferred Stocks defined.—First Preferred Stocks are those which have the first claim upon such dividends as may be distributed. They may be cumulative or non-cumulative, participating or non participating. If cumulative, the amount by which the dividend at any dividend period fails to reach the stipulated rate is carried forward to continue as a claim upon dividends until satisfied; if non-cumulative, such amount lapses. If a first preferred stock is participating, it is not limited to the stipulated rate in the amount of dividends which it may receive, but is entitled to participate, in accordance with the terms of the contract under which it is issued.

in further dividends; if non-participating, it is limited to the Stipulated rate.

48. Second Preferred Stocks defined.—Second Preferred Stocks are those whose claims in the distribution of dividends are next after those of first preferred stocks. These stocks may also be cumulative or non-cumulative, participating or non-participating.

49. Common Stocks defined.—Common Stocks are those whose claims in the distribution of dividends are subordinate to the claims of all other stocks.

50. Voting Powers.—Stocks differ also in regard to the voting powers incident to ownership of them.

51. Retirement of Stocks.—Stocks are sometimes issued under contracts wherein the issuing corporation reserves to itself the right to retire them at its option, either absolute or subject to conditions expressed in the contracts whereunder the stocks are issued.

52. Separate account required for each class of stocks.—In the accounts of stocks outstanding, a separate account shall be raised for each class of stock issued, and no two stocks shall be considered of the same class unless they are equal in their interest or dividend rights, their voting rights, and the conditions under which they may be retired. The characteristics of any class of stocks in these three regards shall be designated in the title of the account raised to cover such stocks, and shall be clearly expressed in the first entry in such account. To the account for any class of stocks shall be credited when issued the par value of the amount of stock of that class issued. If such issue is for money, that fact shall be stated; and if for any other consideration than money, the person to whom issued shall be designated, and the consideration for which issued shall be described with sufficient particularity to identify it; if such issue is to the treasurer, or other agent of the corporation, to be by him disposed of for the benefit of the corporation, that fact and
1785 the name of such agent shall be shown; and such agent shall in his account of the disposition thereof show the like details concerning the consideration realized thereon, which account when accepted by the corporation shall be preserved as a corporate record. If the fair cash value of the consideration realized upon the issue of any amount of stock is greater than the par value of such stock, the excess shall be credited to the account "Premiums on Stocks," and the corresponding reference thereto shall be contained in the entry relating to such stock in the stock account.

1786 SCHEDULE B.

Income Account.

1. Income and Indicant Accounts Compared.—A comparison of the balances in the foregoing accounts (Schedule A) at any particular moment will, if the accounts have been properly kept, show the then existing conditions of a corporation's affairs so far as such con-

dition can be shown through the accounts. The group of accounts just defined is sometimes called the Balance Sheet or Indicant accounts. Their balances indicate the condition of the corporation at any particular time. These accounts with their subsidiary accounts are all that are necessary prior to the time when the corporation becomes what may be called a "going concern."

When a corporation begins operations it requires an additional group of accounts in which to classify in convenient form the accounting history of the various changes it undergoes. Such group of accounts brings together or accumulates the account of the various incidents of the corporation's history. This group of accounts may be called the Income account. They are made up usually on a yearly basis and are closed into one grand account called "Corporate Surplus or Deficit," which ties together this group of accounts and the preceding group.

2. Divisions of Income Account.—The principal divisions of this group of accounts are the Revenue accounts, the Revenue Deduction accounts, the Income Deduction accounts, and the Appropriation accounts.

3. Revenues Defined.—By Revenues, as the word is used here, are meant all amounts of money which the corporation receives or becomes lawfully entitled to recover for services rendered, for products sold, as gross profits on merchandise sold, or as a return upon its property (or interests in property). Revenues are classified as Operating Revenues and Non-operating Revenues.

4. Operating Revenues Defined.—Operating Revenues are those derived from the sale of products and merchandise, from services rendered, and from return on property used by the person or corporation in its own operations.

5. Non-operating Revenues Defined.—Non-operating Revenues are those derived as a return upon the property of the corporation in the hands of others or from its interests in property in the hands of others. They may be subclassified as Rents, Interest, Dividends and Miscellaneous.

6. Revenue Deductions Defined.—Revenue Deductions include Expenses, Taxes, and Uncollectible Bills.

1787 7. Expenses Defined.—Expenses are those outgoes (including capital consumed) necessary to the production of the commodities sold and the services rendered, and to the collection of the revenues. They are divided into Operating Expenses and Non-operating Expenses. Operating Expenses are those incident to the operating revenues.

8. Taxes Defined.—Taxes are those annual or other payments exacted by governments for the purpose of raising funds for public uses.

9. Uncollectible Bills Defined.—When a corporation is engaged regularly in rendering to general consumers a service, or in sup-

lying to such consumers a commodity (as e. g., electric energy or as for light, heat, or power), current accounts or claims against ch consumers for such service rendered or commodity supplied hich are incapable of collection by the exercise of reasonable dili- nce are included under the name Uncollectible Bills.

10. Gro- Income, Income Deductions, and Net Corporate Income ained.—Revenues, diminished by expenses, taxes, and uncollecti- le bills, give an amount called Gross Income, which is applicable to rporate and leased properties. Gross income is subject to several mpulsory deductions, mostly contractual, like rent, interest, etc., d the remainder after these are made is called Net Corporate In- me, which being subject only to the discretion of the corporation most conveniently carried directly to the corporate surplus. The counts covering the compulsory deductions from gross income as ve defined, are called the Income Deduction accounts.

11. Appropriation Accounts Defined.—The accounts covering the dly changes in the corporate surplus are called the Appropriation counts, since practically all of the matters covered by them are ithin the discretion of the corporation, although they also include rtain adjustments made because of facts of previous years imper- tly accounted for at the time (whether through error or through ck of information), and certain other minor matters like extra- dinary expenses not chargeable as deductions from revenues; also ch matters as profits on the sale of capital, and profits and losses the sale of investments.

12. Definitions of Gas Operating Revenue Accounts.—Credits to various revenue accounts shall be made upon the basis of bills ndered or of gross prices. Discounts for prompt payment, cor- tions of overcharges, overcollections theretofore credited and after- rd corrected, authorized abatements and allowances, and other rrections and deductions shall be charged to the revenue account which they relate. In the following definitions of accounts the tters and numbers prefixed to the titles are inserted solely for con- nience of reference and are no part of the titles or of the defini- ons:

(431.) Municipal Street Lighting—Gas.[1]

Credit to this account all revenues derived from lighting streets for municipal corporations by means of gas, or from supply- 88 ing gas therefor.

NOTE.—In the foregoing account the word "streets" is to be inter- eted to include parks, plazas, and all other public places not classi- ed as buildings.

[1] Charges to this and the following revenue accounts must be made in such ner as to permit their classification in the annual report of the corporation the Public Service Commission.

(432.) Lighting Municipal Buildings—Gas.

Credit to this account all revenues derived from lighting municipal buildings by means of gas, or from gas supplied for such purposes, or for heat or power in municipal building where such gas is supplied at lighting rates and is not separately measured.

(433.) Municipal Heat and Power—Gas.

Credit to this account all revenues derived from municipal corporations for gas supplied at special heat or power rates to such corporations for the production of heat and power.

(434.) Miscellaneous Gas Revenue—Municipal.

Credit to this account all revenues derived from supplying gas to municipal corporations and not provided for in the foregoing accounts; also those from the letting of engines and other gas equipment to such corporations.

(435.) Prepaid Gas.

Credit to this account all revenue derived from the sale of prepaid gas delivered through so-called "prepayment meters."

(436.) Commercial Metered Lighting—Gas.

Credit to this account all revenues derived from all consumers except municipal corporations for gas measured through ordinary meters and supplied for lighting at lighting rates.

NOTE A.—Where gas flowing through any ordinary meter is used by any other consumer than a municipal corporation for lighting and incidentally for heating or power purposes, the revenues derived therefrom shall be credited to this account.

NOTE B.—This account does not include gas sold or supplied to other gas corporations for distribution; for such gas, see account (No. 438), "Other Gas Corporations."

(437.) Commercial Heat and Power—Gas.

Credit to this account all revenues derived from all consumers except municipal corporations for gas supplied for heat or power at special heat or power rates.

NOTE.—This account does not include gas sold or supplied to other gas corporations for distribution; for such gas, see the account (No. 438), "Other Gas Corporations."

(438.) Other Gas Corporations.

Credit to this account all revenues derived from gas sold or supplied to other gas corporations to be by them distributed through their own pipes to consumers. If any portion of such gas incidentally consumed by such corporations for their own benefit, whether for light, heat, or power, it shall be included herein, if not separately measured, or if included under the same contract with that which is distributed by them to consumers.

(439.) Commissions on Others' Gas.

Credit to this account all revenue accruing to the corporation for distributing gas of other companies through its pipes, selling the same, and for all other services performed in connection therewith.

NOTE. In case the corporation distributes through its pipes the gas of another company, the corporation shall charge "Cash" or the appropriate subaccount (or accounts) under "Accounts Receivable" with the value of the gas of such other company supplied by the corporation to consumers, and shall enter a corresponding credit to a clearing account "Gas Supplied by —— Company and Distributed by this Corporation [or, 'by ——,' naming the corporation keeping the account]" which account shall monthly be cleared by charging to such clearing account the amount necessary to balance, and crediting to the account "Commissions on Others' Gas" the Corporation's proportion of the total revenue, and to the account of the company supplying such gas to the corporation that company's proportion of such total revenue.

(440.) Rent of Gas Appliances.

Credit to this account all revenues derived from the letting of gas engines, heating appliances, lamps, and other gas apparatus and appliances (except meters) to others than municipal corporations. Where the contract of letting names only a single consideration for both the letting and the maintenance of the appliances so let, the entire revenue shall be included in this account.

(441.) Gas Merchandise and Jobbing Revenue.

Credit to this account all receipts from the sale of gas merchandise and from gas jobbing. Charge to this account the cost to the account corporation of gas merchandise sold, such cost including transportation charges paid on such goods.

Credit also to this account the profit or commission accruing to the corporation on all jobbing work performed by it as agent under agency contracts, whereunder it undertakes to do jobbing work for another for a stipulated profit or commission upon its actual expense for labor, materials, and supplies.

NOTE A.—In its annual reports to the Public Service Commission the reporting corporation will be required to analyze the credits and debits to this account.

NOTE B.—This account does not include receipts from the sale of superseded equipment, or of junk or other scrap or salvage.

(442.) Sale of Residuals and Byproducts.

Credit to this account all revenue derived from the sale of residuals and byproducts.

This account shall be so kept as to enable the corporation to show in its annual report to the Public Service Commission the amounts of revenue derived from the following sources:

1790 Sale of Gas Coke.
Sale of Coal-gas Tar.
Sale of Water-gas Tar.
Sale of Ammoniacal Liquor.
Sale of Other Residuals and Byproducts.

NOTE A.—The amount of revenue from the sale of any residual or byproduct shall be determined by the price received at the point of delivery to the purchaser, and any expense incurred by the corporation in effecting delivery shall be charged to the appropriate operating expense account.

NOTE B.—Residuals and byproducts consumed by the corporation shall not be credited to the account "Sale of Residuals and Byproducts."

(443.) Joint Gas Rent Revenue.

When any corporation engages in gas operations for the production of some of its product for the benefit of another or others under an arrangement for apportioning the expense upon the basis of the relative amounts of benefit to the several participants in the arrangement, if such arrangement provides for the receipt by the corporation of any profit or return upon its property, such profit or return upon property shall, as it accrues, be credited month by month to this account. Such profit or return must be over and above any provision for wear and tear and depreciation of plant involved in the said production, and the amount thereof must be as provided in the arrangement under which the joint production occurs.

(444.) Other Miscellaneous Gas Revenue.

Credit to this account all revenues derived from others than municipal corporations for the supply of gas and from other gas operations not includible in any of the foregoing accounts.

13. Revenue from Outside Operations.—The detailed revenue accounts for operations other than the above mentioned will be provided for elsewhere.

14. Operating Expenses Defined.—By the operating expenses of a corporation are meant such expenses as are necessary to the maintenance of the corporate organization, the rendering of services required or authorized by law, the sale of merchandise, the production (including herein capital consumed) and disposition of the commodities produced, and to the collection of the revenues therefor. Expenses directly incident to the collection of non-operating revenues and the maintenance of the property from which non-operating revenues are derived are excluded from operating expenses.

15. Definitions of Certain Terms Used in Connection with Expense Accounts.—Except where some other meaning is clearly specified in the definitions of the accounts, the following words, wherever used hereunder, have the meanings below stated:

Cost means cash or money cost, and not prices based on a term of credit.

Labor means human services of whatever character.

Cost of labor includes wages, salaries, and fees paid to persons for their services.

1791 Cost of materials and supplies includes all specifically assignable transportation charges incurred in obtaining the delivery of such materials and supplies upon the premises of the purchaser, and cost of any special tests made thereon prior to their acceptance; and in case the accounting person or corporation desires, it may include a suitable proportion of store expenses (when the materials and supplies are passed through stores) and the cost of further transportation to the place of consumption, and a suitable proportion of the expenses of the purchasing department, in which case a corresponding credit shall be made to the suitable expense account as hereinafter provided.

Cost of repairs, when made by the accounting person or corporation, includes cost of labor expended and material consumed, less salvage, if any.

NOTE.—It is not required that the transportation element of cost shall be assigned with a greater degree of accuracy than to the nearest cent per unit of material or supply. Where a single transportation item covers a multitude of things the portion of the expense not assigned to specific things should be charged to the same account that store expenses are charged to.

16*a*. Classification of Gas Operating Expenses.—For the purposes of this classification gas corporations are divided into two classes designated respectively as Large Companies and Small Companies. The term "Large Companies" shall include all corporations having an annual revenue from gas operations of more than $500,000; all other corporations shall be classed as "Small Companies." Large companies are required to keep as primary accounts the accounts defined in the text below; while small companies may consolidate certain accounts in accordance with the following list:

Small Companies.		Large Companies.	
I. Production Expenses.		I. Production Expenses.	
(601)	Gas Making Labor	(601a)	Works Superintendence.
		(601b)	Boiler House Labor.
		(601c)	Retort House Labor.
		(601d)	Generator House Labor.
		(601e)	Purifier House Labor.
		(601f)	Miscellaneous Labor at Works.
(602)	Boiler Fuel.	(602)	Boiler Fuel.
(603)	Water.	(603)	Water.
(604a)	Fuel under Retorts.	(604a)	Fuel under Retorts.
(604b)	Coal Carbonized.	(604b)	Coal Carbonized.
(605)	Coal Gas Enricher.	(605)	Coal Gas Enricher.
(606)	Generator Fuel.	(606)	Generator Fuel.
(607)	Water Gas Oil.	(607)	Water Gas Oil.
(608)	Purification Supplies.	(608)	Purification Supplies.
(609)	Miscellaneous Works Expense.	(609)	Miscellaneous Works Expense.
(610)	Repairs of Works and Station Structures.	(610)	Repairs of Works and Station Structures.
(610.5)	Repairs of Power Plant	(6508)	Repairs of Furnaces, Boilers and Accessories.
		(6509)	Repairs of Steam Engines.
		(6511b)	Repairs of Gas Engines.
		(6513)	Repairs of Miscellaneous Power Plant Equipment.
(611.5)	Repairs of Gas Apparatus	(611)	Repairs of Benches and Retorts.
		(6511a)	Repairs of Water Gas Sets and Accessories.
		(612)	Repairs of Purification Apparatus.
		(613)	Repairs of Holder.
		(614)	Repairs of Miscellaneous Equipment.
(615)	Repairs of Works Tools.	(615)	Repairs of Works Tools.
(616)	Gas Storage.	(616)	Gas Storage.
(617)	Gas from other Sources.	(617)	Gas from other Sources.
II. Transmission and Distribution Expenses.		II. Transmission and Distribution Expenses.	
(631)	Transmission Pumping.	(631)	Transmission Pumping.
(632)	Distribution Superintendence.	(632)	Distribution Superintendence.
(633)	Distribution Supplies and Expenses.	(633)	Distribution Supplies and Expenses.
(634a)	Gas Meter and Installation Work.	(634a)	Gas Meter and Installation Work.
(634b)	Work on Consumers' Premises.	(634b)	Work on Consumers' Premises.
(635)	Repairs of Gas Mains.	(635)	Repairs of Gas Mains.
(636)	Repairs of Gas Services.	(636)	Repairs of Gas Services.
(637)	Repairs of Gas Meters.	(637)	Repairs of Gas Meters.
(638)	Repairs of Distribution Tools.	(638)	Repairs of Distribution Tools.
(639)	Repairs of Gas Appliances.	(639)	Repairs of Gas Appliances.

III. Municipal Street Lighting Expenses.	III. Municipal Street Lighting Expenses.
(641) Street Lamp Operating.	(641) Street Lamp Operating.
(642) Street Lamp Repairs.	(642) Street Lamp Repairs.
IV. Commercial Expenses.	IV. Commercial Expenses.
(6551) Commercial Administration Gas.	(6551) Commercial Administration—Gas.
(6552) Promotion Office Expense—Gas.	(6552) Promotion Office Expense—Gas.
(6553) Advertising—Gas.	(6553) Advertising—Gas.
(6554) Canvassing and Soliciting—Gas.	(6554) Canvassing and Soliciting—Gas.
V. General and Miscellaneous Expenses.	V. General and Miscellaneous Expenses.
(6833) Salaries and Expenses of General Officers.	(6833) Salaries and Expenses of General Officers.
(6834) Salaries and Expenses of General Office Clerks.	(6834) Salaries and Expenses of General Office Clerks.
(6835) General Office Supplies and Expenses.	(6835) General Office Supplies and Expenses.
(6836) General Law Expenses.	(6836) General Law Expenses.
	(6837) Miscellaneous General Expenses.
	(6838) Insurance.
(6841) Other General Expense.....	(6839) Relief Department and Pensions.
	(6840) Gas Franchise Requirements.
(6842) General Amortization—Gas.	(6842) General Amortization—Gas.
(6845) Gas Expenses Transferred—Cr.	(6845) Gas Expenses Transferred—Cr.
(6846) Joint Operating Expenses—Cr.	(6846) Joint Operating Expenses—Cr.
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	(6847a) Accidents and Damages.
(6847) Injuries and Damages.....	(6847b) Law Expenses connected with Damages.
(6848) General Stationery and Printing.	(6848) General Stationery and Printing.
(6850) Store Expenses.	(6850) Store Expenses.
(6851) Stable Expenses.	(6851) Stable Expenses.
(6852) Undistributed Adjustments—Balance.	(6852) Undistributed Adjustments—Balance.
(6853) Duplicate Gas Charges—Cr.	(6853) Duplicate Gas Charges—Cr.

166. Definitions of Gas Operating Expense Accounts.—In the following definitions of accounts the letters and numbers prefixed to the titles are inserted solely for convenience of reference and are no part of the titles or of the definitions

General Accounts.

I. Production Expenses.
II. Transmission and Distribution Expenses.
III. Municipal Street Lighting Expenses.
IV. Commercial Expenses.
V. General and Miscellaneous Expenses.

I. Production Expenses.

NOTE.—In case the accounting corporation operates two or more separate and distinct plants for the production of gas, it will be required to keep (with the detail herein prescribed) separate accounts covering production at the several plants. In case the circumstances of any corporation make it impracticable to allocate the cost of its works labor among the accounts below prescribed, it should petition the Public Service Commission for permission to consolidate two or more of them. Such application must set out in full the facts which in the judgment of the petitioner make such allocation impracticable.

(601*a*.) Works Superintendence.

Charge to this account the cost of labor of the engineer in charge of works and his assistants, also day and night foreman and station clerks.

(601*b*.) Boiler House Labor.

Charge to this account the cost of labor employed in weighing and handling coal, coke, and breeze from place of storage to boilers; labor employed in operating boilers and engines (including such labor as that of shovellers, weighers, boiler firemen and engineers, and oilers); and labor employed in pumping oil tar from generators through separators to storage tanks, and from storage tanks to boilers. Include also such labor as that of pump house men.

(601*c*.) Retort House Labor.

Charge to this account the cost of labor employed in firing benches, charging and re-charging retorts, patching and scurfing retorts, cleaning pipes and lids, quenching and handling coke used
1794 under benches, and handling coal from place of storage to retort house. This includes such labor as that of foremen, firemen, furnacemen, retort and boiler tenders, patchers, pipemen, lid cleaners, coke quenchers, guymen, riggers, shovellers, and wheelers.

(601*d*.) Generator House Labor.

Charge to this account the cost of labor employed in weighing and handling coal and coke from place of storage to charging floor, and in operating, firing, clinkering and cleaning generators. This includes such labor as that of shovellers, weighers, pumpers, generator firemen, and runners.

(601*e*.) Purifier House Labor.

Charge to this account the cost of labor employed in changing purifier boxes, revivifying oxide, and removing spent oxide to refuse pile. This includes such labor as that of foremen and laborers.

(601*f*.) Miscellaneous Labor at Works.

Charge to this account the cost of general labor in and about the works not specifically engaged in the manufacture of gas, such as that of watchmen, janitors, and messengers, laborers employed in cleaning up yards, removing snow, and cleaning out refuse pile.

(602.) Boiler Fuel.

Charge to this account the cost (in storage pile) of fuel used under boilers. This includes cost of fuel used, freight, demurrage charges, labor employed in discharging and transferring fuel from point of shipper's delivery to place of storage, and cartage employed in discharging and transferring fuel from point of delivery to place of storage.

NOTE.—If boiler fuel is delivered from point of shipper's delivery to boilers by other than boiler house labor, cost of such labor should be added to cost of fuel.

(603.) Water.

Charge to this account the cost of water used for gas production.

(604*a*.) Fuel Under Retorts.

Charge to this account the cost (in storage pile) of fuel used under retorts. This includes cost of fuel used, freight, demurrage charges, and labor and cartage employed in discharging and transferring fuel from point of shipper's delivery to storage pile.

NOTE.—If fuel is delivered from storage to retort house by other than retort house labor, cost of such labor should be added to cost of fuel.

(604*b*.) Coal Carbonized.

Charge to this account the cost (in storage pile) of gas coal used in retorts. This includes invoice cost of coal used, freight, demurrage charges, and labor and cartage employed in discharging and transferring coal from point of shipper's delivery to storage pile.

NOTE.—If coal is delivered from storage to retort house by other than retort house labor, cost of such labor should be added to cost of coal.

1795 (605.) Coal Gas Enricher.

Charge to this account the cost (in storage) of enricher materials used in enriching coal gas. This includes cost of enricher used, freight, demurrage charges, and labor and cartage employed in transferring enricher from point of shipper's delivery to storage.

(606.) Generator Fuel.

Charge to this account the cost (in storage pile) of fuel used in generators. This includes invoice cost of fuel used, freight, demurrage charges, and labor and cartage employed in discharging and transferring fuel from point of shipper's delivery to storage pile.

NOTE.—If generator fuel is delivered from storage to generator house by other than generator house labor, cost of such labor should be added to cost of generator fuel.

(607.) Water Gas Oil.

Charge to this account the cost (in storage tanks) of gas oil or naphtha used in making water gas. This includes invoice cost of oil used, freight, demurrage charges, and labor and cartage employed in getting oil from point of shipper's delivery to storage tanks.

(608.) Purification Supplies.

Charge to this account the cost of material used in gas purification. This includes the average cost of oxide actually used (the invoice cost and freight, plus shavings, plus labor and cartage necessary to store it, plus the cost of mixing it), and the invoice cost of lime actually used.

(609.) Miscellaneous Works Expense.

Charge to this account the cost of sundry suppiles and expenses in connection with tthe works not includible in other accounts. This includes lubricating oil, waste and packing, and other small materials of like nature used in gas production; also incidental items, such as telephone, ice, brooms, mops, kerosene, soap, towels, and similar expenses.

(610.) Repairs of Works and Station Structures.

Charge to this account the cost of all repairs of works and station structures, including permanent piers and other foundations. Such structures include retort houses, generator houses, purifier houses, engine houses, boiler houses, meter houses, coal sheds, coke sheds, tar houses and wells, oil tanks, and other structures for storage of fuel to be consumed or carbonized in the production of gas and the operations auxiliary thereto; structures for residuals and byproducts; appurtenant walks, fences, drives, tramways, trestles, etc., and all fixtures permanently attached to such structures and made a part thereof; also all buildings, holding houses, and other structures at outlying holder stations, except the holders and their appurtenances.

1796 NOTE.—Repairs of short-lived and especially provided foundations and settings for furnaces and boilers, steam engines, gas engines, pumps, generators, benches, condensers, washers, scrub

bers, purifiers, etc., shall not be included herein. Such foundations and settings and the apparatus and machinery to which they pertain are not intended to be included under the term fixtures as above used. Nor shall repairs of gas holders be included in this account.

(G508.) Repairs of Furnaces, Boilers, and Accessories.

Charge to this account the cost of repairing all furnaces, boilers, and boiler apparatus and accessories devoted to the production of steam for use in producing gas and in furnishing motive power in gas works and stations. This includes boilers and valves thereto attached, appurtenant furnaces and grates, and flues leading to smokestacks and chimneys, and the specially provided foundations and settings of such boilers and appurtenances. It also includes mechanical stokers and other like apparatus for regulating the supply of fuel, etc., feed and hot water heaters and economizers, injectors, filters, feed pumps, blower engines, coal conveyors, ash conveyors, water pipes, steam traps, drains, and separators; and pipes for conducting steam from the boiler to the engine, to condensers, or to the gas producers, exhaust pipes, etc. It does not include steam pipes whose primary purpose is the heating of buildings.

(G509.) Repairs of Steam Engines.

Charge to this account the cost of repairing all steam engines devoted to use as prime movers in gas works. This includes the specially provided foundations and settings of such engines. The engine, whether reciprocating or rotary (such as steam turbines), shall be considered to include the throttle or inlet valve and the governor; also condensers and air pumps, but not the steam pipe leading from the boiler, nor the exhaust pipe.

(G511*b*.) Repairs of Gas Engines.

Charge to this account the cost of repairing all gas engines devoted to use as prime movers in gas works and stations. This includes the specially provided foundations and settings of such engines. The engine includes the inlet valve, governor, and ignition and starting apparatus, but not the pipe leading from the gas holder, nor the exhaust pipe.

(G513.) Repairs of Miscellaneous Power Plant Equipment.

Charge to this account the cost of repairing all miscellaneous power plant equipment at gas works which is not includible in any of the foregoing accounts. This includes such mechanical apparatus as belts, pulleys, hangers, countershafts, and other apparatus intermediary between the prime mover and the apparatus operated, cranes, hoists, etc., and machine tools and such other tools at power plants as are proper to be capitalized, etc.

1797 (611.) Repairs of Benches and Retorts.

Charge to this account the cost of all repairs of benches, including the retorts and their settings, and auxiliary piping, including ascension pipes, and foul and hydraulic mains.

(611*a*.) Repairs of Water Gas Sets and Accessories.

Charge to this account the cost of repairing all water gas generators and accessories devoted to the production of gas, the specially provided foundations and settings for such water gas sets, and the flues leading therefrom to smokestacks and chimneys. This account includes not only generators, carburetors, superheaters, seals, and piping connected therewith, but also blast apparatus, oil and steam supplying apparatus, oil heaters, etc. It does not include pipe whose primary purpose is the warming of buildings.

(612.) Repairs of Purification Apparatus.

Charge to this account the cost of all repairs of the apparatus for purifying gas, including condensers, washers, scrubbers, purifiers, tar extractors, etc., and their specially provided foundations and settings.

(613.) Repairs of Holders.

Charge to this account the cost of all repairs of gas holders and appurtenances at works and of those at district stations.

NOTE.—Repairs of holder housings shall be charged to account No. 610, "Repairs of Works and Station Structures."

(614.) Repairs of Miscellaneous Equipment.

Charge to this account the cost of repairing all accessory equipment and apparatus used in the production and storage of gas not specifically provided for in the foregoing accounts. This account includes: repairs of exhausters, station meters, governors, etc.; apparatus for charging retorts, conveyors for disposing of coke and other products and residuals; tar and ammonia apparatus, pumps, pipes, tanks, etc.

(615.) Repairs of Works Tools.

Charge to this account the cost of repairing such tools and implements used in the production and storage of gas as have been capitalized.

(616.) Gas Storage.

Charge to this account the cost of labor and material (except repairs) employed in storing and regulating the flow of gas to dis-

tributing mains by holder pressure. This includes labor of firemen, engineers, valvemen, and superintendents when engaged on gas storage; and cost of coal, coke, water, and incidentals.

(617.) Gas from Other Sources.

Charge to this account the cash purchase price of gas bought from other companies for distribution through the system of the
1798 accounting corporation; also the corporation's proportion of the cost of production (including maintenance, but not including any pure rent or return upon the value of property employed) of gas produced by another concern for the use of the corporation under any joint arrangement for the sharing of expense upon the basis of the relative amounts of benefit to the several participants.

II. Transmission and Distribution Expenses.

(631.) Transmission Pumping.

Charge to this account the cost of pumping gas through mains to the distribution system, including inspection and regulation of booster governors.

NOTE.—In gas operations, when gas is delivered to the supply system outside the works at substantially works pressure, the pipe system, including mains, feeders, and services (and supply pipes to outlying holders, if any), shall all be classed in the distribution system. When the pressure is raised by means of boosters and the gas is delivered to the pipes at higher than works pressure, and is later reduced in pressure and delivered to the distribution system proper, that portion of the pipe system used for conducting gas at the raised pressure shall be classed as the transmission system.

(632.) Distribution Superintendence.

Charge to this account the cost of all labor employed in superintending the operation of the street department, fitting and repair shops, including the salaries of superintendents, foremen, clerks, timekeepers, messengers, watchmen, and janitors employed in the distribution department.

(633.) Distribution Supplies and Expenses.

Charge to this account the cost of office maintenance and incidental expenses of the street and shop departments, including light, heat, telephone, water, ice, etc.

NOTE.—When the distribution office is combined with the works office or commercial office, charges like rent, light, etc., should be divided between them in a fixed ratio, based upon the relative amounts of use.

(634*a*.) Gas Meter and Installation Work.

Charge to this account the cost of labor employed and material used in locking and unlocking meters, building inspection, pumping drip, cleaning service or house pipe with pump; setting, removing, re-setting and changing position of meters, and temporary repairs of leaks in house piping.

(634*b*.) Work on Consumers' Premises.

Charge to this account the cost of installing gas stoves and other appliances on the premises of consumers, and of work done for consumers in maintaining the efficiency of their service, including complaint work and other work done in houses beyond the end of the meter outlet connection. This includes the cost of adjusting or changing location of house pipes, gas burners, fixtures, stoves
1799 and appliances, and the cost of new pillars, tips, burners, or devices not chargeable to repair accounts; it does not include such installation expense items as are provided for in the preceding account.

Credit to this account the cost element of receipts for jobbing work which the accounting corporation has performed as agent under agency contracts.

NOTE A.—Any profit or commission accruing to the corporation on jobbing work performed as agent shall be credited to account No. 441 "Gas Merchandise and Jobbing Revenue;" to that account shall also be credited all receipts from gas jobbing not done under agency contracts.

NOTE B.—Credits and debits to this account must be analyzed in annual reports to the Public Service Commission.

(635.) Repairs of Gas Mains.

Charge to this account the cost of labor and material employed in repairing mains. This includes labor of foremen, inspectors, caulkers, tappers, pavers, drillers, skilled laborers, general laborers, and similar workers on street department payrolls, while engaged in repairing, altering, overhauling, changing position of or removing street mains; protecting exposed or undermined mains, searching for and repairing leaks in mains, and paving over any of the above work; also material and cartage in connection with the above work.

NOTE.—This account must be so kept as to enable the corporation to show separately in its annual report to the Public Service Commission the cost of repairing trunk lines and mains used for transmission of gas, and the cost of repairing those used for distribution.

In gas operations, when gas is delivered to the supply system outside the works at substantially works pressure, the pipe system, including mains, feeders, and services (and supply pipes to outlying

holders, if any) shall all be classed in the distribution system. When the pressure is raised by means of boosters and the gas is delivered to the pipes at higher than works pressure, and is later reduced in pressure and delivered to the distribution system proper, that portion of the pipe system used for conducting gas at the raised pressure shall be classed as the transmission system.

(636.) Repairs of Gas Services.

Charge to this account the cost of labor and material employed in repairing services. This includes the same classes of labor as shown in the account (No. 635), "Repairs of Gas Mains," while engaged in repairing, altering, removing, relaying, cutting off, increasing the size of and changing the position of services, searching for and repairing leaks in services; and paving over any of the above work; also material and cartage in connection with the work shown above.

(637.) Repairs of Gas Meters.

Charge to this account the cost of testing and repairing consumers' meters.

(638.) Repairs of Distribution Tools.

Charge to this account the cost of sharpening and repairing tools and implements used in the street department and the fitting and repair shops and charged to capital accounts.

1800 (639.) Repairs of Gas Appliances.

Charge to this account the cost of repairs of gas lamps, stoves, engines, and other appliances owned by the corporation and rented to consumers.

III. Municipal Street Lighting Expenses.

(641.) Street Lamp Operating.

Charge to this account the cost of labor employed in cleaning and lighting street lamps, and extinguishing street lights; in inspecting and supervising the street lighting district; in reporting on re-lights and discontinues, and watching the hours of lighting and extinguishing; and the incidental expenses of street lamp operating.

(642.) Street Lamp Repairs.

Charge to this account the cost of labor and material consumed in fitting up new lamp posts, re-fitting standpipes, cleaning services, cutting off services, re-caulking columns, removing posts, re-setting posts, re-fitting columns, straightening posts, and all other work of a similar character necessary to maintain the street lighting system

to the degree of efficiency required by the city; also re-paving over openings made necessary by such work.

IV. Commercial Expenses.

(G551.) Commercial Administration—Gas.

Charge to this account all matters provided for under the following heads:

a. Commercial Department General Labor.—This head includes the cost of labor of superintendents and assistants, chief clerks, stenographers, general clerks, high bill clerks, switchboard operators, messengers, janitors and watchmen employed in the commercial department.

b. Commercial Department Accounting.—This head includes the cost of labor of bookkeepers and clerks employed on consumers' accounts.

c. Commercial Department Contracts.—This head includes the cost of labor of clerks and other employees in the application of contract bureau.

d. Commercial Department Collecting.—This head includes the cost of labor of regular and prepayment collectors.

e. Meter Reading.—This head includes the cost of labor of meter readers.

f. Commercial Office Supplies and Expenses.—The head includes the cost of supplies and the incidental expenses of the commercial office.

(G552.) Promotion Office Expense—Gas.

Charge to this account the matters prescribed under the following heads:

1801 *a.* Promotion Management.—This covers the cost of administration of the department maintained for the promotion or development of gas consumption, including that portion of the salaries and expenses of management and clerks in agency and contract departments assignable to new business.

b. Demonstrations.—This covers the cost of labor and expenses incurred in exhibiting and demonstrating the use of gas appliances for the purpose of obtaining new business.

c. Other Promotion Office Expense.—This covers the office expenses of the promotion or new business department.

(G553.) Advertising—Gas.

Charge to this account the matters prescribed under the following heads:

a. Advertising Salaries and Expenses.—This covers the salaries and personal expenses of the advertising manager and clerks.

b. Advertising Sundries.—This covers the cost of commercial advertising sundries, including booklets, dodgers, newspaper advertisements, posters, bulletins, and all related items.

NOTE.—This account does not include the expense of advertising residuals, such being chargeable to the proper residual expense account.

(G554.) Canvassing and Soliciting—Gas.

Charge to this account all expenses incurred in soliciting new business, including wages, commissions, and personal expenses of canvassers, cost of preparing estimates, engineering advice on gas installation, etc., and office sundries in connection therewith.

V. General and Miscellaneous Expenses.

(G833.) Salaries and Expenses of General Officers.

Charge to this account the salaries and traveling and incidental expenses of the chairman of the board, president, vice-president, treasurer, secretary, comptroller, general auditor, general manager, assistant general manager, chief engineer, general superintendent, purchasing agent, and all other officers whose jurisdiction extends to the entire system and whose services can not be satisfactorily allocated to the several departments.

(G834.) Salaries and Expenses of General Office Clerks.

Charge to this account the salaries and traveling and incidental expenses of general office auditors, bookkeepers, cashiers, paymasters, stenographers, clerks employed in counting cash, and all other clerks employed in the general office.

NOTE.—Cost of labor of clerks in the commercial department shall be charged to the account (No. G551), "Commercial Administration—Gas." (See page 46.)

(G835.) General Office Supplies and Expenses.

Charge to this account the cost of office supplies, repairs of office furniture, and renewals of such furniture as has not been
1802 capitalized; wages of janitors, porters, and messengers; rent of rooms in office buildings, repairs of such rented rooms, and all other miscellaneous expenses of general offices. Office expenses of department officers must be charged to the proper departmental accounts.

NOTE.—Rents charged to this account will be required to be reported separately.

(G836.) General Law Expenses.

Charge to this account all law expenses except those incurred in the defense and settlement of damage claims. This includes salaries and expenses of all counsel, solicitors, and attorneys, their clerks and attendants, and expenses of their offices; cost of law books, printing briefs, legal forms, testimony, reports, etc.; fees and retainers for services of attorneys not regular employees; court costs and payments of special, notarial, and witness fees not provided for elsewhere; expenses connected with taking depositions, and all law and court expenses not provided for elsewhere.

NOTE.—The compensation of the general solicitor or counsel or other attorneys engaged partly in the defense or settlement of damage suits and partly in other legal work, should be properly apportioned between this account and the account (No. G847b), "Law Expense Connected with Damages."

(G837.) Miscellaneous General Expenses.

Charge to this account the cost of telephone service, telegrams, and other miscellaneous expenses (including all expense specially incurred in connection with the utilization and sale of residuals and byproducts, such as coke, tar, ammonia, carbon, and other residuals and byproducts, etc.) connected with the general management not otherwise provided for.

NOTE.—Charges to this account must be made in such wise as to enable the corporation to show separately the following matters:

a. Coke expense, including the cost of all labor and supplies specially consumed and expense specially incurred in the disposal of coke over and above what would be necessitated by such disposition if the coke were not sold. This includes the cost of any special preparation of the coke for sale and the cost of hauling such coke to points of delivery.

b. Tar expense, including the cost of all labor and supplies specially consumed and all expense specially incurred in the disposition of tar over and above the expense that would be involved if such tar were consumed by the corporation. If both coal gas and water gas are manufactured, and the resulting tars are separately disposed of, the tar expense shall be stated for each.

c. Ammonia expense, including the cost of all labor and supplies specially consumed and all expense specially incurred in the preparation and sale of ammonia or ammoniacal liquor over and above what would be involved if such liquor were consumed or wasted by the corporation.

d. Other residuals and byproducts expense, including the cost of all labor and supplies specially consumed and expense specially incurred in the preparation and disposition of other residuals and

byproducts than those provided for under the foregoing three heads, over and above what would be involved if such residuals and by-products were consumed by the corporation or wasted.

c. Other miscellaneous expense connected with gas operations and not elsewhere provided for.

(6838.) Insurance.

Charge to this account premiums paid to insurance companies for the fidelity, boiler, casualty, burglar, and all other insurance; also amounts set aside as an insurance reserve.

1803 NOTE.—In their reports to the Public Service Commission corporations will be required to report the charges made to this account for the various kinds of insurance, and for self-insurance.

(6839.) Relief Department and Pensions.

Charge to this account all salaries and expenses incurred in connection with conducting a relief department; also contributions made to such department; also all pensions paid to retired employees, and expenses in connection therewith.

(6840.) Gas Franchise Requirements.

Charge to this account the cost of all gas and other materials and supplies furnished to municipal corporations in compliance with franchise requirements and for which no payment is received by the corporation; also of all direct expense, such as paving and other like matters, incurred in compliance with such requirements and for which no reimbursement is received by the corporation. Amounts charged to this account for which there is no direct money outlay shall be credited to the below provided account (No. 6853), "Duplicate Gas Charges—Cr."

(6842.) General Amortization—Gas.

Charge to this account month by month the amount estimated to be necessary to cover such wear and tear and obsolescence and inadequacy as have accrued during the month in the tangible gas capital of the corporation; and such portion of the life of intangible fixed capital as has expired or been consumed during the month; and the amount estimated to be necessary to provide a reserve to cover the cost of property destroyed by extraordinary casualties; less the amounts charged for that month to the various repair accounts in Gas Operating Expenses. The amount charged (or credited) to this account shall be concurrently credited (or charged) to the reserve account (No. 374), "Accrued Amortization of Capital." (See page 28.)

NOTE A.—Until otherwise ordered, the "amount estimated to be necessary to cover such wear and tear and obsolescence and inadequacy as have accrued during" any month shall be based on a rule determined by the accounting corporation. Such rule may be derived from a consideration of the said corporation's history and experience during the preceding five years, and the accrual may be on the basis of amount of gas sold. Amortization of intangible capital shall likewise be based on rule. Whatever may be its basis, such rules and a sworn statement of the facts and expert opinions and estimates upon which they are based shall be filed with the Public Service Commission on or before January 1, 1909; each amendment of any such rule and a sworn statement of the facts and expert opinions and estimates upon which such amendment is based shall be filed with the Public Service Commission before it is used by the accounting corporation, and shall show the date when it is to be effective. Such rules and statements shall be filed upon sheets 8½ x 11 inches or 9½ x 12 inches and shall be entitled "Rule of the (here naming the accounting corporation) concerning Amortization."

NOTE B.—When any capital is retired from service, the amount (estimated if not known) originally charged to a capital account in respect thereof shall be credited to such capital account, and (except as provided in the account (No. G100), "Fixed Capital, December 31, 1908") the original money cost of such capital, less salvage, if any, shall be charged to the reserve account, "Accrued Amortization of Capital," any necessary adjusting entry being made in the
1894 proper account under "Corporate Surplus or Deficit." Where capital is substantially continuous and can not be satisfactorily individualized, it shall be kept in efficient operating condition through repair, and the renewals and replacements of parts thereof shall be considered repairs. In the case of buildings, towers, bridges, trestles, and other separate structures capable of being readily individualized, charges to this account must be sufficient to provide (in respect of such capital and except as provided in the account (No. G100), "Fixed Capital, December 31, 1908") in the account "Accrued Amortization of Capital" by the time such structures go out of service a reserve equal to the original money cost thereof, less salvage, to which account such original cost, less salvage, shall be charged.

(G845.) Gas Expenses Transferred—Cr.

Credit to this account the proportion of operating expenses (including depreciation and other amortization as well as repairs) chargeable to other coordinate departments (such as electric or street railroad) within the same corporation, but defrayed in the first instance by the gas department.

NOTE.—Do not credit to this account any allowance in the nature of rent or return upon the cost or value of property.

(G846.) Joint Operating Expense—Cr.

When any plant or equipment is maintained or operated by the accounting corporation for the joint benefit of itself and others under an arrangement for apportioning (on the basis of the relative amounts of benefit to the several participants) the operating expenses, the portion of such expenses chargeable to others under the arrangement shall be credited to this account. The portion so credited must not include any allowance for profit or return upon the value of such property.

NOTE A.—The foregoing should be read in connection with the definition of revenue account (No. 413), "Joint Gas Rent Revenue." (See page 36.)

NOTE B.—In the case of the production of gas part of which is transferred to another, if the arrangement under which such production occurs does not provide for the apportionment of expenses, the entire amount charged for the portion supplied is to be credited to the appropriate revenue account covering the sale of gas. (See the account (No. 438), "Other Gas Corporations," page 34.)

(G847*a*.) Accidents and Damages.

Charge to this account all expenses (other than law expenses provided for in the succeeding account) on account of persons killed or injured and property damaged in connection with the operation of the plant, as enumerated under the following heads:

(*a*) Claim Department Expenses.—This head includes salaries and expenses of claim agents, investigators, adjusters, and others engaged in the investigation of accidents and adjustment of claims.

(*b*) Medical Expenses.—This head includes salaries, fees, and expenses of surgeons and doctors; nursing, hospital attendance, medical and surgical supplies; fees and expenses of coroners and undertakers; and contributions to hospitals.

(*c*) Injuries to Employees.—This head includes amounts paid in settlement of claims of employees for injuries arising in the course of their employment; also wages paid to disabled employees while off duty.

1005 (*d*) Other Personal Injuries and Property Damages.—This head includes amounts paid in settlement of claims of persons other than employees for personal injuries sustained in connection with the operation of the plant, and amounts paid in settlement of claims for damage to property not owned by the accounting corporation.

(*e*) Other Accident Expenses.

NOTE A.—If it is desired that the charge to operating expenses on account of injuries and damages shall be upon some arbitrary

basis, the amount so charged shall be credited to the account (No. 381), "Casualties and Insurance Reserve," and the actual disbursements above enumerated shall be charged against such reserve account.

NOTE B.—The amount charged under the head (c), "Injuries to Employees," must be separately stated in annual reports to the Public Service Commission.

(6847/.) Law Expenses Connected with Damages.

Charge to this account all law expenses in connection with the defense or settlement of damage claims, including—

(a) Salaries and Expenses of Attorneys.—A proper proportion of the salary and expenses of the general solicitor or counsel, and salaries, fees, and expenses of attorneys engaged in this work.

(b) Court Costs and Expenses.—Fees of court stenographers, expenses connected with taking depositions, and other court expenses.

(c) Law Printing.—Cost of law books, and cost of printing of briefs, court records, and similar papers.

NOTE A.—If it is desired that the charge to operating expenses on account of law expenses in connection with damages shall be upon some arbitrary basis, the amount so charged shall be credited to the account (No. 381), "Casualties and Insurance Reserve," and the actual disbursements above enumerated shall be charged against such reserve account.

NOTE B.—The compensation of the general solicitor or counsel and other attorneys engaged partly in the defense or settlement of damage suits and partly in other legal work should be properly apportioned between this account and the account (No. 6836), "General Law Expenses."

(6848.) General Stationery and Printing.

Charge to this account all expenses for stationery and printing, stationery supplies, and postage, except as hereinafter provided.

The cost of printing briefs and other legal papers shall be charged to the account (No. 6836), "General Law Expenses," or (6847/) "Law Expenses Connected with Damages," in accordance with the purpose of the printing.

The cost of printing signs, posters, and other advertising matter shall be charged to the account (No. 6553), "Advertising—Gas."

The cost of such mechanical calculators, typewriters, duplicating machines, and other office appliances as are not properly capitalized, shall, if for use in general offices, be charged to the account (No. 6835), "General Office Supplies and Expenses"; or if for the use of departmental officers, to the proper departmental accounts.

(G850.) Store Expenses.

Charge to this account all salaries and expenses in connection with storerooms, including cost of sending materials and supplies from general storerooms to branch storerooms, and the collection of scrap material.

1806 (G851.) Stable Expenses.

Charge to this account the cost of feed, keep, and shoeing of horses, wages of stablemen, hostlers, veterinary expenses, and all other expenses of stabling horses; also the cost of repairing harness and vehicles.

NOTE.—The cost of horses purchased to replace others should be charged to the account (No. G122), "General Equipment."

(G852.) Undistributed Adjustments—Balance.

At least once a year an inventory of materials and supplies shall be taken, and the difference (in respect of any particular class of materials and supplies) between the ledger and inventory balances debited or credited to this account in case it cannot be assigned to a specific account. Credit to this account all discounts recovered through the prompt payment of bills for materials and supplies consumed in operation, unless such discounts are applied to the particular bills.

NOTE.—Where materials and supplies have been used in construction as well as in operation, a suitable proportion of the shortages or overages disclosed by the inventory may be debited or credited to the account (No. G286), "Miscellaneous Construction Expenditures."

(G853.) Duplicate Gas Charges—Cr.

Credit to this account all charges made to any account in gas operating expenses in respect of any gas or other product of gas operations of the corporation consumed therein.

17. Expenses of Outside Operations.—The detailed expense accounts for other than gas operations will be elsewhere provided for.

18. Tax accounts.—An account shall be kept of the taxes chargeable against each particular class of operations, and one for those chargeable against non-operating revenues. Each tax account shall be appropriately entitled (as e. g., "Taxes Assignable to Gas Operations," "Taxes Assignable to Non-operating Revenues," etc.), and shall be so kept as to show separately the following:

State Franchise Tax on Capital Stock.
State Franchise Tax on Gross Earnings.
Special Franchise Tax.
Taxes on Land (exclusive of improvements).

Taxes on Improvements on Lands.
Taxes on Personal Property.
Other Taxes (showing in detail).

To each tax account there shall be charged monthly the amount of taxes accruing during the month, and such amount shall be concurrently credited to the account "Taxes Accrued" (or to the account "Prepaid Taxes," if such tax is prepaid). The amount of taxes accruing during any month shall, where the levy is unknown, be estimated as nearly as may be, and when the levy is ascertained the matter shall be adjusted during the remainder of the tax year. For example, if at the beginning of a tax year the taxes on a particular class of property are estimated to be $6600 for the year, the monthly charge on account of such tax should be $550 until the amount
1807 of the levy becomes known. If during, say, the fifth month it is found that the levy for the year is $6540, there will already have been charged up four months at $550 per month, leaving $4[illegible] to be charged during the remainder of the year, or $545 for the fifth month and each month thereafter during the remainder of the year.

Such taxes as pertain to two or more classes of operations or to non-operating revenues should be apportioned with regard to such operations and non-operating revenues upon an equitable basis, which basis will be required to be reported in the annual report of the corporation to the Public Service Commission.

19. Uncollectible Bills.—For uncollectible gas bills the following account is provided.

(0870.) Uncollectible Gas Bills.

When, after a reasonably diligent effort to collect, any account for gas sold has proved impracticable of collection, it shall be charged to this account and credited to the account receivable in which theretofore charged.

20. Definitions of Non-operating Revenue Accounts.—In the following definitions of accounts the letters and numbers prefixed to the titles are inserted solely for convenience of reference and are no part of the titles or of the definitions:

(0390*b*.) Rent Accrued from Lease of Gas Plant.

Credit to this account monthly as they accrue all revenues flowing to the corporation from its interests in gas plant or equipment held by others under some form of lease whereby it surrenders possession of such property. This account contemplates that the taxes on property so held are payable by the tenant in possession and charged by him to the appropriate tax account. If under the contract of lease such taxes are payable by the lessor or its assignee, such taxes shall be charged to this revenue account and not to any of the lessor's tax accounts, nor to any of its expense accounts.

(G901*d*.) Miscellaneous Rent Revenues.

Credit to this account monthly as they accrue all miscellaneous rent revenues flowing to the corporation as a return upon leased property other than gas plant and equipment. Such revenues shall be classified as follows:

Leasehold Revenues.—That is to say, all revenues flowing to the corporation from its interests in property held by others under any lease the entire term of which is greater than one year. This contemplates that the taxes on property so held are payable by the tenant in possession and charged by him to the appropriate tax account. If under the contract of lease such taxes are payable by the lessor or its assignee such taxes shall be charged to this revenue account and not to any of the lessor's tax accounts, nor to any of its expense accounts.

1808 Other Rent Revenues.—That is to say, all revenues flowing to the corporation from its interests in property held by others under any lease or contract for a term not to exceed one year from the beginning of the term, or held at will or upon sufferance. This account contemplates that the taxes on property of this character shall be paid by the landlord and charged to the appropriate tax account. If under the contract covering the holding for terms of one year or less, or at will, the taxes are to be paid by the tenant, the amount of such taxes shall be credited month by month to this account as they accrue, and shall correspondingly be charged to the tax account covering taxes on property of this character.

Entries in this account must be made in such wise as to show separately the classes above indicated, which will be required to be stated separately in the annual reports to the Public Service Commission.

(G902.) Interest Revenues.

Credit to this account monthly as it accrues all—

Interest from Bound Investments.—That is to say, all interest accruing to the corporation upon such of its interest-bearing bound investments (as hereinbefore defined) as are liabilities of solvent concerns and individuals.

Interest from Free Investments.—That is to say, all interest accruing to the corporation upon such of its interest-bearing free investments (as hereinbefore defined) as are liabilities of solvent concerns and individuals.

Interest from Other Sources.—That is to say, all interest accruing to the corporation upon its interest-bearing current assets, special deposits, and all other assets not provided for under the two foregoing heads, where such interest is a liability, actual or contingent, of solvent concerns and individuals.

Entries in this account must be made in such wise as to show separately the classes above indicated, which will be required to be stated separately in the annual reports to the Public Service Commission.

(G903.) Dividend Revenues.

Credit to this account at their cash value, and as of the date when collectible, all—

Dividends on Bound Investments.—That is to say, all dividends declared by solvent concerns upon stocks held by the corporation among its bound investments.

Dividends on Free Investments.—That is to say, all dividends declared by solvent concerns upon stocks held by the corporation among its free investments.

Entries in this account must be made in such wise as to show separately the classes above indicated, which will be required to be stated separately in the annual reports to the Public Service Commission.

(G904.) Profits from Operations of Others.

Whenever, in accordance with the terms of any contract, the corporation is entitled to participate in the profits resulting from
1809 the operations of others, all revenues accruing to the corporation from such source shall be credited to this account.

NOTE.—This account does not include any dividends on stocks. Such dividends should be credited to the account (No. G903), "Dividend Revenues."

(G905.) Miscellaneous Non-operating Revenues.

To this account shall be credited all non-operating revenues accruing to the corporation and not provided for in any of the foregoing accounts.

21. Definition of Non-operating Revenue Deductions Account.—To an account entitled "Non-operating Revenue Deductions" shall be charged all matters provided for under the following sub-accounts:

A. Rent Expenses. This sub-account includes all matters provided for under the following two heads:

Leasehold Expense.—That is to say, all expense arising in connection with the procuring of revenues from leaseholds having terms greater than one year, including the cost of negotiating contracts, advertising for tenants, fees paid conveyancers, collector's commissions, cost of enforcing payment of rent, cost of ousting tenants, etc., and all other expense arising in connection with such leaseholds. This applies only to leases conveying the property out of the possession of the corporation, and it includes the expense accruing while the property is idle and awaiting an occupant. This head includes cost of maintenance of the property when such cost is borne by the corporation. Such maintenance includes depreciation as well as reparable wear and tear. It does not include taxes.

Other Rent Expense: This head is analogous to the preceding head "Leasehold Expense," and differs from that only in that this provides for expense in connection with property let for a term of one year or less.

b. Interest Expense.—This sub-account includes all expense arising in connection with procuring interest upon investments, such as expense of collection, expense of investigating delay in payment, expense of enforcing payment, and the like. It does not include taxes on such investments.

c. Dividend Expense.—This subaccount includes all expense arising in connection with the collection of dividends on stocks of other corporations; also all expense incurred in the investigation of the affairs of the corporations whose stocks are held, whether for the purpose of detecting mismanagement or for the purpose of inducing the declaration of dividends, and all expense connected with enforcing payment of dividends when declared. It does not include taxes on such investments.

d. Others' Operations Expense.—This sub-account includes the cost of negotiating contracts whereunder the corporation is to participate in profits resulting from the operations of others; also all expense of collecting the corporation's proportion of such profits, and all expense connected with procuring the modification or the dissolution of any such contract.

e. Miscellaneous Non-operating Expense.—This sub-account includes all non-operating expense (as hereinbefore defined) which is not provided for in the foregoing sub-accounts.

1810 *f.* Non-operating Taxes.—This sub-account includes all taxes accruing upon non-operating property and all assignable to non-operating revenues.

g. Uncollectible Non-operating Revenues.—When any non-operating revenues are judged by the corporation to be uncollectible, the amount thereof shall be credited to the account in which theretofore charged, and charged to the account "Non-operating Revenue Deductions" under the head of "Uncollectible Non-operating Revenues."

NOTE.—In annual reports of corporations to the Public Service Commission this account will be required to be fully analyzed.

22. Income Deductions. The sum total of the credit balances in the revenue accounts for any particular operation at the close of a fiscal period gives the gross revenue from that operation for that period. This gross revenue diminished by the operating expenses, the taxes, and the uncollectible bills assignable to such operation for the period, gives the income from that operation for the period. Similarly for the non-operating revenues, the non-operating expenses, and the non-operating taxes.

The aggregate of the incomes from the several operations and the

nonoperating income is the gross income applicable to corporate and leased properties. As has before been said, the gross income is, in the usual case, subject to various compulsory deductions, and these are hereinafter called Income Deductions.

23. Definitions of Income Deduction Accounts.—In the following definitions the letters and numbers prefixed to the titles of the several accounts are inserted solely for convenience of reference and are no part of the titles or of the definitions:

(921.) Interest Deductions.

Charge to this account monthly (or as otherwise below directed) all matters provided for under the following five heads:

Absolute Interest Accrued on Funded Debt.—This head includes all interest accruing absolutely on the outstanding funded debt of the corporation.

Contingent Interest Accrued on Funded Debt.—This head includes, when the contingency occurs, all interest accruing contingently on the outstanding funded debt of the corporation. This includes such matters as interest on income bonds.

Interest Accrued on Receiver's Certificates.—This head includes all interest accruing on receiver's certificates which are liens upon the property of the corporation or any part of it.

Interest Accrued on Other Unfunded Debt.—This head includes all interest accruing on all unfunded debt of the corporation except receiver's certificates.

Interest Accrued on Debenture Stocks.—This head includes all interest accruing on the outstanding debenture stocks of the corporation.

Entries in the account "Interest Deductions" must be made in such wise as to show separately the classes above indicated, which will be required to be stated separately in the annual reports to the Public Service Commission.

1811 (922b.) Rent for Lease of Other Gas Plant.

Charge to this account monthly all amounts accrued against the accounting corporation for rent of gas plant and equipment which it holds under some form of lease from another company or corporation and of which it has the exclusive possession. Taxes accrued on such plant and equipment shall not be charged to this account but to the appropriate Taxes account. If such taxes are (under the contract of lease) payable by the lessor or reversioner, they shall be credited to this account and charged to the appropriate Taxes account. Such taxes, when paid by the lessor or reversioner, shall be charged to its rent revenue account and not to its Taxes account, to the end that taxes upon such plant and equipment shall be reported by the corporation in possession.

(922.) Other Rent Deductions.

Charge to this account the matters provided for in the following sub-accounts:

f. Joint Facility Rents.—Where any plant or equipment is maintained or operated by another corporation for the joint benefit of the accounting corporation and others under a joint arrangement for sharing the expense (on the basis of the relative amounts of benefit to the several participants), if such joint arrangement provides for including in the charge against the accounting corporation any pure rent, profit, or return upon such plant or equipment over and above depreciation and other expense of maintenance and operation, such pure rent, or profit, or return upon property shall be charged to this sub-account.

NOTE.—This should be read in connection with the revenue account (No. 443), "Joint Gas Rent Revenue." (See page 36.)

g. Miscellaneous Rent Deductions.—This sub-account includes all miscellaneous rents payable not elsewhere provided for.

NOTE A.—Rents for furnished offices (and for office rooms in office buildings heated and lighted by the landlord) should not be charged to this account, but to the appropriate expense account.

NOTE B.—Entries in this account must be made in such wise as to permit an analysis in the annual report of the corporation in accordance with the sub-accounts above defined.

(923.) Sinking Fund Accruals.

Charge to this account month by month all accruals required to be made to sinking funds in accordance with the provisions of mortgages or other contracts requiring the establishment of sinking funds. All accruals to sinking or other funds created voluntarily by the corporation and not in pursuance of the provisions of any mortgage or other contract or of the requirements of law shall be excluded herefrom.

(924.) Guaranties of Periodic Payments.

Charge to this account all unsecured accruals of obligations arising under contracts whereby the corporation has guaranteed the annual or more frequent periodic payment of money or performance of other obligation on the part of another corporation
1812 or person, and because of the default of such other corporation or person the liability of the present corporation has become actual. This account does not include such matters as guaranties of payment of principal of funded debt and other similar things relating to a series of years, nor does it include any guaran-

ties for which the corporation has protected itself through taki ample security. If insufficient security has been taken in resp of such annual or more frequent payments, the unsecured porti thereof shall be charged to this account.

(925.) Loss on Operations of Others.

Whenever in accordance with the terms of any contract the c poration is bound to contribute toward reimbursement of the los resulting from the operations of others, all liabilities accruing to t corporation from such source shall be charged to this account.

(926.) Other Contractual Deductions from Income.

Charge to this account month by month all contractual liabili arising from annual or other more frequent periodic matters a not includible in any of the foregoing accounts. This account cludes only deductions from income and not any liabilities aris in exchange for goods or other things purchased.

(927.) Amortization of Landed Capital.

Charge to this account at the close of any fiscal period such p portion of the original money cost (estimated if not known) landed capital as is necessary to cover the proportion of the l thereof expired during such period.

NOTE A.—The amounts charged to this account shall be conc rently credited to the account (No. 374), "Accrued Amortization Capital." (See page 28.)

NOTE B.—When any landed capital expires or is otherwise tired from service (as e. g., through sale), the capital account other indicant account (if any) originally charged therewith sh be credited with the amount originally charged, the account "A crued Amortization of Capital" shall be debited with all amou theretofore credited to such account in respect of such landed ca ital so going out of service, the appropriate account shall be debi with the proceeds of sale (if any), and any necessary adjustme shall be made through the "Corporate Surplus or Deficit" accou

(928.) Amortization of Debt Discount and Expense.

Charge to this account at or before the close of any fiscal peri that proportion of the unamortized discount and debt expense outstanding debt which is applicable to the period. This prop tion shall be determined according to a rule, the uniform appli tion of which during the interval between the issue and the matur of any debt will completely amortize or wipe out the discount which such debt was issued and the debt expense connected the with. Such amortization may at the option of the corporation earlier effected by charging all or any portion of such discount a

debt expense to the account (No. 939), "Other Deductions from Surplus," immediately upon issue of the debt or thereafter.

1813 (929.) Amortization of Premium on Debt—Cr.

Credit to this account at or after the close of any fiscal period the proportion of the premium at which outstanding debt was issued which is applicable to the period. This proportion shall be determined according to a rule, the uniform application of which during the interval between the issue and the maturity of any debt will completely amortize or wipe out the premium at which such debt was issued. Such amortization may at the option of the corporation be effected by crediting all or any portion of such premium to the account (No. 931*b*), "Other Additions to Surplus," only upon the maturity of the debt.

24. Appropriations.—The balance resulting from closing the foregoing income deduction accounts for any fiscal period into gross income for that period gives the Net Corporate Income for the period. The net corporate income being of the same nature as the corporate surplus shall be closed into the "Corporate Surplus or Deficit" account. The group of accounts which show for any fiscal period the changes in the "Corporate Surplus or Deficit" account are designated the Appropriation accounts, for the reason that substantially all of them are subject only to the discretion of the corporation. At the end of each fiscal period each of the appropriation accounts shall be closed into the "Corporate Surplus or Deficit" account.

25. Definitions of Appropriation Accounts.—In the following definitions of the appropriation accounts the letters and numbers prefixed to the titles of the accounts are inserted solely for convenience of reference and are no part of the titls or of the definitions:

(931*a*.) Bad Debts Collected.

When any debt theretofore written off as a bad debt is collected, the amount of the collection shall be credited to this account. Expense involved in such collection shall be charged to this account.

(931*b*.) Other Additions to Surplus.

Credit to this account all additions to surplus because of erroneous accounting in prior fiscal periods, and all other additions to surplus not elsewhere provided for.

NOTE.—A complete analysis of this account will be required in annual reports of corporations to the Public Service Commission.

(932.) Expenses Elsewhere Unprovided For.

Charge to this account all expenses not chargeable as a part of operating expenses or of non-operating expenses, such as fines levied

on the corporation for violation of law, for misfeasance, for nonfeasance, etc., fines levied on directors, officers, and other employees and assumed by the corporation, donations to funds, to churches and other associations, and other like expenses and outgoes.

(933.) Dividends on Outstanding Stocks.

When any dividend is declared upon any outstanding stocks of the corporation, the amount of such dividend shall there-
1814 upon be charged to this account. All entries to this account shall show the amount of stock upon which the dividend is declared, the class of such stock, and the rate of the dividend as well as the amount thereof; and if the dividend is payable in any other thing than money, such thing shall be described in the entry with sufficient particularity to identify it, and the actual money value thereof shall be stated as the amount of the dividend.

When any dividend is declared upon the stocks of the corporation held in its treasury, the amount of such dividend thereon shall be credited to this account. Entries of credits to this account shall be made with the same degree of particularity as is prescribed in the preceding paragraph.

(934.) Amortization Elsewhere Unprovided For.

Charge to this account such amortization as is not elsewhere provided for. This account provides for all optional amortization, such as that of discount on stocks outstanding, abandoned property, etc.

(935.) Appropriations to Reserves.

Charge to this account all optional appropriations to reserves.

(936.) Gifts to Controlled Corporations.

Charge to this account all gifts made by the corporation to its controlled corporations, also such portions of all advances thereto as are not carried as assets.

(937.) Other Appropriations.

Charge to this account all optional appropriations made by the corporation and not elsewhere provided for.

NOTE.—A complete analysis of this account will be required in annual reports of corporations to the Public Service Commission.

(938.) Bad Debts Written Off.

Charge to this account the amount by which debts are written off from the accounts of the corporation when they become stale and are placed in the "bad debt" class.

NOTE.—Such "uncollectible bills" as have been provided for in the heretofore defined "uncollectible bills" accounts must not be included in this account.

(939.) Other Deductions from Surplus.

Charge to this account all deductions from surplus because of erroneous accounting in prior fiscal periods, and all other deductions from surplus not elsewhere provided for.

NOTE.—A complete analysis of this account will be required in annual reports of corporations to the Public Service Commission.

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1819 At an Adjourned Meeting of the Public Service Commission for the First District, Duly Held at Its Office, No. 120 Broadway, in the Borough of Manhattan, City and State of New York, on the 29th Day of June, 1917.

Present:

Oscar S. Straus, Chairman;
Henry W. Hodge,
Travis H. Whitney,
Charles S. Hervey,
Commissioners.

Case No. 578.

In the Matter of a Uniform System of Accounts for Gas Corporations Within the Jurisdiction of the Commission.

Order Modifying the Final Order.

An order having been adopted by the Public Service Commission, First District, on December 8, 1908, prescribing a uniform system of accounts to be kept by gas corporations subject to its jurisdiction, it is hereby

Ordered, That Schedule A of the Uniform System of Accounts for Gas Corporations be modified by the substitution for paragraphs 9-22 thereof the matter contained in Schedule 1 appended hereto.

Ordered, That in addition to such amendment there be inserted as an introduction to the definitions of capital in said Schedule A the following statement:

In prescribing this uniform system or method of keeping accounts, records and books to be observed by such corporations, the Commission is not undertaking that any item set out in any account will have the Commission's approval either as to amount or character in fixing a rate or authorizing an issue of securities. The system or method of accounts prescribed is designed to set out the facts in connection with the income, outgo, etc., and the Commission will determine in any proceeding involving the fixing of a rate or authorizing an issue of securities just what consideration shall be given to items in the several accounts.

1820 The following definitions of capital relate to the cost of productive property, which is one of the items of information required in the consideration of applications for the consent of the Commission to the issue of securities. These definitions are applicable to specific expenditures relating to specific property rather than the property investment of the company in its entirety. A specific expenditure may therefore be properly classified as an "addition" when it does not take the place of anything previously existing without implying that this justifies the issue of additional securities. Before determining that an outlay for an addition may be provided for by the issue of additional securities, the Commission may require evidence that the entire property investment has been increased by the amount of the specific addition, and that the expenditure has not been made from the proceeds of earlier issues of securities or from the proceeds of sale of other property or from funds set aside for the purpose of maintaining the investment unimpaired.

It is the practice of the Commission in every case to require the presentation of evidence respecting the adequacy of the provision made for meeting depreciation or consumption of capital by charges against revenue in accordance with the terms of accounts elsewhere defined in this classification. Unless and until otherwise ordered, the moneys reserved from income for the preservation of the capital investment are not required to be segregated from other assets in a

special cash account or fund, nor to be retained until they can be expended in replacing any specific property. On the contrary, the moneys so reserved will be available for the acquisition of other assets and in the ordinary case will be concurrently expended either for replacements or additions, to the end that there shall be no idle cash at the same time that there is current use for funds for capital investment.

While it is not at present required that the depreciation reserve "Accrued Amortization of Capital" shall be subdivided into the various classes of fixed capital hereinafter specified, the commission recommends that such subdivision be made and entered year by year in a "Plant Ledger" or "Register of Fixed Capital."

Ordered, That this order take effect on the first day of January, 1918.

1821 SCHEDULE 1.

9. Further Classification of Capital.—Fixed capital is further divisible into original capital, additions, betterments, and renewals and replacements, as defined below.

10. Original capital is capital put into service in carrying out such part of the plans for construction and finance as is authorized for immediate execution at the outset of the enterprise.

11. Additions comprise tangible or intangible capital which is added to original capital and does not take the place of anything previously existing.

12. Betterments comprise the enlargement or improvement of existing structures, facilities and equipment. When a betterment consists in the substitution of a superior part for an inferior part retired (as, for example, the strengthening of a building by the substitution of heavier girders), the amount of the betterment is the excess cost of the new part over the cost of the part retired. (If the cost of the part retired is not known, it shall be estimated and the facts upon which the estimate is based shall be shown.) Changes or alterations in existing structures, facilities and equipment necessary or incidental to the installation of a betterment shall be classed as repairs, and the cost of such changes or alterations, less salvage, if any, shall be charged to the appropriate operating expense account.

13. Renewals include all extensions of terms of years in land and tangible fixed capital, and all extensions of the life period of franchises and other intangible fixed capital.

14. Replacements include all substitutions for capital exhausted or become inadequate in service, the substitutes having substantially no greater capacity than the things for which they were substituted. When, through wear and tear or through casualty, it becomes necessary to replace some part of any structure, facility, or unit of equipment, and the extent of such replacement does not amount to a substantial change of identity in such structure, facility, or unit of equipment, the replacement of such part is to be considered a repair, and

the cost of such repair is to be treated as an operating expense, and must not be charged to any capital account.

NOTE. A.—Any replacement that involves a change in the type or character of construction as well as capacity of the part replaced (such, for illustration, as the substitution of concrete or steel poles for wood poles in a division or section of an electric line) should be recorded in capital account, after the capital account has been relieved of the cost of the part replaced. In order, however, to simplify the accounting, replacements of parts or sections of continuous capital, such as track, gas mains and electric line, even when involving a change in type or character, shall be treated as repairs in case the cost of a continuous section does not exceed $100; and office furniture, small buildings, and equipment of minor importance, when replaced in kind and without betterment, shall be treated according to the same rule.

NOTE B.—When the replacements to be made to an important building or other structure, machine or piece of apparatus will constitute the major portion of its value when replaced, the entire
1822 structure, machine or piece of apparatus when taken out of service shall be considered as retired and the cost thereof credited to capital account, as provided in Paragraph 15, and the reconstructed property, including that portion of the original property not removed at its present value, shall be considered as an addition and the cost thereof accounted for accordingly.

15. Withdrawals or Retirements.—To the end that the capital accounts shall at all times disclose the cost of all property in service, the cost of retired capital, whether replaced or not, must be deducted from (i. e., credited to) the capital account. Every gas corporation is therefore required to take such measures and establish such procedure as will insure strict compliance with these requirements. . . When anything is worn out, lost, sold, destroyed, abandoned, surrendered upon lapse of title, become unserviceable, or otherwise withdrawn or retired from service, the amount at which such thing stood charged in the capital account shall be credited to the capital account in which it stood charged at the time of exhaustion or retirement, and the entry of such credit shall cite by name and page of book or other record the original entry of cost of the thing retired. If there is no such original entry, that fact shall be stated in connection with the credit entry. If the amount originally charged (i. e., the ledger value) is not separately recorded, it shall be taken to be the proportionate share of said property in the value of the entire group in which the property is included. The entry shall state the fact of such estimation.

NOTE A.—The foregoing rule shall not apply to capital temporarily out of service, provided such period of temporary disuse does not exceed two years. In their annual reports to the Public Service Commission corporations will be required to give particulars concerning all capital temporarily disused and not credited to the proper capital account in accordance with the foregoing rule.

NOTE B.—No receiver or other person temporarily in charge of a gas corporation shall be relieved of the foregoing requirement through failure to obtain the records of the corporation. If by reason of the absence of the corporate records, he is unable to make the proper credits to the capital accounts of the corporation for retirements, he shall open on his books the two historical accounts "Property Retired During the Receivership" and "Depreciation Accrued Prior to the Receivership" and credit to the former account the original cost in accordance with the foregoing requirement, concurrently charging the same amount (less salvage, if any) to the several depreciation reserves.

16. Entries Must Enable Identification.—Every debit or credit to a fixed capital or other investment account must be made in such wise as to be readily identified with the particular item of property to which it relates. For each item (or project) of fixed capital or other investment the records shall show the date of the entry, the date of acquisition or installation, the date when placed in service, the actual money cost, and the description thereof with such particularity as to enable the location and identification thereof (including, in case the item is movable, the name of the manufacturer and the identifying mark or number, if any, imprinted thereon, and such other particulars as may be necessary for identification.) Where two or more items are acquired under a single undivided contract, the entry in respect of each shall refer to the others, and shall state the entire consideration, and shall also state the portion thereof fairly applicable to the particular item covered by the entry. When any item of capital is withdrawn from service the date of withdrawal shall
1823 be included in the withdrawal entry relating to such item.

NOTE A.—In the case of continuous structures like electric lines, gas mains, etc., the record shall be itemized to the extent that no item shall contain more than one operating division or section or more than one type of construction. The entry for any item shall so specify the principal physical characteristics (such as size, weight, type, etc.) of the chief constituent parts of the item, together with location, that identification may be assured.

NOTE B.—The date when an item of fixed capital is placed in service may, if preferred, be kept in the engineering records.

17. Work Orders Required for Changes in Fixed Capital.—Each extension, improvement, retirement or other change in the property of a gas corporation shall be covered by a "work order" (or "job order") definitely designated by number, name, or other distinguishing mark, issued by the officer having jurisdiction in such matters. Such work order shall describe in detail the ownership, character and location of the work to be undertaken, state the approximate dates of commencement and completion, and bear reference to (*a*) the authorization under which it is undertaken, (*b*) the detailed estimates of its cost, and (*c*) maps, profiles, plans, diagrams, specifications, files, etc., applicable to the work. All work orders and supporting records shall be preserved during the existence of the prop-

erty to which they relate and shall be so filed as to be conveniently accessible for examination. * * * Where a betterment, substitution, replacement or retirement of property is involved, the work order shall show the date of installation of the property enlarged, improved, replaced or withdrawn, and shall cite by name and page of book the accounting and engineering records covering such installation. If a work-order system was in use at the time such property was installed, the work order covering the withdrawal of such property shall cite the work order under which it was installed, as well as the original cost at which such property was charged in capital account on the books of the corporation. * * * When work involves more than one capital account as defined in the Uniform System of Accounts for Gas Corporations, a separate work order shall be issued for the work chargeable to each account. The corporation may in exceptional cases issue a work order covering more than one account, provided that such fact is stated in the work order, and provided that the estimated cost is so prepared that details of labor, material, apparatus, references, etc., as required above, shall be available for the part of the work which is chargeable to each account. * * * A copy of each work order, or a list of such orders, shall be filed with the Commission within one week from the time of issuance.

NOTE.—Fixed capital charges for regularly recurring work, such as setting meters, running services or other similar projects, the individual cost of which does not exceed $250, may be covered by standing orders. A monthly report shall be filed with the Commission showing the number and total cost of units installed under each standing order.

18. Balance Sheet Accounts for Work in Progress.—The work or job orders shall accumulate current charges for labor and material applied to the particular job or project until its completion in such wise as to show the total cost of each completed project. The aggregate amount of such charges on all open work orders shall be
1824 carried in a suspense account designated "Work in Progress" until transfer can properly be made to the permanent accounts; provided, however, (1) that the cost of additions shall be carried until the completion of the work in a fixed capital account to be designated "Unfinished Construction," and (2) that the cost of work involving the removal or retirement of any fixed capital shall not be carried in suspense beyond the end of the next succeeding fiscal year without the permission of the Commission, and (3) that the cost of repair work shall not be carried in suspense beyond the end of the current fiscal year.

NOTE A.—If at the beginning of a job involving the replacement or retirement of any fixed capital, the accounting corporation shall make full credits therefor to capital account, the cost of installing new property in substitution or replacement may be carried in the fixed capital account "Unfinished Construction."

NOTE B.—Requirement of the use of the above-mentioned clearing accounts "Work in Progress" and "Unfinished Construction" will be suspended in the case of a company which satisfies the Commission that the system which it has in use for recording construction expenditures produces similar results in respect of the following essential matters:

(1) Complete identification of expenditures with property.

(2) A clear statement of the total cost of each job or project.

(3) The exclusion from the fixed capital account of all duplications (replacements) arising out of reconstruction work.

In case these conditions are met and the clearing accounts are not used, all debits or credits to fixed capital accounts shall be contemporaneously spread over the authorizations or orders to which they relate and the fact established at usual accounting intervals that the respective totals are in agreement.

NOTE C.—The accumulated charges on standing work orders for regularly recurring work, such as the setting of meters, running services, etc., shall be closed out monthly to the permanent account.

19. Costs of New Capital to be Actual Money Costs.—All charges made to capital or other accounts on or after January 1, 1909, shall be the actual money cost of the things in respect of which they are made. When the consideration actually given for the thing in respect of which a charge to a capital account is made is anything other than money, the actual consideration shall be described in the entry with sufficient fullness and particularity to identify it, and the amount charged shall be the actual money value of such consideration at the time of the transaction.

20. Discounts Upon Securities Not to be Charged to Capital Accounts.—Discounts upon securities and other commercial paper issued in payment for capital are to be provided for in other accounts and must in no case be charged to the capital accounts.

21. Costs of Labor, Materials and Supplies.—Cost of labor (employed in construction) includes not only wages, salaries, and fees paid employees, but also such personal expenses of employees as are borne by the corporation. Cost of material and supplies consumed in construction is the cost at the places where they enter into construction, including cost of transportation and inspection when specifically assignable. If such materials and supplies are passed through storehouses, their cost entered in the account may include a suitable proportion of store expense.

22. Improvements on Leased Property.—In the case of leases where substantially the full benefit of improvements will be
1825 obtained by the lessee, the cost of additions to and betterments of leased property should be charged to a sub-account under the appropriate fixed capital account, and depreciation and retirements in connection therewith treated in the same manner as on

company-owned property. In case the full benefit of improvements will not be obtained by the lessee because of reversion to the lessor at the expiration of the lease, the cost of improvements should be charged to suspense and cleared by uniform charges to rent deductions within the period of the lease. Ordinary current repairs, including minor rearrangements and changes in connection with leased buildings, should be charged to the appropriate maintenance accounts. Expenditures charged to lessors or for which lessors are required under the leasehold agreement to reimburse the lessee prior to the termination of the lease should not be charged to the fixed capital accounts of the lessee.

1826 COMPLAINANT'S EXHIBIT 2.

PLF.'S EX. —, AUG. 10, 1920. G. J. P.

EXHIBIT "B."

Kings County Lighting Company.

Operating Expenses.

1919.

Summary.

	Amount.	Cost per M c. f. sold.
Production Expense	$757,641.72	.5920
Distribution Expense	61,928.79	.0484
Street Lighting Expense	515.98	.0004
Commercial Expense	86,994.35	.0680
Promotion Expense	9,945.43	.0077
General Expense	72,778.67	.0569
Plant Withdrawn from Service	12,872.46	.0100
Taxes	87,362.98	.0682
Uncollectible Bills	10,816.48	.0085
Total operating expenses	$1,100,856.86	.8601

Plff.'s Ex. 2.

1827 EXHIBIT "B," PAGE 2.

Kings County Lighting Company.

Detailed Operating Expenses.

1919.

	Amount.	Cost per M c. f. made.
Production expense:		
Works Superintendence	$15,866.43	.0101
Boiler House Labor	24,213.75	.0155
Generator House Labor	35,983.05	.0230
Purifier House Labor	2,462.19	.0016
Miscellaneous Labor at Works	6,230.56	.0040
Total gas making labor	84,755.98	.0542
Boiler Fuel	114,768.08	.0733
Water	9,922.66	.0063
Generator Fuel	189,943.68	.1212
Water Gas Oil	347,171.13	.2216
Purification Supplies	2,078.31	.0013
Miscellaneous Works Expense	8,358.66	.0053
Repairs Works & Station Structures	2,062.49	.0013
Repairs Furnaces, Boilers & Acc	14,329.03	.0091
Repairs Steam Engines	986.37	.0006
Repairs Gas Engines	14.15	.....
Repairs Misc. Power Plant Equipment	2,156.49	.0014
Repairs Water Gas Sets & Acc	17,405.77	.0111
Repairs Purification Appts	164.46	.0001
Repairs Works Tools	48.38	.....
Repairs Holders	386.91	.0003
Repairs Miscellaneous Equipment	5,491.63	.0035
Gas Storage	6,856.34	.0044
Total production cost	806,900.52	.5150
Residual Credit	*49,258.80	*.0315
Net station cost	757,641.72	.4835
Gas Made M. C. F	1,566,628	
Gas Sold M. C. F	1,279,845	

*In red ink in copy.

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EXHIBIT "B," PAGE 3.

Kings County Lighting Company.

Detailed Operating Expenses.

1919.

	Amount.	Cost per M c. f. sold.
Distribution expense:		
Transmission Pumping	$1,246.10	.0009
Distribution Superintendence	5,462.17	.0043
Distribution Supplies & Expenses	4,616.21	.0036
Meter & Installation Work	10,836.32	.0085
Work on Consumers' Premises	9,433.25	.0074
Repairs Mains	3,559.11	.0028
Repairs Services	2,816.88	.0022
Repairs Meters	22,900.98	.0179
Repairs Appliances	227.10	.0002
Repairs General Structures	669.70	.0005
Repairs Distribution Tools	160.97	.0001
Total	61,928.79	.0484
Street-lighting expense:		
Street Lamp Operating	67.37	.....
Street Lamps Repairs	448.61	.0004
Total	515.98	.0004
Commercial expense:		
General Labor	23,118.15	.0181
Accounting Labor	21,194.87	.0166
Contracts	3,762.93	.0029
Collecting	18,082.07	.0141
Meter Reading	6,357.46	.0050
Supplies & Expenses	14,478.87	.0113
Total	86,994.35	.0680
Promotion expense:		
Office Expense	7,615.50	.0059
Canvassing & Soliciting	418.94	.0003
Advertising Sundries	1,910.99	.0015
Total	9,945.43	.0077

1829 EXHIBIT "B," PAGE 4.

Kings County Lighting Company.

Detailed Operating Expenses.

1919.

	Amount.	Cost per M c. f. sold.
General expenses:		
Salaries & Expenses General Offices	$16,944.83	.0132
Salaries & Expenses General Office Clerks	29,906.75	.0234
General Office Supplies & Expenses	.....	.....
General Law Expenses (Excluding Rate Case)	2,909.33	.0023
Miscellaneous General Expense	16,748.65	.0131
Insurance	6,829.68	.0053
Accidents & Damages	562.01	.0004
General Stationery & Printing	5,901.56	.0046
Stable Expense	.....	.....
Undistributed Adjustments	*42.78	.....
Cost of Mfg. Residuals Sold	.....	.....
Duplicate Charge Credit	*6,981.36	*.0054
Total	72,778.67	.0569
Plant Withdrawn from Service	12,872.46	.0100
Taxes:		
Real Estate	47,364.02	.0380
Special Franchise	33,276.00	.0260
State Gross Earnings	6,206.38	.0038
State Excess Dividends	.....	.....
Federal Income Tax	.....	.....
Capital Stock Tax	516.58	.0004
Total	87,362.98	.0682
Uncollectible Bills	10,816.48	.0085

1830 COMPLAINANT'S EXHIBIT 3.

Book containing summary sheets, operating and capital expenditures, Kings County Lighting Company's divisional accounts, year 1919.

Not printed.

*In red ink in copy.

Explanation

EXHI

KINGS COUNT

COST OF PRODU
AND THE RE
FOR THE YEAR

	QUANTITY
COST OF PRODUCTION :	
Generator Coal	22,594.80
Boiler Fuel Coal	13,148.71
Boiler Fuel Water Gas Tar	749,367
Boiler Fuel Gas Oil	5,591
Total Fuel	
Gas Oil	5,375,887
Water	
Iron Oxide	8,000
Sundry Supplies	
Total Material	
Residuals - Water Gas Tar Produced	765,312
Net Material	
Gas Making Labor	
Total Material and Labor	
Repair Labor and Material	
Miscellaneous Works Expense	
Gas Storage	
Total Cost of Production - forward	

nants Exhibit 6.

EXHIBIT "B"

KINGS COUNTY LIGHTING COMPANY

ST OF PRODUCTION & DISTRIBUTION
AND THE RESULT OF OPERATIONS
OR THE YEAR ENDED DEC. 31, 1919

QUANTITY		PRICE	AMOUNT	COST PER M.C.F.MADE	MATERIAL PER M.C.F.MADE
22,594.80	Tons	$.407 Ton	189,943.68	.1212	32.30 lbs.
13,148.71	Tons	$.034 Ton	66,186.94	.0422	18.80 lbs.
749,367	Gals.	.064 Gal.	48,174.55	.0308	.48 gal.
5,591	Gals.	.073 Gal.	406.59	.0003	-
			304,711.76	.1945	
375,887	Gals.	.0646 Gal.	347,171.13	.2216	5.43 gals.
			9,922.66	.0063	
8,000	Bu.	.223 Bu.	1,788.40	.0011	
			289.91	.0002	
			663,883.86	.4237	
765,812	Gals.	.064 Gal.	49,258.80	.0315	
			614,625.06	.3922	
			84,755.98	.0542	
			699,381.04	.4464	
			43,045.68	.0274	
			8,358.66	.0053	
			6,856.34	.0044	
- forward 1,566,628,000 C.F.			757,641.72	.4835	

Complainant's Exhibit 6

EXHIBIT "B" Page 2

			AMOUNT	COST PER M.C.F.SOLD
Total Cost of Production - Forward - Cost per M Cubic Feet Sold			$757,641.72	.5920
COST OF DISTRIBUTION AND OTHER EXPENSES :				
Transmission Pumping			1,246.10	.0009
Distribution Superintendence			5,462.17	.0043
Distribution Supplies & Expenses			4,616.21	.0036
Meter and Installation Work			10,836.32	.0085
Work on Consumers Premises			9,433.25	.0074
Repairs Mains			3,559.11	.0028
Repairs Services			2,816.88	.0022
Repairs Meters			22,900.98	.0179
Repairs Appliances			227.10	.0002
Repairs General Structures			669.70	.0005
Repairs Distribution Tools			160.97	.0001
Street Lighting Expense			515.98	.0004
Commercial Expense			96,939.78	.0757
Salaries and Expenses General Office			46,851.58	.0366
General Law Expense (Excluding Rate Case)			2,909.33	.0023
Miscellaneous General Expense			16,748.65	.0131
Insurance			6,829.68	.0053
Accidents and Damages			562.01	.0004
General Stationery & Printing			5,901.56	.0046
Undistributed Adjustments			42.78	
Duplicate Charge Credits			6,981.56	.0054
Uncollectible Bills			10,816.48	.0085
Total Cost of Distribution, etc.			242,979.70	.1899
PLANT WITHDRAWN FROM SERVICE			12,872.46	.0100
TAXES	Assessed Valuation	Tax		
Real Estate Land	750,000.00			
Improvements	1,469,500.00			
Total	2,219,500.00	52,380.20		
Less amount charged to Non-Opr. Taxes		5,016.18	47,364.02	.0370
Special Franchise	1,410,000.00		33,276.00	.0260
State Gross Earnings			6,206.38	.0048
Capital Stock Tax			516.58	.0004
Total Taxes			87,362.98	.0682
TOTAL COST OF GAS SOLD			1,100,856.86	..8601

1831 COMPLAINANT'S EXHIBIT 4.

Two books containing operating and capital expenditures, Kings County Lighting Company, even months and odd months, year 1919.
Not printed.

1832 COMPLAINANT'S EXHIBIT 5.

General Journal under year 1919.
Not printed.

(Here follows Complainant's Exhibit #6, marked pages 1833-1834.)

1835 COMPLAINANT'S EXHIBIT 7.

Company's Ledger No. 4 for the year 1916.
Not printed.

1836 COMPLAINANT'S EXHIBIT 8.

Trial Balance Book year 1919.
Not printed.

1837 COMPLAINANT'S EXHIBIT 9.

Ledger, Accounts payable, distribution.
Not printed.

1838 COMPLAINANT'S EXHIBIT 10.

Ledger, Accounts payable.
Not printed.

1839 COMPLAINANT'S EXHIBIT 11.

Tax Bills, Books of 1920. Not produced or marked, but considered in evidence.
Not printed.

1840 EXHIBIT "D."

Kings County Lighting Company.

Operating Expenses, Six Months Ended June 30, 1920.

Summary.

	Amount	Cost per M c. f. sold
Production Expense	$571,945.87	.7107
Distribution Expense	48,877.46	.0607
Street Lighting Expense	2,292.13	.0028
Commercial Expense	46,670.27	.0580
Promotion Expense	7,918.75	.0098
General Expense	44,156.20	.0549
Plant Withdrawn from Service	8,079.40	.0100
Taxes	47,657.63	.0592
Uncollectible Bills	5,542.13	.0069
Total operating expenses	$783,139.84	.9730

Pltff's. Ex. 12.

1841 EXHIBIT "D." PAGE 2.

Kings County Lighting Company.

Detailed Operating Expenses, Six Months Ended June 30, 1920.

Production expense:	Amount.	Cost per M c. f. made.
Work Superintendence	$11,639.26	.0123
Boiler House Labor	20,835.66	.0220
Generator House Labor	29,772.07	.0314
Purifier House Labor	940.86	.0010
Miscellaneous Labor at Works	4,077.69	.0043
Total gas-making labor	67,265.54	.0710
Boiler Fuel	68,215.31	.0719
Water	12,873.45	.0136
Generator Fuel	125,130.17	.1318
Water Gas Oil	273,668.40	.2884
Purification Supplies	1,107.09	.0011
Miscellaneous Works Expense	7,296.56	.0077
Repairs Works & Station Structures	4,178.17	.0044
Repairs Furnaces, Boilers & Acc.	6,103.53	.0064
Repairs Steam Engine	1,296.49	.0014
Repairs Gas Engine	255.43	.0003
Repairs Misc. Power Plant Equipment	1,073.58	.0011
Repairs Water Gas Sets & Acc.	10,175.57	.0107
Repairs Purification Apparatus	101.13	.0001
Repairs Works Tools	441.10	.0005
Repairs Holders	5,479.00	.0058
Repairs Miscellaneous Equipment	2,780.24	.0029
Gas Storage	7,787.38	.0082
Total Production Costs	595,228.14	.6273
Residual Credits	*23,282.27	*.0245
Net Station Costs	571,945.87	.6026
Gas made M. C. F.	948,810	
Gas sold M. C. F.	807,940	

*In red ink in copy.

1842 EXHIBIT "D." PAGE 3.

Kings County Lighting Company.

Detailed Operating Expenses, Six Months Ended June 30, 1920.

	Amount.	Cost per M c. f. sold.
Distribution expense:		
Transmission Pumping	$749.94	.0009
Distribution Superintendence	3,777.38	.0047
Distribution Supplies & Expenses	2,114.11	.0026
Meter and Installation Work	6,393.62	.0079
Work on Consumers' Premises	7,264.36	.0090
Repairs Mains	13,293.33	.0165
Repairs Services	3,826.14	.0048
Repairs Meters	11,222.79	.0140
Repairs General Structures	16.48	.0000
Repairs Distribution Tools	219.31	.0003
Total	48,877.46	.0607
Street lighting expense:		
Street Lamp Operating	8.04	.0000
Street Lamp Repairs	2,284.09	.0028
Total	2,292.13	.0028
Commercial expense:		
General labor	16,366.73	.0203
Accounting	8,931.22	.0110
Contracts	1,582.49	.0020
Collecting	9,943.35	.0124
Meter Reading	4,481.78	.0056
Supplies & Expenses	5,364.70	.0067
Total	46,670.27	.0580
Promotion expense:		
Office Expenses	6,303.07	.0078
Advertising Sundries	1,615.68	.0020
Total	7,918.75	.0098

Complainant's Exhibit 13

EXHIBIT "D"

KINGS COUNTY LIGHTING COMPANY

COST OF PRODUCTION & DISTRIBUTION
AND THE RESULT OF OPERATIONS
FOR THE SIX MONTHS ENDED JUNE 30, 1920.

	QUANTITY		PRICE	AMOUNT	COST PER M.C.F.MADE	MATERIAL PER M.C.F.MADE
COST OF PRODUCTION :						
Generator Coal	14,276.057	Tons	8.77 ton	125,130.17	.1318	33.70 lb.
Boiler Fuel Coal	10,324.156	Tons	4.84 ton	50,004.74	.0527	24.37 lb.
Boiler Fuel Water Gas Tar	242,165	Gals.	.0731 Gal.	17,712.23	.0187	.26 gal.
Boiler Fuel Gas Oil	5,096	Gals.	.0978 Gal.	498.34	.0006	
Total Fuel				193,345.48	.2038	
Gas Oil	3,423,681	Gals.	.0797 Gal.	273,668.40	.2884	3.60 gal.
Water				12,873.45	.0136	
Iron Oxide	3,699.27	Bu.	.30 Bu.	1,079.79	.0011	
Sundry Supplies				27.30	.0000	
Total Material				480,994.42	.5069	
Residuals - Water Gas Tar Produced	292,067	Gals.	.0797 Gal.	23,282.27	.0245	
Net Material				457,712.15	.4824	
Gas Making Labor				67,265.64	.0709	
Total Material and Labor				524,977.59	.5533	
Repair Labor and Material				31,664.24	.0336	
Miscellaneous Works Expense				7,496.58	.0077	
Gas Storage				7,787.38	.0082	
Total Cost of Production - forward 948,810,000 C. F.				571,945.87	.6028	

Decrease Gas on Hand 147,000 C. F.

EXHIBIT "D"

KINGS COUNTY LIGHTING COMPANY

COST OF PRODUCTION & DISTRIBUTION
AND THE RESULT OF OPERATIONS
FOR THE SIX MONTHS ENDED JUNE 30, 1920.

	QUANTITY		PRICE	AMOUNT	COST PER M.C.F.MADE	MATERIAL PER M.C.F.MADE
COST OF PRODUCTION :						
Generator Coal	14,276.057	Tons	8.77 ton	125,130.17	.1318	33.70 lb.
Boiler Fuel Coal	10,324.156	Tons	4.84 ton	50,004.74	.0527	24.37 lb.
Boiler Fuel Water Gas Tar	242,165	Gals.	.0731 Gal.	17,712.23	.0187	.26 gal.
Boiler Fuel Gas Oil	5,096	Gals.	.0978 Gal.	498.34	.0006	
Total Fuel				193,345.48	.2038	
Gas Oil	3,423,681	Gals.	.0797 Gal.	273,668.40	.2884	3.60 gal.
Water				12,873.45	.0136	
Iron Oxide	3,699.27	Bu.	.30 Bu.	1,079.79	.0011	
Sundry Supplies				27.30	.0000	
Total Material				480,994.42	.5069	
Residuals - Water Gas Tar Produced	292,057	Gals.	.0797 Gal.	23,282.27	.0245	
Net Material				457,712.15	.4824	
Gas Making Labor				67,265.64	.0709	
Total Material and Labor				524,977.59	.5533	
Repair Labor and Material				31 664.24	0336	
Miscellaneous Works Expense				7,296.56	.0077	
Gas Storage				7,787.36	.0082	
Total Cost of Production - forward	948,810,000	C. F.		571,945.67	.6028	

Decrease Gas on Hand	147,000	C. F.
Used by Company	3,247,400	
Gas Sales to Consumers	804,692,668	
Total	808,087,068	
"Unaccounted for" due to condensation, leakage, slow meters, etc.	140,722,932	(14.83%)
	948,810,000	

				AMOUNT	COST PER M.C.F. SOLD
Total Cost of Production - Forward - Cost per M Cubic Feet sold				$ 571,948.67	.7107
COST OF DISTRIBUTION AND OTHER EXPENSES					
Transmission Pumping				749.94	.0009
Distribution Superintendence				3,777.36	.0047
Distribution Supplies & Expenses				2,114.11	.0026
Meter and Installation Work				6,393.62	.0079
Work on Consumers Premises				7,264.26	.0090
Repairs Mains				13,232.37	.0165
Repairs Services				3,826.14	.0048
Repairs of Meters				11,227.79	.0140 - .0147
Repairs General Structures				16.48	.0000
Repairs Distribution Tools				219.31	.0003
Street Lighting Expense				2,292.13	.0028
Commercial Expense				54,869.02	.0671
Salaries & Expenses General Office				25,562.21	.0318
General Law Expenses (Excluding Rate Case)				400.66	.0005
Miscellaneous General Expense				10,397.07	.0129
Insurance				6,317.48	.0079
Accidents & Damages				826.26	.0010
General Stationery & Printing				3,824.39	.0047
Unistributed Adjustments				108.79	.0001
Duplicate Charge Credits				3,085.03	.0038
Uncollectible Bills				5,541.13	.0069
Total Cost of Distribution, etc.				155,456.94	.1931
PLANT WITHDRAWN FROM SERVICE				8,079.40	.0100
TAXES		Assessed Valuation	Tax		
Real Estate Land		750,000.00			
Improvements		1,481,500.00			
Total		2,231,500.00	$ 28,340.44		
Less amount charged to Non-Opr. Taxes			2,717.04	25,623.40	.0318
Special Franchise		1,410,000.00		17,907.00	.0222
State Gross Earnings				3,919.69	.0049
Capital Stock Tax				197.54	.0003
Total Tax				47,687.63	.0592
TOTAL COST OF GAS SOLD				782,139.64	.9730
Deduct - Income of gas					
Municipal Street Lighting	23,670,260 c.f.	75¢	17,906.65		
Municipal Buildings	2,638,300 c.f.	75¢	1,976.88		
Commercial Sales	778,181,200 c.f.	80¢	622,544.96		
Total Gas Sales	804,692,760			642,428.66	.7951 7978
				140,711.18	.1779
Deduct - Misc. Operating Revenues					
Gross Profit from Sale of Appliances			11,778.10		
Interest from Bank Balances			3,060.08		
Interest from other sources			870.89	15,689.04	.0194

Complainants Exhibit 14

KINGS COUNTY LIGHTING COMPANY

Statement Showing the Handling Cost, Purchase Cost and Total Cost per ton of Generator and Boiler Coal used in the Manufacture of Gas, during the year 1919.

	Tons of Coal used	Cost of Coal used	Cost of Handling Coal Used	Handling cost per ton of coal used	Purchase cost per T- coal used	Total cost per T of Coal used.
Generator Coal						
Anthracite	22,594.80	$189,943.68	$2,231.85	$.0997	$8307	$8407
Boiler Coal						
Anthracite	2,359.43	19,744.36	230.24	.0976	8270	8368
Bituminous	1,739.45	10,743.81	127.07	.0731	6104	6177
Barley	9,049.83	35,696.76	291.81	.0322	3913	3946
T O T A L	$13,146.71	$56,186.94	$ 649.12	$.0494	$4985	$5034

Supplemental Exhibit 14
Sheet 2

[illegible] COUNTY [illegible]

Statement showing Retailing Coal, Purchased Coal and Total Coal gas [illegible] used in the Manufacture of Gas during the six months ended June 30, 1920

	Type of Coal used	Cost of Coal used	Cost of Handling coal used	Handling cost per T of coal used	Purchase cost per T of coal used	Total cost per ton of coal used
Retailer Coal						
Anthracite	14,278.00	$[illegible]	$1,700.00	$ [illegible]	$ [illegible]	$ [illegible]
Steel Ovens						
Anthracite	691.18	[illegible]	10.37	[illegible]	[illegible]	[illegible]
Bituminous	1,114.71	7,[illegible]	16.72	[illegible]	[illegible]	[illegible]
Total	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

CANDLE POWER TESTS - 1919 -

DATE / TEST BY	1		2		3		4		5		6		7		8		9		10		11		12		13		14		15		16	
	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.	CO.	CY.
JANUARY	—		15.10		16.50		16.10		17.80		20.54		22.19		21.10		16.80		15.55		21.65		17.80		15.35		21.28		21.57		19.20	
	—		15.30		11.70		15.15		24.57		21.60		21.35		21.30		20.60		18.90		20.25		15.75		15.50		20.66		18.35		17.45	
	—		17.25		21.59		16.05		24.45		21.92		20.95		19.90		12.00		18.40		21.15		15.20		19.50		17.40		17.53		17.90	
Av.	—	—	15.78	13.18	16.60	13.89	15.97	14.35	21.61	—	21.05	13.33	21.70	15.02	20.77	14.31	18.13	15.33	17.62	13.13	21.18	14.05	16.18	—	16.78	14.69	19.45	14.78	19.80	16.46	18.18	16.6
FEBRUARY	15.15		—		16.30		—		—		—		—		—		—		—		—		—		—		—		—		—	
	16.05		—		16.85		—		—		—		—		—		—		—		—		—		—		—		—		—	
	16.90		—		—		—		—		—		—		—		—		—		—		—		—		—		—		—	
Av.	16.23	11.97	—	—	16.58	14.52	—	16.53	—	15.74	—	15.36	—	12.96	—	—	—	—	—	14.65	—	—	—	—	—	—	—	14.72	—	17.03	—	—
MARCH	12.30		—		21.20		23.20		26.40		12.60		15.80		—		—		16.20		16.95		15.50		16.80		16.05		18.00		14.80	
	17.15		—		20.45		23.00		26.50		18.30		15.60		—		—		16.52		17.50		16.15		18.60		16.25		19.60		15.10	
	12.00		—		20.42		26.20		25.40		21.75		16.20		—		—		12.15		10.40		15.50		19.30		16.75		18.65		16.30	
Av.	17.15	16.51	—	20.25	20.69	16.66	24.13	18.30	26.10	17.02	19.22	15.98	15.67	—	—	15.41	—	—	14.62	15.79	16.75	15.61	16.12	15.24	18.23	—	16.48	—	18.68	14.21	16.72	—
APRIL	12.15		14.65		16.90		19.30		17.65		13.90		19.10		15.95		14.00		16.20		21.40		16.35		—		18.00		17.60		10.20	
	9.50		12.10		16.00		18.50		15.90		14.55		18.88		15.20		16.42		17.20		20.95		15.80		—		15.90		18.38		12.30	
	14.05		16.55		—		—		14.85		—		18.20		14.85		15.40		14.55		20.50		16.60		—		14.52		18.25		13.04	
Av.	12.70	13.73	14.97	13.90	16.55	13.36	18.60	16.29	16.47	15.86	14.23	—	18.73	15.24	15.66	12.99	14.94	14.89	14.65	15.57	20.95	16.77	16.37	16.22	—	—	16.14	14.22	18.38	13.38	11.85	13.6
MAY	19.85		19.80		20.00		15.10		30.20		16.94		—		—		19.89		16.55		19.14		16.40		21.10		20.48		19.11		23.63	
	18.15		19.70		19.50				27.36		18.21		—		—		20.86		16.25		21.03		25.74		23.31		20.40		20.15		21.53	
	18.80		15.40		18.60				24.37		20.65		—		—		23.54		16.20		15.60		16.50		22.60		24.28		21.98		20.51	
Av.	19.13	14.23	17.30	16.66	19.37	16.21	15.10	—	27.31	17.47	18.59	—	—	15.55	—	16.10	21.43	15.97	16.00	15.53	18.16	—	17.88	17.00	22.63	17.80	24.22	16.25	20.63	18.36	21.89	17.7
JUNE	—		21.55		22.10		20.50		20.60		20.40		24.90		—		16.10		18.20		26.60		20.20		17.60		20.00		23.90		22.50	
	—				19.80		19.50		21.70		21.70		21.60		—		23.30		24.90		27.10		23.00		19.90		19.25				20.50	
	—														—																	
Av.	—	—	21.55	15.95	20.75	19.13	25.00	13.98	21.15	16.38	24.05	18.60	23.25	19.65	—	—	19.70	17.81	21.55	19.16	26.85	20.52	21.60	19.36	18.25	19.32	19.63	—	23.90	—	21.50	18.
JULY	21.20		19.20		19.90		18.80		24.00		19.50		5.80		19.00		19.30		18.70		15.40		15.30		18.00		18.20		18.75		18.30	
	19.50		19.00		22.00				19.50				17.85		18.30		18.40		19.40		14.15		16.75				15.50		17.85		18.95	
																															18.25	
Av.	20.35	17.60	14.10	19.23	20.95	18.76	18.80	—	20.25	—	14.50	—	16.83	16.86	18.65	18.18	19.10	18.01	18.05	—	14.18	—	16.03	—	18.00	—	16.85	19.33	18.30	—	18.50	—
AUGUST	18.60		12.40		16.50		19.15		23.30		18.70		16.15		22.10		19.25		18.20		19.10		21.00		21.25		16.40		22.80		21.70	
	20.50		22.20				25.30				22.90		20.00		22.20		19.65				19.15		21.60		18.20		18.80		23.50	
			21.90								20.20		25.15		18.25		19.10				21.90		23.35		16.75		20.85		23.75	
Av.	19.55	13.59	20.17	13.06	16.50	—	22.53	17.02	23.30	7.85	20.60	—	20.62	—	20.85	15.75	19.53	—	18.20	—	20.47	16.35	20.67	14.70	21.40	16.36	16.18	—	20.82	15.40	22.98	—
SEPTEMBER	16.79		18.40		18.30		17.40		20.30		21.60		—		24.15		17.45		18.95		20.30		11.30		11.25		20.50		19.35		20.10	
			18.35		20.16		19.40		20.65		19.15		—		23.10		20.65		10.16		18.10		22.50		18.70				21.20		23.35	
			19.40		21.20		20.50		20.35		18.20		—		18.10		22.60		11.45		20.30		11.23		18.90				20.55		22.90	
Av.	16.79	—	18.88	7.69	19.88	15.90	19.10	14.58	20.43	15.85	19.85	14.71	—	—	22.18	17.48	20.40	16.67	17.52	—	19.13	K.25	19.02	—	18.45	—	20.50	—	20.37	16.23	22.05	K.
OCTOBER	23.00		21.80		24.50		21.10		19.55		22.00		25.70		20.60		28.60		23.25		26.90		20.70		25.35		23.60		20.10		18.65	
	21.60		18.90		24.38		21.15				21.65		23.80		18.60		23.30		23.20		26.60				22.35		22.35		19.90		22.35	
	22.75		20.90		19.95		22.50				24.90		21.65		19.70		21.20		24.25		24.20						21.80		18.50		22.90	
Av.	22.45	15.64	20.33	—	22.92	21.19	21.71	17.71	19.55	18.89	22.18	—	23.72	15.85	19.63	—	24.37	18.41	22.90	16.42	25.90	19.04	20.70	—	23.95	—	22.58	16.54	19.50	17.03	21.30	17.
NOVEMBER	22.00		18.30		18.65		20.65		18.50		23.10		18.20		20.85		—		25.30		24.10		21.30		19.10		18.85		20.10		—	
	20.60				12.10		18.15		23.80		19.70		19.10		20.50		—		22.15		20.90		20.40		22.20		16.35		19.05		—	
	21.65				12.50		18.40		20.00		19.25		18.75		19.15		—		20.10		20.90		20.20		19.45		16.05		17.55		—	
Av.	21.42	—	18.30	—	17.75	15.75	19.07	—	20.77	16.20	20.35	17.15	18.68	16.8	20.17	—	—	—	— .52	19.60	21.97	17.47	20.97	17.47	20.25	15.85	17.08	11.08	18.90	12.67	—	—
DECEMBER	13.70		11.95		14.35		20.05		20.60		23.10		19.38		20.00		20.05		15.15		20.90		21.05		25.70		21.50		19.65		17.90	
	18.60		19.30		18.25		18.50		17.00		13.18		21.20		20.60		17.45		15.50		15.65		20.40		28.70		21.50		16.60		23.00	
	12.25																															
Av.	16.52	13.91	18.63	14.76	17.30	13.48	17.28	14.80	18.80	15.01	18.14	—	22.29	15.79	20.30	20.68	18.75	19.54	15.38	16.35	18.28	13.71	20.73	17.40	27.20	—	21.50	—	18.13	15.28	20.45	15

1919 - KINGS COUNTY LTG. CO.

Implements Exhibit 15

15		16		17		18		19		20		21		22		23		24		25		26		27		28		29		30		31		Monthly Average	
CY		CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	CO.	CY	Company	City
		19.20		21.45		21.38		18.75		16.35		17.15		15.90		19.12		16.85		17.18		17.10		17.40		17.85		16.25		15.65		16.35			
		17.45		21.20		21.19		16.05		18.20		17.66		16.25		17.10		16.10		16.30		—		18.30		17.10		15.60		20.05		15.60			
		17.90		20.80		21.06		17.80		17.90		17.85		17.12		20.41		15.84		15.35		—		17.45		15.20		15.25		17.35		17.20			
16	16.46	18.18	16.67	21.22	16.28	21.20	6.03	16.33	—	17.40	15.51	18.59	14.37	16.42	13.36	19.62	16.78	16.26	14.91	15.34	13.49	12.90	—	11.78	14.38	14.92	13.96	15.70	14.87	18.35	15.03	16.32	—	18.09	14.96
		—		19.60		16.45		15.50		16.05		16.50		—		—		18.60		12.30		16.45		16.10		18.10		—		—		—			
		—		13.95		15.98		15.00		16.25		16.00		—		—		15.92		19.00		18.80		13.60		12.90		—		—		—			
		—		13.30		12.85		14.55		15.80		16.65		—		—		17.20		18.95		19.10		18.05		16.90		—		—		—			
17	17.03	—	—	14.23	15.93	16.09	14.51	16.22	14.51	16.05	14.86	16.58	14.76	—	—	—	—	17.24	17.10	18.42	16.27	18.45	16.34	17.45	13.08	17.63	15.28	—	—	—	—	—	—	20.30	15.16
		12.80		17.10		12.30		14.40		13.90		18.12		16.30		12.80		13.10		15.70		12.39		17.37		13.95		16.00		15.62		16.80			
		14.10		11.30		14.85		14.65		13.10		19.50		16.10		12.30		12.20		14.83		13.80		15.83		14.30		16.70		14.45		18.10			
		16.30		12.80		12.32		14.65		14.30		17.10		16.80		11.48		12.45		14.02		15.20		15.40		14.85		12.58		16.10		12.25			
18	18.21	—	—	12.45	14.95	14.18	13.68	14.57	13.28	13.97	14.32	19.11	14.11	16.40	14.03	12.19	—	12.68	14.27	14.85	—	13.96	14.18	16.13	—	14.37	12.90	16.76	12.50	16.07	—	15.71	13.96	16.77	15.14
		10.20		12.45		14.45		20.50		—		18.80		15.20		15.14		16.34		14.85		15.60		16.50		19.95		21.20		18.60		—			
		14.30		12.90		14.90		12.60		—		17.84		15.44		15.30		16.46		15.45		15.80				20.00		24.50		18.00		—			
		13.04		12.00		15.60		13.04		—		17.20		16.65		16.37		16.15		15.95		17.30				20.18		21.90		16.15		—			
19	12.38	11.85	13.40	12.45	12.94	15.03	13.25	12.58	13.75	—	—	17.88	14.40	15.76	13.64	15.60	12.66	16.52	13.08	15.42	14.24	16.23	13.88	15.50	—	20.04	—	22.53	12.83	17.78	14.43	—	—	16.41	14.11
		23.63		17.10		17.10		17.41		26.11		20.99		20.68		21.35		20.45		—		19.90		22.70		20.12		24.00		—		18.95			
		21.53		22.88		17.60		17.86		22.96		20.13		20.47				21.00		—		14.70		18.10		19.75		18.60		—					
		20.51		16.85		20.08		29.25		20.68		19.88		29.29						—															
20	21.36	21.17	17.74	18.42	18.36	18.26	—	18.51	16.30	21.78	16.19	20.33	17.45	20.55	16.36	21.35	16.64	20.73	17.07	—	—	17.30	18.52	20.40	13.10	19.94	18.21	20.30	19.22	—	—	18.95	—	20.07	16.97
		22.50		21.20		21.30		21.20		20.00		22.30		21.30		18.35		13.50		16.85		15.85		—		17.80		19.80		19.00		—			
		20.50		19.96		19.80		21.80		21.50		21.60				19.70		15.30		18.25		17.20		—		18.50						—			
																																—			
21	—	21.50	17.10	20.58	17.17	22.55	18.37	21.50	18.91	20.75	18.47	21.95	18.83	21.30	—	19.03	15.86	14.30	17.12	17.55	17.33	16.52	16.08	—	15.76	18.15	15.54	19.80	—	19.00	15.65	—	—	20.44	17.96
		18.30		19.95		18.00		15.40		18.90		19.55		21.10		19.00		26.00		21.25		21.80		22.20		16.90		16.55		16.95		16.95			
		18.95		18.70		20.10		18.80				17.50		18.76		19.70		21.10		25.50		22.50				18.60		18.70		18.35		18.73			
		18.25																																	
22	—	18.50	—	16.33	—	18.05	—	17.10	17.11	18.90	—	16.53	18.43	17.73	18.05	17.35	18.09	22.55	20.18	23.38	18.67	22.35	17.35	21.20	—	17.20	18.11	17.63	17.28	17.65	17.10	17.84	16.89	18.96	18.05
		21.20		20.80		19.75		22.20		22.60		20.75		22.10		20.10		20.80		20.20		20.95		20.95		18.20		17.20		17.85		18.25			
		23.20				19.10		24.20		23.30		23.30		23.50		20.10				17.80		22.30		23.45		17.15		21.65		18.10					
		23.25				20.35		24.00		24.00		20.60		23.70		22.75				16.25		21.15		21.05		24.30		17.45							
23	15.40	— 21	—	20.30	—	19.13	16.36	22.48	16.94	23.48	16.66	22.38	15.42	22.08	16.95	—	16.96	20.80	—	18.25	16.02	20.47	13.95	21.82	16.53	19.60	15.27	18.10	14.71	17.48	—	18.75	—	20.57	16.29
		20.10		24.30		21.20		19.20		21.20		—		22.40		23.30		19.80		18.55		14.85		19.15		21.60		18.60		25.05		—			
		22.35		15.30		21.23		21.20		24.20		—		22.20										18.90				21.20		22.80		—			
		22.90		24.70		20.90		22.90		24.50		—		21.10										22.70								—			
24	16.23	22.05	16.52	20.92	16.46	21.10	15.11	20.48	16.31	23.30	—	—	—	22.27	19.27	23.80	—	19.81	15.02	18.35	17.74	14.85	15.02	20.25	—	21.60	—	17.80	—	23.02	17.27	—	—	20.13	16.34
		18.65		18.20		16.00		20.10		19.65		20.50		18.00		18.30		20.10		18.25		20.85		21.10		18.20		17.10		20.90		19.50			
		22.35		22.85		18.90				18.25		18.45		19.20		19.10		20.10		18.65		16.10		20.40		19.50		17.15		20.65		19.60			
		22.90		18.25		16.00						17.50		19.10		17.28		22.90		19.10				19.05		18.20		18.85		17.20		18.70			
25	17.03	21.30	17.87	19.70	15.66	16.97	—	20.10	—	19.75	16.28	19.75	15.78	18.77	15.54	13.40	14.15	20.87	14.81	18.67	16.27	18.48	—	20.18	16.58	18.63	16.34	17.70	12.52	20.25	15.16	19.27	16.69	20.62	16.57
		—		25.90		20.65		17.85		18.90		27.10		24.30		20.50		24.00		22.50		22.10		20.90		—		18.90		20.20		—			
		—		24.80		21.45		20.30		18.60		23.70		23.30				24.30		19.70		24.60		20.90		—		17.85		17.60		—			
		—		26.85		19.80		20.10		18.30		24.25		24.55				24.63		17.90		22.00		18.00		—		18.40				—			
26	17.67	—	—	25.38	15.16	20.63	—	19.42	13.69	18.60	14.91	24.04	16.74	22.73	16.48	20.50	—	24.97	15.18	20.03	16.71	24.90	17.32	19.77	—	—	14.71	19.22	—	17.15	15.03	—	—	20.69	15.57
		17.80		16.15		19.95		19.60		19.61		19.50		20.04		20.35		19.58		18.29		19.54		18.41		19.38		19.33		20.45		18.00			
		23.00		20.15		15.30		19.65																											
27	15.48	20.45	15.83	18.15	15.16	17.63	13.65	19.63	—	19.64	—	19.50	—	22.04	18.79	20.35	—	19.58	18.59	18.29	—	19.54	—	19.41	—	19.78	17.52	19.33	15.90	20.45	—	18.00	—	19.30	16.12

Average for Year 19.49 16.10

1848

DAILY CALORIMETRIC TESTS — YEAR 1919

B.T.U.

KINGS CO

MONTH	TIME	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	2
JANUARY	8		538.90	539.91	587.57		570.73	579.58	570.98	580.89	623.85	571.81		570.63	604.60	577.94		547.52			580.16		594.25			580.05	
	9	565.90	569.15	613.82	596.80	531.87	581.30	579.28	583.18	562.06	576.91	596.45	545.67	571.94		596.65	585.79	577.10	605.73	588.60	592.53	573.72		589.01	575.96	572.62	58
	3				591.85		583.62	577.76		564.53	599.09	576.76		584.87		583.61	590.76		603.15			591.05		596.75	572.26		
	Ave	565.90	569.52	576.86	596.46	531.87	578.88	578.61	576.08	569.16	599.78	584.01	545.67	582.44	604.60	586.07	587.76	577.10	604.43	588.60	586.34	587.38	594.25	590.41	585.36	586.58	58
FEBRUARY	8				594.77												592.85								576.54		
	9	593.63	581.25	574.91	581.38	587.72	575.12	577.87	574.99	578.96	588.32	587.97	583.39	601.90	585.91	607.02		603.75	587.23	567.77	573.16	580.02	588.69	578.15		603.94	58
	3	574.59		577.16	600.56						583.16			585.07	586.60			585.03		647.82	600.11				627.44	577.69	60
	Ave	584.55	581.25	576.03	594.77	587.72	585.34	577.87	574.99	578.96	586.09	587.97	583.39	593.23	586.29	607.02	592.85	594.39	587.23	607.79	586.63	580.02	588.69	578.15	602.99	590.81	57
MARCH	8			590.70				603.17	581.02					601.17	581.28			567.22									
	9	554.11	577.13		596.89	612.73	576.36	573.02			593.42	564.81	587.78		620.79	619.69	594.19		586.69	567.85	576.85	609.50	569.49	591.30	586.39	560.01	57
	3	628.12		603.16		596.09	636.73				627.71	602.05	588.73	577.88	591.53					604.97	606.28	607.54	605.11		596.59		58
	Ave	591.53	577.13	622.03	596.89	654.48	606.54	573.02	603.17	581.02	611.66	583.43	588.35	589.53	619.69	619.69	594.19	567.22	586.69	586.16	591.36	606.02	584.80	591.30	586.99	560.01	58
APRIL	8		577.44								587.90														573.29	592.56	57
	8	669.76		588.95	586.07	562.73	576.77	574.72	578.15	573.36		600.72	606.19	586.83	581.15	602.08		582.07	584.79	631.10	551.12	570.13	583.37	607.80	609.23	581.65	60
	3	583.91				602.88		575.73	578.77		582.57	571.75				594.20	587.32			624.38		577.09	583.29		560.01	551.69	
	Ave	626.83	577.44	588.95	586.07	582.80	576.77	585.28	578.46	573.36	585.23	587.73	606.19	586.83	581.15	596.14	587.32	582.07	584.79	627.74	551.12	574.61	583.33	607.80	579.16	585.28	60
MAY	8	577.43		572.52		536.81	593.69	622.11	585.52	582.43	573.97	586.83	537.85	602.90	585.29	572.15	584.54	591.65		603.70	589.88	617.65	596.37	615.95			57
	8	557.10	617.91	587.85	587.26	579.88		600.85	576.64	590.87	575.09		593.48	619.77	601.58	605.30	576.92	606.57	580.12	629.99	580.54	594.73	573.53	605.76	611.57	585.52	62
	3	557.18		609.71		641.73	547.32	603.62	610.98	636.28	556.58	609.89		557.07	577.27	575.57	587.34	555.96		592.01			609.28		601.92		
	Ave	592.57	617.91	613.70	587.26	591.11	576.80	601.86	590.11	596.53	573.38	591.33	566.66	603.25	588.05	587.81	589.43	584.76	580.12	586.90	585.21	597.19	591.70	610.60	606.75	585.52	60
JUNE	8		662.75	577.63				604.62		587.92	603.59							594.36	576.69			575.61					
	9				585.15	583.32	587.07	599.05			576.72	573.16	575.34	585.22	604.06	603.57	577.14		571.11	587.02	597.71		572.60	595.57	576.61	573.58	57
	3		622.08	591.72	601.90	594.50	599.57			576.16		604.95	576.72	600.20	594.95		618.76	590.81			596.65	586.28		590.46	599.58		57
	Ave		592.41	586.17	585.17	587.16	594.32	601.83		582.29	590.26	591.80	576.43	592.71	599.25	603.57	607.95	592.58	573.87	587.02	597.28	593.44	592.60	593.01	588.09	573.58	57
JULY	8																										
	9	592.03	597.61	576.49	588.63	576.93	575.21	600.17	594.22	575.35	571.37	585.57	587.05	579.92	576.12	575.12	592.65	594.68	580.71	561.14	595.12	592.52	565.18	586.33	601.42	589.78	69
	3	579.59	590.23	596.28			588.78	587.01	585.11	585.53	571.11				580.71	582.22	563.00	594.44	605.87			596.79	593.40	612.24	585.79	581.12	
	Ave	596.75	594.92	586.90	588.63	576.93	596.21	594.46	590.61	580.23	571.24	585.57	587.05	579.92	587.37	587.67	576.32	555.91	592.29	561.14	595.12	592.52	565.18	586.33	601.42	589.78	69
AUGUST	8								585.71			582.20	604.09	602.69	577.26	604.42	586.10		594.09	592.32	581.59		596.16	583.92		594.78	59
	9	596.74	603.29	585.97	613.65	606.20	605.20	601.24	577.34	581.67	582.58	587.20	604.09	594.34	585.88	592.81		597.33	583.11	611.85	609.30	583.60	609.85	593.01	581.74	582.88	59
	3		590.71		596.25				560.97	580.77		601.28	597.10	573.08	585.78	589.40	616.12		600.05	622.11	580.29	585.89	587.91	584.74		585.49	69
	Ave	596.74	587.10	585.97	595.96	606.20	605.20	601.24	574.49	580.83	582.58	581.89	597.29	592.35	586.12	596.38	590.96	597.33	592.90	602.18	588.73	584.74	591.97	578.46	581.74	585.37	60
SEPTEMBER	8		577.94	581.62	593.38	583.71	586.44	597.63	604.36	572.07	575.12	615.24	587.69	604.56		577.70	592.94	586.54	603.80	561.71	587.58		571.49				57
	9	583.12	600.05	583.68	576.37	572.24	581.81	580.80	636.20	576.77	622.23	576.27	582.76	612.30	601.87	599.23	630.93	592.49	586.70	576.86	627.57	585.15	613.36	623.93	588.10	611.35	
	3		578.41	627.86	606.34	585.36	583.52		624.32	612.71	571.64	614.73	581.01	577.87		611.19	586.29	592.25	617.89	619.97	632.75		622.91				
	Avg	583.12	585.30	597.72	592.74	580.44	583.92	589.21	603.93	600.84	596.35	611.07	584.22	602.91	601.87	596.24	613.30	592.43	602.22	585.15	616.63	585.15	602.50	623.93	588.10	611.35	57
OCTOBER	8	607.55	606.36	582.39	603.51		611.17	584.69	603.39	593.01	590.66	586.88		605.74	589.26	582.57	607.04	590.46	596.27		585.85	592.59	601.73	580.23	583.73	606.77	58
	9	577.28	582.85	582.06	617.23	590.25	630.46	580.05	596.20	617.15	583.13	632.14	603.12	596.50	602.09	594.79	596.96	592.71	585.09	600.88	624.61	592.02	576.76	608.11	579.25	605.11	
	3	610.58	601.88	622.37	611.94		587.71	596.06	585.11	596.96	623.74	620.65		593.57	611.11	606.27	623.62	606.85	594.14			612.20	596.74	585.29	623.59	585.80	57
	Avg	596.97	597.03	595.61	602.09	590.25	609.85	596.93	594.89	602.57	599.18	613.22	603.12	598.60	611.82	594.54	609.21	596.01	591.83	600.88	604.73	596.24	591.25	591.19	591.21	597.03	58
NOVEMBER	8	605.54		594.67	599.19	597.96	606.33	580.52	598.96		587.36	585.78	605.18	609.92	597.62	592.32		596.30	581.94	596.35	570.75	612.91	602.48		582.75	583.15	60
	9	616.56	586.03	603.27	617.98	611.29	600.67	596.77	589.13	624.80	596.57	596.88	596.57	583.99	597.17	593.32	585.27	623.77	611.14	592.17	596.77	567.25	631.87	597.62	629.09	611.44	
	3	603.36		571.03	610.96	596.76	592.36	596.79	589.10		588.63	618.95	596.19	597.27	592.32	596.62		597.20	584.37	596.33	587.20	603.48	573.01		592.99	592.65	62
	Avg	608.55	586.03	589.66	609.04	596.16	596.79	596.79	589.10	624.80	591.52	600.54	596.96	596.92	592.37	592.32	585.27	591.81	592.48	589.42	596.92			592.62	608.24	587.65	62
DECEMBER	8	570.85	582.30	583.44	605.04	607.67	596.24		611.24	576.52	583.10	569.13	595.23	586.56	597.16	589.12	604.76	607.86	561.61	577.13	662.27						
	9	581.03	609.54	589.70	573.07	621.53	617.57	623.38	614.05	615.87	567.67	573.13	634.22	604.91		590.35	616.67	617.40	604.52	592.04	695.25	603.17	611.84	602.56	587.75	602.92	60
	3	593.26	587.14	596.87	585.08	596.72	561.76		597.03	600.06	568.26	602.75	634.00	634.00		599.79	581.61	585.28	632.23	625.05							
	Avg	581.88	593.66	586.41	594.40	608.44	609.19	623.38	607.78	597.22	566.34	582.34	613.48	657.66	597.16	593.76	614.35	597.62	599.55	604.74	653.72	603.17	611.84	602.56	587.75	602.92	60

Plaintiff's Exhibit 16

DAILY CALORIMETRIC TESTS — YEAR 1919
B.T.U.

KINGS COUNTY LIGHTING CO.

5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	MONTHLY AVG.
																											581.42
																											589.75
																											591.63
																											587.83
																											590.15
																											592.08
																											594.38
																											588.21
																											594.14
																											596.32
																											591.69
																											600.64
																											590.74

1849

Kings County Lighting

Candle Power Tests – 192

Date	Time	Co. 1	City	Co. 2	City	Co. 3	City	Co. 4	City	Co. 5	City	Co. 6	City	Co. 7	City	Co. 8	City	Co. 9	City	Co. 10	City	Co. 11	City	Co. 12	City	Co. 13	City	Co. 14	City	Co. 15
January	9 A.M.	20.18		19.30		17.30		19.15		14.80		20.30		17.45		19.65		17.65		22.80		20.15		17.50						
	12 M.			19.50		21.40				17.20		25.60		20.70		24.20		17.55		18.00										
	3 P.M.									22.50																				
	Average	20.60		19.58	17.25	19.45		19.15	17.44	17.71	15.87	22.05	18.81	19.08	16.35	21.93	18.44	17.60	19.40	20.40		20.15		17.50				16.01		16.1
February	9 A.M.	18.79		18.40		20.18										16.80		19.40		17.80				15.90						
	12 M.																													
	3 P.M.																													
	Average	18.79		18.40		20.18								15.41		18.80		19.40	15.45	17.80	14.42	—	14.09	15.90				11.90	11.10	14.6		
March	9 A.M.	23.70		23.00		17.40		17.12		18.81		18.00				17.50		23.57		20.10		21.80		20.18		17.50				23.20
	12 M.	19.97		20.02		17.80		16.61		17.70						20.10		20.10		25.56		17.26		16.66		18.92				23.88
	3 P.M.	20.18		17.68		23.50		22.18		19.45						24.90		19.98		22.23		18.46		20.64						17.20
	Average	21.28	18.11	20.24	17.13	19.67	13.18	18.60	15.04	18.65	14.01	18.00	14.63			21.37		21.40	17.44	22.83	18.24	19.84	18.25	19.16	17.92	18.21				18.10
April	9 A.M.	18.90		17.34		19.09				14.22		18.18		18.25		18.84		20.91						20.80		19.68		16.57		20.00
	12 M.	14.69		15.55		18.45				17.43		18.39		19.40		17.50		19.11						19.89		16.40		21.14		19.20
	3 P.M.	16.27		12.39						16.21		18.35		20.24		18.21		20.36						19.07		16.59		21.6		19.20
	Average	16.62	15.65	15.09	11.47	16.71	10.20			16.15	10.26	18.31	11.45	19.29	16.41	18.20	15.50	20.37	15.90					19.93	15.41	17.56	16.06	19.91	14.05	19.47	18.4
May	9 A.M.	20.52				17.81				24.41		11.27		16.12		20.60				17.20		11.56		16.76		13.83		16.71		20.47
	12 M.	21.70				23.14		21.62		26.40		20.67		15.05		17.25				15.52		17.60		17.50		19.47		11.11		15.40
	3 P.M.							18.40		5.18		20.65		16.73						14.58		16.57		19.40		16.10				
	Average	21.11	18.99			20.50	18.09	20.01	18.57	22.16	18.31	19.60	16.54	15.97	16.28	18.93	16.65			18.10	12.95	15.24	12.33	17.89	12.71	16.41	12.23	17.55	13.01	17.97	10.2
June	9 A.M.	9.91		11.79										9.50		9.98		6.47		8.91		10.05		11.75				14.44		15.70
	12 M.	9.80		9.18												7.63		6.98		10.42		12.65		12.12				16.35		15.82
	3 P.M.	9.22												7.93						12.41		14.24						15.37		16.48
	Average	9.65	5.59	10.49	3.59			4.14		4.11		3.99		8.71		8.81	3.33	6.73	7.10	10.46	6.30	12.31	11.41	11.74	12.25			15.72	10.32	15.42	11.1
July	9 A.M.											13.52		12.09		12.58		14.83		14.03				18.86		12.71		15.69		12.85
	12 M.	10.96		10.08		10.21						12.13		12.69		13.85		13.55		13.04				13.44		12.36		14.64		12.72
	3 P.M.	12.05		12.14								14.03		12.08		14.82		13.70						14.18		15.23		16.02		13.33
	Average	11.52	9.92	11.11	8.63	10.21						12.23	7.90	12.29	10.96	13.65	11.82	13.86	10.75	13.53				15.83		13.62		15.46		13.00
August																														
September																														
October																														
November																														
December																														

Complainant's Exhibit 17

6 CITY	co. 17 CITY	co. 18 CITY	co. 19 CITY	co. 20 CITY	co. 21 CITY	co. 22 CITY	co. 23 CITY	co. 24 CITY	co. 25 CITY	co. 26 CITY	co. 27 CITY	co. 28 CITY	co. 29 CITY	co. 30 CITY	co. 31 CITY	Average for Month
									18.75	18.33	22.12	21.04	21.08	18.85		
15.72			15.81		21.32	18.36	22.41	16.86	18.75	18.33	15.76 22.12	18.50 21.04	21.08	18.85		19.86 17.72
19.40	17.60	18.30		17.88		19.80	21.92		22.22	18.72	18.68	18.95				
							23.28			23.20	19.50	18.06				
										20.32	19.61					
13.25 19.40	16.45 17.10	15.37	18.50	14.91 17.85	14.08		19.80	17.90	22.22	14.42 20.25	16.43 19.29	15.23 18.50	15.54			19.01 14.81
18.25	16.10	18.45		18.35		17.29	17.65		15.15	18.57	18.83	18.49		17.60	17.31	17.30
20.12	17.82	15.38		20.34		23.15	18.25		18.20	18.61	15.62	13.96		18.16	16.23	22.02
14.65	15.58	16.66				22.21	19.00		18.30	17.05	20.90			20.00	19.10	16.71
17.45 16.21	13.04 18.82	17.84	16.83	17.31	19.35 14.49		20.88	17.52	18.37	14.55 17.22	15.31 17.08	15.84 18.45	16.61 16.22		18.59 14.92	17.55 18.70	16.22 18.92	16.06
16.32			21.25		16.85	16.80	16.60		14.09	14.50		14.90	19.77	16.30	17.80	
18.26			19.70		20.50	16.96	18.47		15.60	14.83		14.43	14.28	19.00	17.50	21.76
			18.95		21.16	18.00	19.83		17.82			18.85	19.60	19.29	19.82	19.80
18.49 11.44	17.07		19.87	16.72	19.50 19.07	17.21	17.65 18.30	18.95	19.70	16.65 14.82	15.05		15.87	14.69 17.88	14.91 18.20	14.31 18.37	15.53 20.78	15.37	18.24	15.60
14.12	13.36		12.14		11.43	10.39	13.65			11.67	8.06	8.03	8.25	6.98	9.18	9.55		
12.46	11.67		13.05		12.02	12.35	11.72			7.32	7.84	7.66	7.54	2.72				
10.00	11.29		15.31		11.41	14.61				7.88	7.28			2.94				
13.86 12.07	11.94	9.96	13.50	11.68	11.62 10.18	12.45	7.74 12.69	10.19		8.96	6.50 7.73	6.6 7.85	5.91 8.15	3.78 7.54	6.12 9.18	3.06 9.55	14.47	11.69
	10.49					11.11	11.43	10.21		9.33			14.20			11.92		
13.94	11.40		11.89			13.00	11.21	11.01		7.61	7.60		10.55			11.37		
12.53	9.59					12.51	13.83			9.73	9.74			12.57		12.53		
2.92 13.96	6.99 10.49	6.70	11.89	6.85	12.21	9.12 12.14	9.36	10.61	9.20	8.89	8.23 8.67	9.52	12.37	10.25	13.17	12.00 11.94	11.89	11.29	8.04
13.01			10.24	8.32		14.45	12.14			8.31			10.35	7.17	6.60	6.74 7.53	7.47	
			9.34				10.63						10.18		7.02	7.73 7.95	8.11	
			8.72		14.37		10.69							6.74	7.73	8.82		
13.01			9.43	8.72	14.37	14.45	11.15		8.31				10.27	6.96	7.12	7.24 8.10	8.09	11.86	

1850

Kings County Ligh

Daily Calorim

Date	1	2	3	4	5	6	7	8	9	10	11	12	13	14	
January		583-60	576.81	587.98	606.30	622.37	572.89	586.54	576.75	623.11	589.02	577.66	587.17	602.54	58
	- -	630.86	586.83	-	565.88	578.44	585.48	549.74	586.43	624.63	-	587.29	-	- -	-
	574.00	595.58	611.74	- -	603.43	613.44	617.42	660.40	574.40	618.45	-			- -	-
	574.00	603.35	591.14	587.98	591.94	604.11	591.43	615.56	580.86	604.00	589.02	582.48	587.17	602.54	586
February															
	614.61	564.02	614.04	-	567.76			-	556.38	- -	576.68	—	- -	- -	-
	-	-	-	581.77	617.14	602.32	609.46	615.88	617.23	595.01	-	566.58	594.50	581.38	-
	614.61	564.02	614.04	581.77	592.45	602.32	609.46	615.88	586.80	615.21	576.68	566.58	594.50	581.38	
March	630.61	640.25	596.11	624.71	514.04	581.25	- -	571.26	601.46	605.13	631.11	617.96	595.65	- -	60
		591.12	595.11	624.71	586.80	- -	- -	604.17	572.76	647.[illegible]	[illegible]	595.17	616.01	-	52
	591.80	591.[illegible]	629.15	641.71	648.55	-	-	621.41	611.20	617.22	595.58	633.18	- -	- -	58
	630.61	595.11	613.[illegible]	631.40	604.11	581.25	- -	597.65	592.4	610.53	601.90	605.69	605.82	-	57
April	624.04	587.38	504.98	-	568.03	602.25	583.26	623.48	623.21	-		594.27	597.03	588.17	61
	537.41	554.21	543.74	-	623.46	622.16	611.63	569.04	628.83	-		601.22	553.46	634.11	62
	525.96	545.77	-		578.65	593.94	598.30	587.67	565.14	-		591.91	600.34	618.47	56
	562.47	561.94	524.46		590.05	608.12	597.73	593.40	605.73	-	- -	595.80	583.61	613.58	60
May	638.45		604.04		681.10	646.44	588.71	662.04		596.02	525.89	578.54	566.26	593.16	63
	658.27	-	654.18	644.00	703.03	635.39	556.72	566.23	- -	559.44	604.91	595.21	619.63	604.89	57
	-	- -	-	601.48	563.38	590.76	569.68		-	639.17	551.98	612.64	572.63	- -	-
	648.31		629.11	622.74	644.37	624.20	571.72	614.14		598.21	560.76	595.46	586.17	599.03	60.
June	545.29	492.69	487.13	445.33	505.79	- -	492.06	509.85	530.45	556.16	545.75	542.82	-	537.36	52
	501.79	491.10	477.36	484.06	488.95	- -	470.08	527.31	510.51	583.62	572.01	541.67	-	560.92	52
	543.67	447.62	490.01	476.83	- -	- -	509.63	494.06	547.18	534.34	612.41	-	-	519.33	52
	520.25	477.14	484.83	485.41	497.57	-	490.56	510.40	529.54	559.60	576.75	542.25	-	543.87	53
July	507.18	577.36	434.89	-	- -	-	501.69	547.03	554.62	524.26	529.00	-	571.92	565.75	546.53	52
	549.97	573.73	562.17	-	- -	-	526.51	546.41	531.22	536.66	-	-	544.64	530.33	534.[illegible]	55
	529.88	549.04	-	-	- -	-	551.75	517.91	557.88	567.64	-	-	562.76	577.69	562.[illegible]	56
	529.19	500.04	510.03	-	- -	-	536.58	537.14	544.61	543.04	532.83	-	559.11	554.59	548.12	54
August															
September															
October															
November															

020

Supplemental Exh. C.1 18

18	19	20	21	22	23	24	25	26	27	28	29	30	31	Average per Month	Time
															9 A M
88.27	624 88	580 49									343 48				12 M
88.27	624 88	580.49	574 36	598 18	578.44	581.06	599 12		641 20	600.50					3 P M
					578.44	581.06	599 12		641 20	600 50	343.48			593 14	Average
							511 84		562 89	616.53					9 A M
86.50	596.99	600 93	582 44	558 6					643 87						12 M
86 50	596 99	600.93	582 44	558 26	571 45	593.15	571 84	614 97	570 88	616 53				591 41	3 P M
1.3 27	600 21	564 64													Average
3.41	571														9 A M
7793	599 43			584.00	575 11	611.54	589.13	627 09							12 M
14 94	592.77	564 64		545 27		14.26	540 94	623 60							3 P M
															Average
	598.06	571.58	601.42	608 83	564.77	514.13		512.05	612.13	575 11	601 29				9 A M
	581.51	670.77	601.21	595 68	630 24	593 03	—	560.47	565.54	601 88	608 79	620 72			12 M
	581 35	599 86	633 25	621 65	616 01	— —		609 29	624 85	594 18	608 72	597 28	—		3 P M
	587 00	614 07	612 13	614 05	603 66	583.59	—	580.60	600 84	592 61	606 29	618 43		593 41	Average
39.99	579.56	527.42	497 58	509 17		473 41	499.76	521 80	485.28	416 31	41 24		214 22		9 A M
38 99	567 08	544 30	530 44	536 75		201 07	496 57	481 32	465 25	598 12	412 59				12 M
79 00	592.01	531 60	582 59			518 41	501 06	— —		518 65					3 P M
79.33	579 55	534 44	520 18	523.26		497.61	499 13	501 56	475 21	497 49	442 57				Average
31.89	492.75		556 38	541 32	510 12	469.91	479 41	526 94		538		229 1			9 A M
49.91	491 36		572 46	576 18	585.23	535 41	535 45	529 17		535 63		262 52			12 M
58 27			579 59			505.45	510 74			565 03		279 48			3 P M
76.57	492.06		567		522.68	503.61	508.25	528.05		546 29		262 15			Average
	524.22	522.71		521 12	516.32	443		534	511	567	446 71				9 A M
	553 02	534 15		584 16	576 30	594 11		476 0	471 7	531 57	424 24	214 8	21 42		12 M
	519 16	540 82	536 42	551 9	524 53			521 44	544 43	527 41	424 52	232 26			3 P M
	531 71	532 58	536 42	551 9	518 22	594 11		516 14	443 60	531 29	421 2	232 71	218		Average

569

1843 COMPLAINANT'S EXHIBIT 12.

Exhibit "D." Page 4.

Kings County Lighting Company.

Detailed Operating Expenses, Six Months Ended June 30, 1920.

General expenses:	Amount	Cost per M c. f. sold.
Salaries & Expenses General Officers	89,140.21	.0114
Salaries & Expenses General Office Clerks	16,442.00	.0204
General Office Supplies & Expenses	1,643.64	.0020
General Law Expenses (Excluding Rate Case)	400.66	.0005
Miscellaneous General Expense	8,753.38	.0109
Insurance	6,317.48	.0079
Accidents & Damages	828.26	.0010
General Stationery & Printing	3,824.39	.0047
Undisputed Adjustments	*108.79	*.0001
Duplicate Charge Credit	*3,085.03	*.0038
Total	44,156.20	.0549
Plant Withdrawn From Service	8,079.40	.0100
Taxes:		
Real Estate	25,623.40	.0318
Special Franchise	17,907.00	.0223
State Gross Earnings	3,929.69	.0049
Capital Stock Tax	197.54	.0002
Total	47,657.63	.0592
Uncollectible Bills	5,542.13	.0069

(Here follow Complainant's Exhibits Nos. 13, 14, 15, 17 and 18, marked pages 1844 to 1851, inclusive.)

[*In red ink in copy.]

1852 COMPLAINANT'S EXHIBIT 19.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

PLTF.'s EX. 19. J. A. F.

Copy.

Agreement made this 16th day of December, A. D. 1918, between the Standard Oil Company of New York, a corporation organized under the laws of the State of New York, party of the first part, and the Kings County Lighting Company, Brooklyn, New York, party of the second part, witnesseth:

In consideration of the mutuality hereof, it is hereby agreed between the parties hereto as follows:

The party of the first part sells and agrees to deliver to the party of the second part, its successors or assigns, the number of gallons of gas oil, 28 to 31 gravity, the second party shall use in the manufacture of gas in its plant during the contract period beginning January 1st, 1919, and ending July 31st, 1919; such supply to be Four Million One Hundred Twenty Five Thousand (4,125,000) gallons.

It is understood and agreed between the parties hereto that the quantity above mentioned is the estimated requirements of the second party during the above period, and that the party of the first part reserves the right to cancel any balance of oil remaining undelivered as of July 31st, 1919.

The party of the second part agrees to receive the gas oil above mentioned at and for the price of Seven and Forty Nine Hundred Fifty Ten Thousandths (7.1950) Cents per gallon delivered in bulk boats at the mouth of the pipe line leading from the dock to the receiving tanks of the second party, such deliveries to be made as the business of the second party may require and as they in writing order, but not less than one bulk boat at any one time; the first party to have two weeks' notice of shipments required.

The price mentioned in this agreement being based on present transportation rates is subject to change upon thirty (30) days' notice, and in case these rates are advanced or reduced, the price above mentioned is to be adjusted accordingly.

The proper loading of the oil to be certified to by a representative of the New York Produce Exchange.

This agreement is understood to cover the liquid gas making material that will be required for use in the plant of the said party of the second part continuously during the contract period, but total deliveries shall not exceed Four Million One Hundred Twenty Five Thousand (4,125,000) gallons.

It is understood between the parties hereto that should the first party's usual manufacture be interrupted or shipment delayed by reason of strikes, lockouts, or stoppage of labor from whatever cause, fire, quarantine of vessels, arrests or restraints of Princes, Rulers,

Governments and Peoples, war, or any causes whatsoever beyond its control, delivery may be postponed until such interruption or delay is ended.

Further, to the price mentioned above will be added any national or state tax which may be imposed.

It is agreed between the parties hereto that payments shall be made in cash thirty (30) days after date of invoice; interest at six (6) per cent thereafter; funds current in New York.

In witness whereof the parties hereto have executed this agreement the day and year first written above.

[SEAL.] STANDARD OIL COMPANY OF NEW YORK,
By E. M. HIGGINS,
Director.
KINGS COUNTY LIGHTING COMPANY,
By RALPH ELSMAN,
General Manager.

553 [Endorsed:] "C 1B." January to July 31st, 1919.

554 COMPLAINANT'S EXHIBIT 20.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

PLTF'S EX. 20. J. A. F.

Agreement made this 31st day of July, A. D., 1919, between the Standard Oil Company of New York, a corporation organized under the laws of the State of New York, party of the first part, and the Kings County Lighting Company, Brooklyn, New York, party of the second part, witnesseth:

In consideration of the mutuality hereof, it is hereby agreed between the parties hereto as follows:

The party of the first part sells and agrees to deliver to the party of the second part, its successors or assigns, the number of gallons of gas oil, 28 to 31 gravity (sulphur content of the oil not to run above one half of one per cent), the second party shall use in the manufacture of gas in its plant during the contract period beginning August 1st, 1919, and ending December 31st, 1919, or at such time as the quantity herein provided for has been delivered;

Such supply to be two million five hundred thousand (2,500,000) gallons.

The party of the second part agrees to receive the gas oil above mentioned at and for the price of five and ninety six hundredths (5.96) cents per gallon delivered in bulk boats at the mouth of the pipe line leading from the dock to the receiving tanks of the second party; such deliveries to be made as the business of the second party may require and as they in writing order, but not less than one bulk boat at any one time; the first party to have two weeks' notice of shipments required.

The price mentioned in this agreement being based on present transportation rates is subject to change upon thirty (30) days notice, and in case these rates are advanced or reduced, the price above mentioned is to be adjusted accordingly.

The proper loading of the oil to be certified to by a representative of the New York Produce Exchange.

This agreement is understood to cover the liquid gas making material that will be required for use in the plant of the said party of the second part continuously during the contract period, but total deliveries shall not exceed two million five hundred thousand (2,500,000) gallons.

Any undelivered balance of oil purchased under agreement dated the 16th day of December 1918, is by this writing abrogated.

It is understood between the parties hereto that should the usual manufacture of the party of the first part be interrupted or shipment delayed by reason of strikes, lockouts, or stoppage of labor from whatever cause, fire, quarantine of vessels, arrests or restraints of Princes, Rulers, Governments and Peoples, war, or any cause whatsoever beyond its control, delivery may be postponed until such interruption or delay is ended.

Further, to the price herein mentioned will be added any national or state tax which may be imposed.

It is agreed between the parties hereto that payments shall be made in cash thirty (30) days after date of invoice; interest at six per cent thereafter; funds current in New York.

1855 In witness whereof the parties hereto have executed this agreement the day and year first written above.

[SEAL.] STANDARD OIL COMPANY OF NEW YORK.
By E. M. HIGGINS, *Director.*
KINGS COUNTY LIGHTING COMPANY.
By RALPH ELSMAN, *Vice President.*

1856 [Endorsed.] "C I B." Aug. 1 to Dec. 31, 1919.

1857 COMPLAINANT'S EXHIBIT 21.

U. S. District Court, S. D. of N. Y.

Filed Sep. 22, 1920.

PLFF'S EX. 21. J. A. F.

Agreement made this 14th day of January, A. D., 1920, between the Standard Oil Company of New York, a corporation organized under the laws of the State of New York, party of the first part, and the Kings County Lighting Company, Brooklyn, New York, party of the second part, witnesseth:

In consideration of the mutuality hereof, it is hereby agreed between the parties hereto as follows:

The party of the first part sells and agrees to deliver to the party of the second part, its successors or assigns, the number of gallons of gas oil, 24 to 32 gravity, the second party shall use in the manufacture of gas in its plant during the contract period beginning January 14th, 1920, and ending when the full quantity is taken; such supply to be two million (2,000,000) gallons, it being understood between the parties hereto that any quantity of oil remaining undelivered as of April 14th, 1920, shall be cancelled.

The party of the second part agrees to receive the gas oil mentioned above at and for the price of eight and eight one hundredths (.08) cents per gallon delivered in bulk boats at the mouth of the pipe line leading from the dock to the receiving tanks of the second party; such deliveries to be made as the business of the second party may require, orders in writing to be duly given, but not less than one bulk boat at any one time; the first party to have two weeks' notice of shipments required.

The price mentioned in this agreement being based on present transportation rates is subject to change upon thirty (30) days' notice, and in case these rates are advanced or reduced, the price above mentioned is to be adjusted accordingly;

The proper loading of the oil to be certified to by a representative of the New York Produce Exchange.

This agreement is understood to cover the liquid gas making materials that will be required for use in the plant of the said party of the second part continuously during the contract period, but total deliveries shall not exceed two million (2,000,000) gallons.

It is understood between the parties hereto that should the usual manufacture of the party of the first part be interrupted or shipment delayed by reason of strikes, lockouts, or stoppage of labor from whatever cause, fire, quarantine of vessels, arrests or restraints of Princes, Rulers, Governments and Peoples, war, or any cause whatsoever beyond its control, delivery may be postponed until such interruption or delay is ended.

Further, to the price herein mentioned will be added any national or state tax which may be imposed.

It is agreed between the parties hereto that payments shall be made in cash thirty (30) days after date of invoice; interest at six per cent thereafter; funds current in New York.

In witness whereof the parties hereto have executed this agreement the day and year first written above.

STANDARD OIL COMPANY OF NEW YORK.
By C. M. HIGGINS,
Director.

KINGS COUNTY LIGHTING COMPANY.
By RALPH ELSMAN,
Vice President.

Department of Gas Oil, S. O. Co. of New York, Jan. 17, 1920.
C. M. Higgins.

1859 [Endorsed:] "C. B." Contract with Standard Oil Company of New York. Dated January 14, 1920. Expiring April 14, 1920. Price 8.08¢ per gallon. Quantity 2,000,000 gallons.

1860 COMPLAINANT'S EXHIBIT 22.

Pltf's Ex. 22. J. A. F.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

Agreement made this 17th day of March A. D., 1920, between the Standard Oil Company of New York, a corporation organized under the laws of the state of New York, party of the first part, and the Kings County Lighting Company, Brooklyn, New York, party of the second part, witnesseth:

In consideration of the mutuality hereof, it is hereby agreed between the parties hereto as follows:

The party of the first part sells and agrees to deliver to the party of the second part, its successors or assigns, three million five hundred thousand (3,500,000) gallons of gas oil distillate, 20 to 28 gravity Beaume, at and for the price of ten (10) cents per measured gallon delivered in bulk boats at the mouth of the pipe line leading from the dock to the receiving tanks of the said second party.

Such deliveries to be made as the business of the second party may require, orders in writing to be duly given, but for not less than one bulk boat at any one time; the first party to have two weeks' notice of shipments required.

It is understood between the parties hereto that delivery of the oil specified herein is to begin approximately May 1st, 1920, and that any quantity of oil remaining undelivered as of December 31st, 1920, shall be cancelled.

The price mentioned in this agreement is based on the boat transportation and freight rates now prevailing. In case these rates are advanced or reduced, the price above mentioned is to be adjusted accordingly;

The proper loading of the oil to be certified to by a representative of the New York Produce Exchange.

The sale and delivery of the oil specified herein is contingent upon the ability of the party of the first part to secure the full quantity and provide for the necessary equipment in which to move the oil into New York Harbor.

It is understood between the parties hereto that should the usual manufacture of the party of the first part be interrupted, or shipments delayed by reason of strikes, lockouts, stoppage of labor from whatever cause, fire, quarantine of vessels, arrests or restraints of Princes, Rulers, Governments and Peoples, war, or any cause whatsoever beyond its control, delivery may be postponed until such interruption or delay is ended.

Further, to the price herein mentioned will be added any national or state tax which may be imposed.

Complainants Exhibit 23

NO.

1112 PRUDENTIAL BUILDING,
BUFFALO, N. Y.

203 SOUTH DEARBORN STREET,
CHICAGO, ILL.

WILLIAMS & PETERS
COAL
1 BROADWAY

141 MILK STREET,
BOSTON, MASS

WILLIAMS, WELLS & CO.
NEW HAVEN, CONN.

GENERAL SALES AGENTS.

will give consignee the benefit of the lower price during such time as it is in effect.

Contract effective April 1, 1919, Contract expires March 31, 1920.

KINGS COUNTY LIGHTING COMPANY

Accepted by Williams Peters

Signature of Purchaser. VICE PRESIDENT

1863

Complainant's Exhibit 25

LEHIGH VALLEY COAL SALES COMPANY

WM. S. WOLLE
GEN'L EASTERN SALES AGENT

LEHIGH VALLEY
LV
COAL SALES CO.

90 WEST STREET
NEW YORK

Mar. 24th, 1920.

Mr. Ralph Elsman, Vice Pres.,
Kings County Lighting Co.,
4802 New Utrecht Avenue,
Brooklyn, N.Y.

Dear Sir:-

In accordance with your telephone talk with me on the 20th inst., and our Mr. Partrick's interview with you to day, I submit propcsition to supply your Company with 30,000 tons of Broken coal, also 15,000 tons of number 3 Buckwheat, (Barley), to be taken by you in approximately equal monthly proportions during the year beginning April 1st, 1920.

The price for the Broken coal will be our current price at time of shipment to Gas Companies and the price for the Barley will be $2.00 per gross ton on cars at mines.

It is understood that this coal is to be paid for on the 20th of the month next succeeding that in which it is shipped to you, and all deliveries will be subject to our strike clause reading as follows:

> "This Company shall not be responsible for damages for a failure to deliver if prevented from doing so by our inability to procure transportation, or by floods, accidents or casualties, or from lockouts or strikes among the employes of companies who mine the coal or of any transportation company engaged in moving the coal, or by Federal or State legislative or executive action, or by legal proceedings, or by any other causes that are beyond our control. In case of such interruption or prevention, this Company reserves the right to cancel the portion of this order unfilled during the time this Company is unable, for causes beyond its control, to make deliveries as per order of Kings County Lighting Company."

If the above is in accordance with your understanding, please acknowledge, and oblige,

It is agreed between the parties hereto that payments shall be made in cash thirty (30) days after date of invoice; interest at six per cent thereafter; funds current in New York.

1861 In witness whereof the parties hereto have executed this agreement the day and year first written herein.

STANDARD OIL COMPANY OF NEW YORK,
By C. M. HIGGINS,
Director.
KINGS COUNTY LIGHTING COMPANY,
By RALPH ELSMAN,
Vice President.

1862 [Endorsed:] "C. B." Contract with Standard Oil Co. of New York and Kings County Lighting Co. Dated March 17, 1920. Expiring December 31st, 1920. Prices 10¢ per gal. Quantity 3,500,000 gal.

(Here follow Complainant's Exhibits Nos. 23, 24, and 25, marked pages 1863, 1864, 1865, and 1866, inclusive.

1867 COMPLAINANT'S EXHIBIT 26.

PFf's Ex. 26. 8/12/20. A. J. P.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

March 27, 1920.

Mr. William S. Wolle,
General Eastern Sales Agent,
Lehigh Valley Coal Sales Company,
90 West Street, New York, N. Y.

DEAR SIR:

Referring to our conversation of a few days ago, advise that I accept your proposition as outlined in your letter of March 24, 1920 to supply this Company with 30,000 tons of Broken coal and 15,000 tons of number 3 Buckwheat (Barley) to be taken by us in approximately equal monthly proportions during the year beginning April 1, 1920.

I understand owing to the mining situation that it will be impossible for you to quote us a price on Broken coal at this time, but that you will supply it to us at the current price charged to all companies. The price of the Barley coal will be $2.00 per gross ton on cars at mines.

It is also understood that the coal is to be paid for on the 20th of the month next succeeding that in which the coal is received by this Company, and all deliveries will be subject to the strike clause reading as follows:

"This Company shall not be responsible for damages for a failure to deliver if prevented from doing so by our inability to procure transportation, or by floods, accidents or casualties, or from lockouts or strikes among the employes of companies who mine the coal or of any transportation company engaged in moving the coal, or by Federal or State legislative or executive action, or by legal proceedings, or by any other causes that are beyond our control. In case of such interruption or prevention, this Company reserves the right to cancel the portion of this order unfilled during the time this Company is unable, for causes beyond its control, to make deliveries as per order of Kings County Lighting Company."

As soon as the Broken coal market becomes settled, I desire to draw up a regular contract covering shipments. Meanwhile we will draw up a contract covering the shipments of Barley coal and will forward it to you for your signature. Orders will be forwarded you today regarding the shipments commencing April 1st.

Complainant's Exhibit 27

KINGS COUNTY LIGHTING COMPANY

ANTHRACITE COAL PURCHASES

SIX MONTHS ENDED -

JUNE 30, 1920.

TONS	C.W.T.	COST PER TON AT MINE	AT DOCK	COST	RAIL FREIGHT	TAX ON RAIL FREIGHT	W.T.R. FREIGHT	TAX ON WATER FREIGHT	INSURANCE	TOWING	WAR TAX ON TRANSPORTATION	TOTAL COST	COST PER T AT DOCK
648	-		8.15	5,281.20					12.72		44.72	5,338.64	8.24
631	05		8.15	5,144.69					12.39		43.56	5,200.64	8.24
639	02		8.15	5,206.67					12.64		44.10	5,263.31	8.24
635	14		8.15	5,180.96					12.48		43.86	5,237.30	8.24
608	01		8.15	4,955.61					11.93		41.96	5,009.50	8.24
551	08		8.15	4,493.91					10.82		38.05	4,542.78	8.24
609	01		8.15	4,963.76					11.95		42.07	5,017.74	8.24
620	11		8.15	5,057.46					12.18		42.82	5,112.46	8.24
553	02		8.15	4,507.77					10.86		38.17	4,556.80	8.24
516	01		8.15	4,205.81					10.13		35.60	4,251.54	8.24
548	08		8.15	4,469.46					10.76		37.84	4,518.06	8.24
486	10	4/8/20	8.15	3,964.98					9.55		33.67	4,008.10	8.24
633	17		8.65	5,482.80					13.23		43.74	5,539.77	8.75
536	19	5.95	4/14/20	4,991.75	1,552.06	46.56	411.09	12.33	16.65		-	7,030.44	8.36
496		5.95		2,951.20	917.60	27.53	84.32	2.55	9.55	140.00	-	4,133.07	8.33
526	02	5.95		3,124.35	971.44	29.14	89.17	2.68	10.47	150.00	-	4,357.30	8.30
512	03	5.95		3,042.29	1,132.46	33.97	104.07	3.12	12.15	475.97	-	5,404.05	8.88
467	18	7.20	5/24/20	3,296.88	647.12	25.41	274.37	6.73	10.54	257.30	-	4,668.35	10.09
731	06	7.20		6,276.20	1,599.79	47.99	423.73	12.71	19.17	186.75	-	8,516.64	9.85
731	06	7.20		5,266.36	1,362.91	40.89	358.34	10.75	16.81	156.36	-	7,201.11	9.84
771	10	7.20		5,554.60	1,477.26	42.62	376.04	11.34	17.73	200.36	-	7,677.36	9.89
816	-	7.30	6/13/20	5,949.60	1,507.75	45.23	399.35	11.96	18.94	143.75	-	8,076.50	9.91
244	10	7.20		5,434.85	1,377.33	41.32	364.81	10.94	17.30	154.40	-	7,400.95	9.96
14536	03			$109,354.28	$12,685.76	$360.56	$2,837.39	$85.11	$301.80	1,644.37	$530.07	128,019.29	

Total Tons Purchased 14,536 - 3 C.W.T. @ $8.81 Cost per Ton - Total Cost $128,019.29

Complainants' Exhibit 28

KINGS COUNTY LIGHTING COMPANY

STEAM COAL PURCHASES

YEAR - 1919

TONS	C.W.T.	LBS.	COST PER TON	SCREENINGS	#4 BUCK.	#2 BUCK.	#3 BUCK.	WAR TAX & INSURANCE	TOTAL COST
389	-	540	$ 3.30	$ 1,284.50	$	$	$	$	$ 1,284.50
16	-	1460	2.50	-	41.63				41.63
298	-	-	2.38½	-	710.73				710.73
9	-	640	2.50	-	23.21				23.21
503	-	1710	3.30	1,662.42	-				1,662.42
101	-	1760	3.50	356.25	-				356.25
394	-	855	3.50	1,381.99	-				1,381.99
144	-	464	2.50	-	361.16				361.16
265	-	400	3.05	808.86	-				808.86
340	-	1340	3.05	1,038.82	-				1,038.82
111	-	2060	3.05	341.35	-				341.35
611	-	-	4.33	-	2,645.63				2,645.63
711	15	-	2.90	2,064.08	-			56.94	2,121.02
306	-	2150	3.05	936.22	-				936.22
319	07	-	4.00	-	-	1,277.25			1,277.25
95	-	900	3.05	291.11	-				291.11
120	-	1560	3.05	368.12	-				368.12
185	-	1350	3.50	649.61	-				649.61
242	-	2210	3.05	741.11	-				741.11
507	-	-	3.57	-	-		1,809.99		1,809.99
58	-	1400	3.50	205.19	-				205.19
41	-	1110	3.05	126.56	-				126.56
703	05	-	4.33	-	3.045.07				3,045.07
18	-	1350	3.05	56.71	-				56.71
18	-	80	3.05	55.01	-				55.01
23	-	480	3.05	70.80	-				70.80
723	15	-	4.33	-	3,133.84				3,133.84
62	-	510	3.50	217.76	-				217.76
514	-	-	3.57	-	-		1,834.98		1,834.98
491	04	-	3.50	1,719.20	-				1,719.20
544	06	-	4.33	-	2,356.82				2,356.82
583	02	-	4.33	-	2,524.82				2,524.82
143	-	1180	2.75	394.70	-				394.70
44	-	590	3.05	135.00	-				135.00
76	-	1810	3.05	234.26	-				234.26
567	09	-	3.50	1,986.08	-				1,986.08
7	-	520	3.05	22.06	-				22.06
39	-	1740	2.75	109.39	-				109.39
615	02	-	4.33	-	2,663.38				2,663.38
686	08	-	4.33	-	2,972.11				2,972.11
6	-	160	2.75	-	16.70				16.70

Plaintiff's Exhibit 29.

KINGS COUNTY LIGHTING COMPANY

Bailey [redacted] COAL PURCHASES

SIX MONTHS ENDED -

JUNE 30, 1920

TONS	G.M.T.	COST AT MINES	COST	RAIL FREIGHT	RAIL TAX	WATER FREIGHT	WATER TAX	INSURANCE	TOWING	TOTAL COST
18	05	$ 3.05	$ 55.70	$ -	$ -	$ -	$ -	$ -	-	$ 55.70
553	02	4.33	2,394.92	-	-	-	-	-	-	2,394.92
73	11	2.75	202.25	-	-	-	-	-	-	202.25
813	09	4.33	3,522.24	-	-	-	-	-	-	3,522.24
792	09	4.34	3,439.23	-	-	-	-	-	-	3,439.23
493	16	4.25	2,096.65	-	-	-	-	-	-	2,096.65
449	06	4.25	1,909.53	-	-	-	-	-	-	1,909.53
512	11	2.00	1,025.10	896.96	26.91	87.13	2.61	4.97	-	2,043.68
634	10	2.00	1,269.00	1,110.38	33.31	310.91	9.33	6.16	-	2,739.09
60	-	3.00	180.00	-	-	-	-	-	-	180.00
100	12	3.02	301.52	-	-	-	-	-	-	301.52
4,501	09	$37.30	$16,398.12	$ 2,007.34	$ 60.22	$ 398.04	$11.94	$11.13	-	$ 18,886.79

Total Tons 4501 Tons 9 CWT at cost per ton $4.20 - $18,886.79

Complainant's Exhibit 30

KINGS COUNTY LIGHTING COMPANY

BITUMINOUS COAL PURCHASES

SIX MONTHS ENDED -

JUNE 30, 1920

	TONS	C. W. T.	COST PER TON	COST ALONGSIDE: TOWING	COST ALONGSIDE: OF DOCK	TOTAL COST
Whitney & Newcomb	404	17	$ 6.50	-	-	$ 2,664.32
Morse Dry Dock	8	19	6.50	-	-	58.04
W. J. Adams Co.	306	-	8.25	$236.62	$ 9.03	2,761.43
Semi-Bull Co.	319	-	6.25	957.00	9.25	2,950.75
Total -	1.038	16		$1,193.62		$ 8,434.54

Total Bituminous Coal Purchased 1,038 tons 16 C.W.T. @ $7.19 - Total Cost $8,434.54

Until the regular contracts are signed, it is understood that this letter formally closes the deal, and it is agreed that the coal shipments should start at the receipt of our order.

Yours very truly,

____ ____,
Vice President.

R. E. W.

(Here follow Complainant's Exhibits Nos. 27, 28, 29, and 30, marked pages 1868, 1869, 1870, and 1871, inclusive.)

1872 COMPLAINANT'S EXHIBIT 31.

PTf's Ex. 31. 8/12/20. A. J. P.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

Lehigh Valley Coal Sales Company,

Wm. S. Wolle, Genl. Eastern Sales Agent,

90 West Street, New York.

July 2nd, 1919.

Kings County Lighting Company,
Mr. Ralph Elsman, Vice President,
4802 New Utrecht Avenue,
Brooklyn, N. Y.

DEAR SIR:

Your favor of the 30th ultimo, making certain reservations in regard to contract as stated in our letter of the 30th, for supplying you with 7,000 tons #3 Buckwheat coal, received.

We accept the reservations mentioned, and will, therefore, consider the contract closed.

Yours very truly,

WM. S. WOLLE,
General Eastern Sales Agent.

W. S. W./S.

1873 June 30, 1919.

Mr. William S. Wolle,
General Eastern Sales Agent,
Lehigh Valley Coal Sales Co.,
90 West Street, New York, N. Y.

DEAR SIR:

Referring to your letter of the 30th inst. in which you quote us on the delivery of approximately seven thousand (7,000) tons of No. 3 Buckwheat coal for shipment between this date and March 31, 1920 at $4.33 per gross ton alongside our dock, advise we accept your quotation with the following reservations:

1. We will be unable to make payment on the 15th of the month following a shipment of coal, but will make payments around the 20th as all our bills are paid on this date.

2. The Company will be unable to give you equal monthly proportions of shipments for some time to come, however, as soon as possible we will advise you ten days or two weeks in advance before shipment is required and will endeavor to keep the shipments as uniform as possible.

3. If in event your Company is unable to ship the coal for any reason inserted in the clause in your letter, this Company has the option of deducting the amount of coal necessary to be purchased outside of this contract.

4. This Company reserves the right to cancel the entire contract in event it is found that your coal is unsuitable for our use.

5. This company takes exception to the underscored words in the clause in your letter of June 30th which reads as follows:

"This Company shall not be responsible for damages for a failure to deliver if prevented from doing so by our inability to procure transportation, or by floods, accidents or casualties, or from lockouts or strikes among the employes of companies who mine the coal or of any transportation company engaged in moving the coal, or by Federal or State legislative or executive action, or by legal proceedings, or by any other causes that are beyond our control. In case of such interruption or prevention, this Company reserves the right to cancel the unfilled portion of this order."

We propose that you state in substitution of the underscored words, the following:

In case of such interruption or prevention, this Company reserves the right to cancel the portion of this order unfilled during the time this Company is unable, for causes beyond its control, to make deliveries as per order of Kings County Lighting Company.

1873½ Will you kindly acknowledge receipt of this letter and advise me if these terms are satisfactory, and if so, we will consider this a contract, binding on both Companies.

Yours very truly,

(Signed) RALPH ELSMAN,
Vice President.

R. E./W.

1874 Lehigh Valley Coal Sales Company,

Wm. S. Wolle, Genl. Eastern Sales Agent,

90 West Street, New York.

June 30th, 1919.

Kings County Lighting Co.,
Mr. Wm. C. Reukauf, Purchasing Agt.,
4802 New Utrecht Avenue,
Brooklyn, N. Y.

DEAR SIR:

In accordance with your request of our Mr. G. J. Partrick, I respectfully submit proposition to supply your Company with approximately 7,000 tons Barley coal, for shipment in about equal

monthly proportions between this date and March 31st, 1920, to your Dock at 55th Street & First Avenue, Brooklyn, cargoes of 600 tons at $4.33 per gross ton alongside your Dock.

Payment for all coal shipped in any one month is due on the 15th of month following.

This Company shall not be responsible for damages for a failure to deliver if prevented from doing so by our inability to procure transportation, or by floods, accidents or casualties, or from lockouts or strikes among the employes of companies who mine the coal or of any transportation company engaged in moving the coal, or by Federal or State legislative or executive action, or by legal proceedings or by any other causes that are beyond our control. In case of such interruption or prevention, this Company reserves the right to cancel the unfilled portion of this order.

If the above agrees with your understanding, please acknowledge receipt, and oblige,

Yours truly,

WM. S. WOLLE,
General Eastern Sales Agent.

W. S. W. H.

1875 COMPLAINANT'S EXHIBIT 32.

Pl'ff's Ex. 32. Aug. 12 20. J. A. F. Rep'd't's Ex. J.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

Before the Public Service Commission for the First District, No. 7 Lafayette Street, Borough of Manhattan, City of New York, 15th Day of June, 1920.

Present Honorable Alfred M. Barrett, Deputy and Acting Commissioner.

Case No. 2471.

In the Matter of the Hearing on Motion of the Commission Concerning the Regulations, Practices, Service, Equipment, and Facilities of the Kings County Lighting Company and Concerning the compliance by said Company with the Requirements of Law.

Order "B."

A hearing having been duly had by and before this Commission in the above entitled matter on and between the 12th day of March and the 31st day of March, 1920, Hon. Morgan T. Donnelly, Deputy Commissioner, presiding, and T. H. Ward, Assistant Counsel, attending for the Commission, John P. O'Brien, Assistant Corporation Counsel, appearing for the City of New York, Samuel F. Mora appearing for the Kings County Lighting Company; and the Commission being of opinion that the equipment, facilities and service

of the Kings County Lighting Company are inadequate and unsafe; and it appearing further that the plant and equipment and services of the Kings County Lighting Company are now inadequate to properly supply the present consumers totaling approximately 39,000; and it appearing further that said plant is inadequate to supply applicants who have made and filed applications for gas service with said company approximately 1,400 in number; and it further appearing that the said Kings County Lighting Company will be unable to supply gas to the probable and normal increase of applicants which will total about 2,000 during the year 1920 to 1921; and the Commission being of the opinion that it would
[376] be reasonable to require additions, changes, repairs and improvements in the plant and property of said Kings County Lighting Company so as to meet the requirements herein above referred to, it is therefore ordered that the Kings County Lighting Company

(1) Install three water gas generating machine sets of capacity of not less than 3,000,000 cu. ft. of gas per machine per day, with suitable waste heat boiler additions to utilize waste products of combustion.

(2) Install adequate blowing plant for same capable of maintaining 42-inch static pressure.

(3) Install adequate oil piping system, including pumps, for handling asphalt base oil now being supplied by oil companies.

(4) Install scrubber condensers of a capacity of at least 12,000,000 cu. ft. of gas per day.

(5) Install piping system of adequate size between various gas plant apparatus to convey a volume of not less than 1½ million cu. ft. of gas per hour with suitable receptacles to receive the accumulation of residue from the gas and further install pumping equipment for the removal of such residue.

(6) Install purification apparatus, including tar extractors, shaving, scrubber and purifier, capable of removing impurities from gas of a quantity representing the maximum output of the plant.

(7) Install necessary gas measurement devices in the form of one station meter capable of measuring accurately the gas manufactured.

(8) Provide necessary minor equipments, such as recording gauges, pyrometers, thermometers, siphon gauges, etc., to properly indicate operating conditions at all times.

(9) Remodel and enlarge present generating equipment by providing for increased blast pressure enlarging pipe connections and install controllers.

(10) Make necessary structural changes in buildings to provide proper facilities for the various installations above ordered.

1877 (11) Increase the present gas storage holder facilities of the company to 9,000,000 cu. ft. capacity, together with the necessary piping and pumping systems and accessories from the manufacturing plant to the storage holder.

(12) Make necessary additions and extensions to present distribution system in order that same may be at all times of sufficient capacity to deliver gas in accordance with the requirements of the Public Service Commissions Law.

(13) Procure 4,500 gas meters so as to provide for necessary changes of meters on account of age and also to provide for applicants for service.

(14) Procure 200,000 cu. ft. of gas service piping in sufficient quantity and suitable sizes for the purpose of installing meters to meet the needs of the applicants for gas service and services.

It is further ordered that the Kings County Lighting Company make said changes, alterations, additions, improvements and repairs and complete same not later than December 1, 1920, and that said company through its officers, agents, or employees notify this Commission on the first day of each and every month from the first day of July, 1920, to and including the first day of December, 1920, as to the progress and state of completion of said improvements, alterations, additions, changes and repairs made by said company pursuant to this order, and it is

Further ordered that this order shall take effect immediately and shall continue in force until modified or abrogated by further order of this Commission.

It is further ordered that the Kings County Lighting Company not later than June 15, 1920, shall notify this Commission in writing whether the terms of this order are accepted and will be obeyed.

By the Commission:

[L. S.] JAMES B. WALKER,
Secretary.

1878 & 1979 STATE OF NEW YORK,
County of New York, ss.:

I, James B. Walker, Secretary of the Public Service Commission for the First District, Do hereby Certify, that I have compared the above with the original approved by said Commission on June 11, 1920, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of the Commission, this 11th day of June, 1920.

[SEAL.] JAMES B. WALKER,
Secretary.

1880 COMPLAINANT'S EXHIBIT 33.

Pl'ff's Ex. 33, Aug. 12/20. J. A. F.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

July 13, 1920.

In re Kings County Lighting Company. Case No. 2471.

Hon. Lewis Nixon,
Public Service Commission,
49 Lafayette Street,
New York City.

DEAR SIR:

The order designated "Order B" in the above case, dated June 10, 1920, requires the Kings County Lighting Company to notify the Commission in writing whether the terms of the order are accepted and will be obeyed. The order recites that the plant and equipment of the Company are now inadequate to properly supply present and prospective consumers and directs the Company to make additions, changes and improvements in its plant and facilities.

The Company concurs in the recitals of fact that the plant and facilities are now inadequate and agree with the Commission that the additions and improvements enumerated in the order should forthwith be made. In the sense aforesaid it accepts the order and will obey the same so far as it is in its power to do so. At the present time the Company is without funds, or the means to obtain funds, with which to finance the work. The Company will use every effort to finance the work and undertake the same as soon as it is assured of the means for that purpose.

Yours very truly,

RALPH ELSMAN,
Vice-President.

1881 COMPLAINANT'S EXHIBIT 34.

Plf's Ex. 34, Aug. 17, 1920. G. J. P.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

The U. G. I. Contracting Company,

Broad and Arch Streets.

D. J. Collins, Vice President.

Philadelphia, July 29, 1920.

Mr. Ralph Elsman, Vice President,
Kings County Lighting Company,
4802 New Utrecht Avenue,
Brooklyn, N. Y.

DEAR SIR

In connection with the rebuilding of the plant of the Kings County Lighting Company, I would say that the amount of work contemplated and necessary at this time for putting of your Works in shape to take care of the immediate requirements of your Company, will be approximately $840,000. These payments to be made monthly, covering the amount of work done during the preceding month.

The amounts of these monthly payments it would be difficult to give definitely, but they would vary very probably from $50,000 to $100,000 per month.

It would be impossible for us to complete all of the work contemplated, in order that it might be ready for your winter load, but it might be possible, if every effort is made, to complete sufficient equipment to keep the plant in operation during the coming winter.

1882 In order to do this, however, the work of installation must actually be started at once. To have completed all of the work contemplated and necessary for your works at the present time, it should have been started not later than January 1, 1920.

As I have stated, a portion of the equipment can be installed that will make it possible to keep your works in operation, yet the program will undoubtedly only take care of your necessities for this coming winter.

This is the vital point that you are interested in at present,—that is, getting over this particular period. The other equipment that will be necessary, in order to put your plant in first-class condition, would follow after the difficulties of the present situation have been met.

Due to the very strenuous conditions that this country has been suffering under for the past few years, Gas Construction work generally has been very much delayed, and Companies all over the

United States are calling on us for new equipment, and it is impossible for us to take care of everyone promptly.

We know that your Company has been in litigation for many years regarding the 80 cent gas law, and we know that owing to what seems to us an inadequate rate, your Company probably has difficulty in financing the necessary extensions for this plant.

188 We desire that your Company to meet the payments for the construction and betterments, deposit at least $300,000 of the estimated cost of $840,000 subject to our draft.

You will readily understand that our Company would not want to obligate itself to the large investment above mentioned, unless you can unqualifiedly guarantee us that the payments will be taken care of as they become due.

We also realize that your Company is suffering intensely in the operation of its plant, from the conditions due to the quality of the oil supplied, and as this situation is becoming more acute, we would advise that you take immediate action in the matter.

With the heavier oils which Gas Companies are being forced to use in the future, the present daily capacity of your plant will be materially reduced, so that the new equipment is vitally essential, not only to make up for the reduction in capacity, but also in order to meet the demand of the public for the coming winter and the future.

We would appreciate it very much if you would give this matter your immediate consideration, and advise us as to whether or not you desire us to proceed in the matter, on the lines stated above.

Yours truly,

D. J. COLLINS,
Vice President.

1886 COMPLAINANT'S EXHIBIT 37.

PL'FF'S EX. 37. J. H. F.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

S18S

Please take notice that an order of which the annexed is a copy was duly entered in the within entitled action in the office of the Clerk of the County of New York on August 7th, 1918.

Yours, etc.,

INGRAHAM, SHEEHAN & MORAN,
Attorneys for Plaintiff.

14 Wall Street, Borough of Manhattan, New York City.

To Hon. Merton E. Lewis,
Attorney General of the State of New York.
Hon. William P. Burr,
Corporation Counsel to and Attorney for Defendant The City of New York.
Hon. William L. Ransom,
Attorney and Counsel for the Public Service Commission of the State of New York for the First District.

1887 At a Special Term, Part I. of the Supreme Court of the State of New York Held in and for the County of New York, at the County Court House, in said County, on the 7th Day of August, 1918.

Present: Hon. Francis Key Pendleton, Justice.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

MERTON E. LEWIS, as Attorney General of the State of New York; Oscar J. Straus, Travis H. Whitney, Charles S. Hervey, Frederick J. H. Kracke, and Charles Bulkley Hubbell, Composing the Public Service Commission of the First District of the State of New York, and The City of New York, Defendants.

Order.

An order having been made in the above entitled action, on August 2nd, 1916 granting, on certain terms and conditions prescribed by the Court and set forth in such order, the application of the plaintiff company that the enforcement of Chapter 604 of the Laws of 1916 be restrained during the pendency and until the

determination of this action; and such order amongst other things, having permitted the plaintiff company, without any liability for penalties, to make the same charges for gas to its consumers other than The City of New York from and after July 1, 1916, which it had theretofore made (namely, 95 cents per 1,000 cubic feet), instead of the rate of 80 cents prescribed by such statute; and such order having, as one of the conditions thereof, directed that
1888 the plaintiff company pay into the Empire Trust Company on the first day of each and every month while the order was in force a sum equivalent to 15 cents for each 1,000 cubic feet of gas, out of the total amount collected from private consumers during the preceding month in payment for gas furnished, such money so deposited to be held as a special deposit subject to the determination of this action and the further order of this Court; and the plaintiff herein having now, in advance of the determination of the action, moved this Court for an order nevertheless relieving it from making further deposits in the Empire Trust Company from its collections from the sale of gas to its consumers and authorizing and directing the Empire Trust Company to pay to, or upon the order of, the plaintiff, the funds heretofore deposited by the plaintiff in accordance with the terms and conditions of the said order of August 2nd, 1916, together with accrued interest thereon, the said order of August 2nd, 1916, and the restraining of the enforcement of the said statute to continue nevertheless in force; and the said motion having duly come on to be heard:

Now, on reading the said notice of motion dated May 23, 1918 the affidavit of Ralph Elsman verified May 23, 1918, with due proof of service thereof, and the exhibits annexed thereto and upon reading and filing the supplemental affidavit of Ralph Elsman verified May 31, 1918, the affidavit of John P. O'Brien verified June 4, 1918, the affidavits of Alton D. Adams and William R. Birdsley, each verified June 25, 1918, the affidavit of John P. O'Brien verified June 26, 1918, the replying affidavit of Ralph Elsman verified June 27, 1918, the affidavits of Lewis G. Mitchell, Solomon Fromm and Leo Ehrlich, each verified June 29th, 1918, and the affidavits of Arthur J. Stern, Robert T. Mitchell and Michael Timpano, each verified July 1st, 1918, and upon reading the pleadings herein, the
1889 said order entered August 2, 1916, the original and supplemental affidavits of G. W. Mead verified respectively June 20 and July 26, 1916, the affidavit of Adna F. Weber verified June 27, 1916, the affidavit of Willard F. Hine verified July 13, 1916, the affidavit of Edward Bromberger verified July 24, 1916, all heretofore filed herein, and upon reading the testimony adduced before Hon. Charles E. Hughes, Referee herein, and after hearing George L. Ingraham, Esq., and Samuel F. Moran, Esq., of counsel for plaintiff, and William L. Ransom, Esq., of counsel for defendant the Public Service Commission of the State of New York for the First District, Robert S. Conklin, Esq., of counsel for defendant Merton E. Lewis as Attorney General of the State of New York, and William P. Burr, Esq., Corporation Counsel, by John P. O'Brien, Esq., and A. Judson Hyatt Esq., for defendant The City of New

York, and Leo Ehrlich, Esq., by leave of Court on behalf of himself, Lewis G. Mitchell, Solomon Fromm, Arthur J. Stern, Robert T. Mitchell and Michael Timpano, customers of the plaintiff, and due deliberation being had thereon, and upon filing the opinion of the Court it is

Ordered

1. That the Empire Trust Company of the City of New York be, and it hereby is, authorized and directed to pay to or upon the order of the plaintiff the Kings County Lighting Company all moneys heretofore deposited with it under the terms of the order made and entered herein August 2nd, 1916, together with all interest accrued thereon to the date of such payment upon the deposit by the plaintiff with said Empire Trust Company of the 5% bonds of the plaintiff, with all unmatured coupons thereto attached, issued under and secured by its First Refunding Mortgage to Central Trust Company of New York, as Trustee, dated July 1st, 1904, of a face amount equal to the amount of the payment made or to be made to the plaintiff hereunder.

1890 2. That in lieu of paying into the Empire Trust Company from time to time on the first day of each month 15 cents per 1,000 cubic feet of the total amount collected from its consumers other than the City of New York during the preceding month in payment for gas, as provided in clause 2 of said order entered August 2nd, 1916, the plaintiff may deposit with said Empire Trust Company its said 5% bonds secured by said mortgage, with all unmatured coupons attached, of a face amount equal to the amount of cash required to be deposited under said order entered August 2nd, 1916, and upon making deposit of bonds in such amount the plaintiff be and hereby is relieved from making the cash deposit required for any such month for which bonds are so deposited. All the foregoing to be on and subject to the following conditions and provisions

3. That the plaintiff shall pay to the Empire Trust Company the interest on the said bonds as the interest coupons thereon mature, and all the mortgage bonds of plaintiff deposited with the Empire Trust Company under the provisions of this order, together with the interest paid thereon shall be held by said Trust Company subject to the further order of the Court, and prior to the deposit by it of any bonds or the withdrawal of any of the said funds, the plaintiff shall execute and file in the office of the Clerk of the County of New York, in substantially the form of the undertaking annexed to this order and made a part hereof, its written undertaking or promise to make good or pay any deficiency which may arise in the said funds by reason, and to the extent, of any withdrawal of moneys therefrom pursuant to the provisions of this order and by reason of any future deposit of bonds in lieu of cash, as provided in said order of August 2, 1916.

1891 4. That the plaintiff may use and expend the moneys so withdrawn or withheld by it through such deposit of bonds for the purpose of making payment of the $85,000 demand loan of

the plaintiff specified in Exhibit G annexed to the said affidavit of Ralph Elsman, verified May 23rd, 1918, and for the payment of extensions and additions to plaintiff's plant and facilities contracted for and in course of construction, as specified in Exhibit H annexed to said affidavit, or other similar improvements, first authorized and approved by the Public Service Commission for the First District, and the plaintiff, its officers, directors, agents and employees during the pendency of this action or until the further order of the Court, are hereby enjoined and restrained from expending any of the moneys hereby authorized to be withdrawn or withheld from the said Empire Trust Company for any other purpose.

5. That during the pendency of this action, or until the further order of the Court, plaintiff Kings County Lighting Company be, and hereby is restrained and enjoined from declaring or paying any dividends on its capital stock and from using the revenue derived by it from the sale of gas, or from any other source whatsoever, for any purpose other than defraying the expenses of maintaining its service and operating its plant and facilities in the manufacture and distribution of gas, the payment of interest upon its lawful obligations, sinking fund charges, taxes, insurance, legal expenses, and the cost of additions, extensions and improvements to its plant and facilities.

6. That during the pendency of this action or until the further order of the Court plaintiff, Kings County Lighting Company, be, and it hereby is, restrained and enjoined from creating or suffering to be created any additional lien or encumbrance upon its property, except through the issue of bonds under and in accordance
1892 with the terms of its First Refunding Mortgage to Central Trust Company of New York, as Trustee, dated July 1, 1904, and then only for the purposes of making additions, extensions and improvements to its plant and facilities as provided in said mortgage.

7. During the pendency of this action or until the further order of the Court, the plaintiff shall have printed on all its bills rendered to its consumers other than The City of New York the following notice:

"An Act of the Legislature, Chapter 604 of the Laws of 1916, purports to fix 80 cents per 1,000 cubic feet as the price of gas in the district served by this Company. On August 2, 1916, an order was made and entered by the Supreme Court permitting this Company to charge 95 cents per 1,000 cubic feet for gas furnished pending the determination of the action brought to test the validity of said Act. If it be determined that the Act is enforceable against this Company the amount of this bill in excess of 80 cents per 1,000 cubic feet will be refunded with interest in accordance with the terms of said Court order as modified by order entered July, 1918."

8. In the event that the trial of this action is unreasonably delayed by any of the parties, the adverse party may apply, upon notice, for an order modifying or vacating any provisions of this order.

9. Except as expressly otherwise herein provided, the order made and entered by this Court August 2, 1916, shall be and remain in full force, virtue and effect, but nothing in this order shall be construed as in any way adjudicating any issue in this action or as anticipating, prejudicing or affecting the outcome thereof, the purpose of this order being solely to enable the plaintiff to obtain and use without sale of its bonds under unfavorable conditions or borrowing at rates of interest which would greatly burden its consumers, cash moneys urgently required by it to meet present extraordinary conditions growing out of the existing war, which conditions necessitate large additions to plaintiff's plant and distribution system
1893 and also prevent the sale of plaintiff's mortgage bonds at the present time on favorabel terms to provide funds for the payment of such additions.

Enter.

F. K. P.,
J. S. C.

1894 *Plaintiff's Undertaking.*

Know all men by these presents.

That the undersigned, Kings County Lighting Company, a corporation duly organized and existing under the laws of the State of New York, having its office and principal place of business at 480 New Utrecht Avenue, Borough of Brooklyn, City of New York, County of Kings, is held and firmly bound unto The People of the State of New York in the sum of Four Hundred Thousand Dollars ($400,000), lawful money of the United States of America, to be paid to the said The People of the State of New York; for which payment, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

The condition of this obligation is such that if Chapter 604 of the Laws of 1916 be finally determined to be invalid or unenforceable in its application to the Kings County Lighting Company in the action now pending in the Supreme Court, New York County, wherein Kings County Lighting Company is plaintiff and Merton E. Lewis as Attorney General of the State of New York and others are defendants, or if said Chapter be finally determined to be valid and enforceable in its application to said Kings County Lighting Company in said action, and the above-bounded Kings County Lighting Company pays or causes to be paid and deposits in the Empire Trust Company of the City of New York, subject to the further order of said Court, the amount of moneys equal to any deficiency which may arise by reason and to the extent of any withdrawal of moneys from said Empire Trust Company pursuant to the provisions of the order entered in said action on July, 1918, and by reason of any deposit of bonds with said Empire Trust Company, as authorized by said order of July, 1918, in lieu of cash as provided in the order entered in said action on August 2, 1916, then this obligation to be void, otherwise to be and remain in full force and effect.

In witness whereof the undersigned, Kings County Lighting Company, has caused these presents to be signed by its duly authorized officers and its corporate seal to be hereunto affixed this — day of July, 1918.

[Corporate Seal.]

KINGS COUNTY LIGHTING COMPANY,

By —— ——,
President.

Attest:

——,
Secretary.

1895 [Endorsed:] County Clerk No. 19290, Year 1916. Supreme Court, New York County. Kings County Lighting Company, Plaintiff, against Merton E. Lewis, et al., Defendants. Order with Notice of Entry. Ingraham, Sheehan & Moran, Attorneys for Plaintiff, 14 Wall Street, Borough of Manhattan, New York City. Service of the within order is admitted this eighth day of August, 1918. —— ——, Attorney for ——. A copy of the within paper has been this day received at the office of the Corporation Counsel. Aug. 8, 1918. William P. Burr, Corporation Counsel. Copy Received, Aug. 8, 1918, 4:50 P. M. Wm. L. Ransom, Counsel for Public Service Commission, First District, State of New York. Copy of within paper Received, Aug. 8, 1918, Merton E. Lewis, Attorney General. Copy with service admissions filed with Empire Trust Co., Aug. 9, 1918. L. F. M.

1896 COMPLAINANT'S EXHIBIT 38.

Pl'ff's Ex. 38. J. A. F.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

At an Adjourned Meeting of the Public Service Commission for the First District Duly Held at Its Office, No. 120 Broadway, in the Borough of Manhattan, City and State of New York, on the 13th Day of October, 1917.

Present:

Oscar S. Strauss,
Chairman:

Travis H. Whitney,
Charles S. Hervey,
Commissioners.

Case No. 2235.

In the Matter of the Hearing on the Motion of the Commission as to the Standards for Measurement of the Quality and Power of Gas Manufactured, Distributed, or Sold by Gas Corporations Within the First District and the Rates or Charges for Such Gas Service Based upon Such Standards.

Order Fixing Heating Standard for Gas.

By Chapter 125 of the Laws of 1906 and amendatory acts of 1916 and 1917, the maximum price for gas manufactured, furnished or sold in the City of New York, the illuminating power of which is fixed at not less than twenty-two (22) sperm candles as more fully set forth, is prescribed at eighty cents per thousand cubic feet, in the Borough of Manhattan, in the first ward of the Borough of Queens, in the Borough of Brooklyn (including the territory annexed to the County of Kings by Chapter 410 of the Laws of 1915, as amended) and in the Borough of the Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, and at one dollar per thousand cubic feet in the Borough of Richmond and in the second, third and fourth wards of the Borough of Queens (except the territory annexed to the County of Kings by Chapter 410 of the Laws of 1915, as amended).

By the provisions of the Public Service Commissions Law, and particularly by Section 66, Subdivision 5, and Section 72 thereof, this Commission may, by order, fix the maximum price to be charged for gas by any person or corporation furnishing gas service, but at not exceeding that fixed by statute.

By the provisions of the Public Service Commissions Law, and particularly by Section 66, Subdivisions 1, 2 and 3, this Commission has the power by order to fix from time to time standards for the measurement of the purity of gas and for the measurement of the illuminating and heating power of gas to be manufactured, distributed or sold by persons or corporations for lighting, heating or power purposes, notwithstanding that another standard for the measurement of any thereof may have been fixed by statute; to require the gas so manfactured, distributed or sold to equal the standards so fixed by it, to determine whether such gas conforms to such standards, and to order reasonable improvements in connection with the manufacture and distribution of gas.

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The War Department of the United States by its responsible officers has communicated to the Commission, in writing and verbally, that a public emergency exists requiring that the gas corporations subject to the jurisdiction of this Commission immediately enter into arrangements with the National Government upon suitable terms of compensation to begin the production, as soon as possible, of certain ingredients essential to the conduct of the present war by the United States which can be more effectively recovered from gas manufactured by the said corporations under a heating power standard than

from gas manufactured under an illuminating power standard, and requesting this Commission to fix a heating standard for gas manufactured, distributed or sold by gas corporations subject to the jurisdiction of this Commission. Also, a hearing has been duly had in this proceeding by and before the Commission on September 18, 1917 and adjuorned dates upon notice to all gas corporations subject to the jurisdiction of this Commission; and the Commission has made investigation and is of the opinion that a public emergency exists rendering it necessary that in the conduct of the war gas corporations manufacturing gas shall produce certain ingredients which can be produced advantageously under a heating value standard, and that it is just, reasonable and proper to fix standards for the measurement of the heating power of gas to which gas corporations subject to the jurisdiction of the Commission shall conform at their election as an alternative to the illuminating standard now fixed by statute, for the period during which the United States may be engaged in the present war: it is

Ordered

1. This Commission hereby fixes a monthly average total heating power of not less than six hundred and fifty (650) British thermal units per cubic foot (ascertained as hereinbelow set forth) as a standard for the measurement of the heating power and thereby the quality of gas to be manufactured, distributed or sold by gas corporations subject to the jurisdiction of this Commission and furnished to consumers at a price not in excess of that now fixed by law or by any order of this Commission. Provided, however, that such heating power standard shall not be, and is not intended to be, in derogation or a repeal of any other standard for the measurement of the quality of gas now fixed by statute, but shall be a standard to which gas shall conform as an alternative, under the election herein provided, to that fixed by statute.

(*a*) The average total heating power, for any three consecutive days in any calendar month, shall not be less than six hundred and fifteen (615) British thermal units per cubic foot.

(*b*) In determining the heating power, the gas shall be corrected to a temperature of sixty (60) degrees Fahrenheit and thirty (30) inches of mercury.

(*c*) Each test to determine the heating quality of the gas shall be made according to approved methods, and in conformance with regulations which may be prescribed by this Commission and at such location or locations as shall be approved by the Commission not less than one-half mile distant in an air line from any manufacturing or distributing station of the gas corporation.

(*d*) The daily heating power of gas at each testing station shall be determined by averaging all the tests made at such station; the daily heating power of gas furnished by the gas corporation
1898 to its consumers shall be determined by averaging the daily heating power of gas at all the testing stations of the supply-

ing corporation; the monthly average heating power of gas furnished by a gas corporation shall be determined by averaging the daily heating power of gas furnished by the gas corporation to its consumer as shown by tests made on not less than twenty days in a calendar month.

II. That the gas manufactured, distributed or sold by gas corporations subject to the jurisdiction of this Commission shall conform to the standard of quality prescribed by any statute now in effect, or, in the alternative, for a period not longer than until three months after the termination of the war in which the United States is engaged, and at the election of any such gas corporation to be made and evidenced only in the manner and in accordance with the terms hereinbelow set forth, to the heating standard prescribed in this Order and elected by such gas corporation.

III. That any gas corporation may exercise the option to furnish gas in conformity with the heating standard fixed in this Order by filing with the Commission a statement in writing, duly authorized by such gas corporation and signed and duly acknowledged, stating that such gas corporation will thereafter and for a specified period, but not longer than the duration of the war in which the United States is engaged and three months thereafter, manufacture, distribute or sell gas within the City of New York which shall conform to the heating standard herein prescribed and in compliance with each and every one of the following terms and conditions:

(*a*) That the rate to be charged or received per one thousand cubic feet for gas manufactured, furnished or sold within the City of New York under the heating standard herein prescribed in Paragraph I shall not exceed the sum of eighty cents or, where such person or corporation is authorized by law or by any order of this Commission to charge a higher rate, shall not exceed such lawful rate.

(*b*) That, in the event that such gas corporation shall propose to furnish gas of a heating quality less than six hundred and fifty (650) British thermal units monthly average total heating power per cubic foot, and shall notify the Commission in writing (duly authorized by the gas corporation and duly signed and acknowledged) of its intention so to do and of the minimum monthly average total heating power for such gas, the rate to be charged or received per one thousand cubic feet for such gas within the City of New York shall not exceed the rate which such person or corporation is now authorized to receive and collect by law or by order of this Commission for gas furnished by it in the City of New York less a per cent (not including fractions of one per cent) equal to the per cent by which the number of British thermal units monthly average total heating power per cubic foot of the heating power elected shall be less than six hundred and fifty (650) British thermal units.

(*c*) That such gas corporation will provide and maintain such suitable testing stations, apparatus and facilities as may be required

and approved by the Commission for use in testing by direction of the Commission the heating power of gas manufactured, distributed or sold by it, and will make all tests subject to the supervision of this Commission and its responsible engineers or agents duly authorized.

(*d*) That such gas corporation will keep posted in its principal office, in a place readily accessible to its customers and open to their inspection, a statement of the average daily heating power of the gas furnished during the preceding calendar month as shown by the tests made under the direction of the Commission as hereinabove provided, in order that the consumers and the public may be advised of the quality of the gas being supplied.

(*e*) That such gas corporation will, upon the application of any consumer who at the time this provision becomes effective
1899 obtains illumination exclusively from open flame burners, provide and install upon such consumer's premises free of any charge, one efficient incandescent lamp complete with mantle, of a type to be certified by the Chief Gas Engineer of the Commission, for each room, but not more than two rooms, occupied by such consumer. Provided, however, that such gas corporation shall not be required to replace, renew or repair any mantle burner so furnished free of charge.

(*f*) That such gas corporation will notify its consumers of their right to have provided and installed incandescent lamps in pursuance of the terms of subdivision (*e*) of this paragraph, by a printed notice on or attached to all bills rendered to the consumers of such corporation during the month following the date of notification filed with the Commission of the election to furnish gas under the heating standard.

IV. That this order shall be without prejudice to any further or other order in respect to rules and regulations governing the testing of gas furnished under a heating power standard or in respect to any other matter covered by the hearing resolution adopted in this case on August 20, 1917, after further hearings in this proceeding or a separate proceeding.

V. That this Order shall take effect at once, and shall continue in force until the further order of the Commission unless abrogated or otherwise changed by order of the Commission.

By the Commission:
[L. S.]

GEORGE F. DAGGETT.
Acting Secretary.

1900 STATE OF NEW YORK:

Public Service Commission for the First District.

Case No. 2235.

In the Matter of the Hearing on the Motion of the Commission as to the Standards for Measurement of the Quality and Power of Gas Manufactured, Distributed, or Sold by Gas Corporations Within the First District and the Rates or Charges for Such Gas Services Based upon Such Standards.

Memorandum.

STRAUS, *Chairman*:

At the time this proceeding was instituted on the motion of the Commission, its scope and purpose were outlined in a memorandum filed by Commissioner Whitney.

The Commission had in two prior proceedings (Cases Nos. 2066 and 2207), the records of which have been incorporated in the present proceeding, considered the results of operation by gas companies in the City of New York under the 22 candle-power standard prescribed by Chapter 125 of the Laws of 1906. As pointed out in Commissioner Whitney's memorandum, the testimony before the Commission was in agreement that a heating standard had become preferable to a candle power standard, primarily because at the very least eighty per cent of the gas used was for heating and not for lighting purposes and therefore its proper test was the thermal rather than the illuminating power. As to gas used for illumination, it appeared that the most efficient method of illumination could be secured through the use of mantles, which depended upon heating value and not candle power. As a further important reason for the advisability of a change in the gas standard, it was pointed out in that memorandum that with such change of standard the companies would be in a position to respond to national requirements for certain by-products necessary for war purposes concerning which the Commission had already been advised by the Federal authorities.

1901 The Legislature has expressly empowered the Commission to change the gas standard, notwithstanding that a particular standard had been previously fixed by the Legislature itself. The present gas standard in the City of New York is fixed by Chapter 125 of the Laws of 1906, which enacted that a corporation engaged in the business of manufacturing, furnishing or selling illuminating gas in the City of New York except in specified parts,

"shall not charge or receive for gas manufactured, furnished or sold in said city a sum per one thousand cubic feet in excess of"

specified rates which now, under the amendments to the Act, are fixed at eighty cents for nearly all parts of the city. By Section 2 of the Act it is provided that

"The illuminating gas furnished by any such corporation, association, copartnership or person shall have an illuminating power of not less than"

what is briefly termed 22 candles, tested at a distance of not less than one mile from the distributing holder. The provisions of this Act are inapplicable to gas furnished or sold to the municipality of the City of New York. (Sec. 4, now Sec. 5, of the Act.)

The passage of Chapter 125 of the Laws of 1906 was preceded by a famous and thorough legislative investigation which terminated in a recommendation of such legislation. Its passage was succeeded by a protracted litigation terminating in a decision of the Supreme Court of the United States, in January, 1909, (212 U. S. 19), upholding the constitutionality of the statute. In the delegation of powers to the Commission, the Legislature expressly imposed a limitation upon the rate making function of the Commission in the provision of Section 72, Public Service Commissions Law, that the Commission may not fix a gas rate in excess of that fixed by the statute, to wit, 80 cents per thousand cubic feet. The investigation, the public discussion necessary to secure the legislation, the character of the litigation and the reservation by the Legislature to itself of the power to raise the 80 cent gas rate were such as to make the Eighty Cent Gas Law, in the minds of the people of New York City, a fundamental provision of law. It should not be changed except by the authority which created it or by the authority which sustained it. As to the possibility that the law might at some time prove a hardship to the companies, the Supreme Court said

> Willcox v. Consolidated Gas Co., 212 U. S. 19, decided January 12, 1909, (pp. 54-55:)

1902 "Upon a careful consideration of the case before us we are of opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the State of New York are in fact confiscatory.

"It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice."

The companies have the undoubted right at any time to make such application to the Supreme Court of the United States, if in their opinion the law creates a confiscatory result. This Commission cannot hamper such rights of the companies. On the other hand, this Commission should not, in the light of the history of that law, do anything which would lessen the obligations of the companies or take any step that would change the processes available to the gas corporations for relief from any of the obligations of that law. In fact the Commission does not have the power directly to

authorize a higher rate for gas than prescribed by the law, and, while it has the power to change the standard of the quality, it does not appear to have the power indirectly to do what it cannot do directly, that is, by lowering the quality to force consumers to use a greater quantity of gas to secure service equivalent to that received under the present statutory quality, and thus produce higher bills to the consumers. The Commission would seem limited to a consideration of a change of standard for the measurement of the quality of gas now legally required. This, however, does not prevent the fixing of a scale of correspondingly decreasing quality and rate.

That the Commission should have power to fix another standard for the measurement of the quality of gas must have been clearly in the mind of the Legislature when it expressly provided, by Section 66, subdivision 3, of the Public Service Commissions Law, that the Public Service Commission shall

"have power by order to fix from time to time standards for the measurement of the purity of gas and for the measurement of the illuminating power of gas and for the measurement of the heating power of gas, to be manufactured, distributed or sold by persons, corporations or municipalities for lighting, heating or power purposes, notwithstanding that another standard for the measurement of any thereof may have been fixed by statute * * *

1903 A national emergency now confronts the Commission which makes it imperative that, in the exercise of powers conferred upon the Commission it take action, more immediate than was originally contemplatd, to coordinate the industry of manufacturing and supplying gas in the City of New York to paramount national needs. Any delay in the action necessary to place the companies in a position to meet the requisition of the government for a certain by-product of gas which can be recovered in sufficient quantity only if gas be manufactured under a thermal standard would jeopardize national interests. The Federal Government has made direct representations to the Commission that it is urgently necessary that the operations of the principal gas plants in this city and elsewhere be made available for the production of an important ingredient essential to war operations. To accomplish this, it becomes necessary for the period of war to permit the gas companies to exercise the option of furnishing gas on a thermal basis.

It is not contemplated that this service should be uncompensated, for the National authorities are prepared to pay a fair equivalent. Because of this readiness of the National authorities to guarantee against loss and possibly even allow a reasonable profit, the National exigency should not be made the opportunity of the gas companies for a betterment in earnings or profits at the expense of the consumers, through a lowering of quality by means of a change in standards. Any right to an increase in rates should be determined through the exercise of legal processes available to the gas companies. Any action herein at the present time does not permit a

decrease in the value of service available to consumers at the present eighty cent gas rate; but because of a National emergency will give freedom and opportunity for the production of a different standard of gas so as to be able to serve the National requirements.

The Commission has given careful consideration to data and testimony that would disclose the thermal content of the gas now actually furnished by the companies under existing requirements of law. By authorization of the Commission, Mr. W. F. Hine, its Chief Gas Engineer, has established testing stations throughout the city, and from January to the present time has supervised tests in these stations, as well as secured the results of tests conducted in testing stations maintained by the city under procedure agreed to. The results of these tests, down to and including August 31st, are set forth in Exhibit 1 herein. A summary sheet of this Exhibit is as follows:

Company.	Testing station	Illuminating value in candles. No. tests.	No. max.	Min.	Ave.	Heating value in B. T. U. No. tests.	Max.	Min.	Ave.
Consol.—Br. 1	Grand	87	23.4	19.6	22.0	86	704	640	665
" —Br. 2	"	86	24.2	19.4	22.0	86	693	620	666
" —Br. 3	"	87	22.7	19.4	22.1	86	686	635	665
" —Br. 3	E. 79th St	133	24.0	20.8	22.6	132	703	649	671
" —Br. 4	"	132	24.1	21.1	22.6	131	707	651	672
" —Br. 6	"	132	24.3	20.5	22.6	131	708	649	670
"	59 Walker	162	24.9	19.8	22.2	402	706	642	668
Consolidated	All	819	24.9	19.4	22.3	1,054	708	620	669
New Amsterdam	Grand	88	23.6	19.4	21.9	85	691	628	664
"	E. 79th	133	24.6	21.4	22.6	130	712	652	672
New Amsterdam System		221	24.6	19.4	22.3	215	712	628	669
N. Y. Mutual	Grand	88	23.2	19.1	21.4	86	675	641	656
Standard	E. 79th	133	24.0	21.3	22.6	132	715	655	672
Cen. Union	3rd Ave	242	26.1	19.5	22.7	116	721	652	675
N. Y. & Queens	Flushing	88	23.4	20.5	22.3	64	679	619	651
Consolidated System		1,591	26.1	19.1	22.3	1,667	721	619	668
B. U. G.—W'msburg	Lee	98	26.1	19.5	22.6	63	671	608	638

" —Nassau	"	97	26.2	19.5	22.7	63	730	617	639
" —Fulton	Court	129	25.8	17.3	21.7	119	691	586	630
" —Citizens	"	139	27.0	16.9	22.4	138	697	568	637
" —Metro.	4th Ave.	239	24.3	19.1	21.8	134	679	608	636
Brooklyn Union System		702	27.0	16.9	22.2	517	730	568	636
Bronx Gas	Morris Pk.	199	27.4	17.8	23.0	88	737	614	680
Kings Co.	N. Utrecht	154	25.4	20.2	22.7	89	665	599	627
B'klyn Boro.	Coney I.	135	25.3	18.7	21.9	77	663	608	636
Queens Boro.	Hammels	163	26.7	20.7	23.5	145	750	615	663
N. Y. & Richmond	N. Brighton	202	23.1	18.2	21.1	61	669	607	636
Independent Companies		853	27.4	17.8	22.6	460	750	599	659
All Companies		3,146	27.4	16.9	22.4	2,644	750	568	659

1905 From this summary it appears that the average thermal content of gas furnished during this period under the requirement of 22 candle power was actually 659 British Thermal Units per cubic foot; that is to say, at least eighty per cent of the gas used by consumers for heating purposes, although furnished under a candle power standard, actually gave those consumers the benefit of 659 thermal units per cubic foot, which they were free to use, whether for household, commercial or scientific purposes, to its greatest efficiency or inefficiency. To illustrate, the practice has been in use by large concerns of buying coal on the basis of its B. T. U. content, yet it has never been contended that the coal producer should be paid on the basis of the thermal units utilized by the purchaser. If such a principle were adopted the most efficient user of coal or gas would pay the highest price per quantity unit and the most improvident user the lowest price. In the case of the Consolidated System, which furnishes over sixty per cent. of the gas used in the City, the average thermal content was 668. In the Brooklyn Union System, which furnishes some thirty per cent. of the gas used within the City, it was 636. In the case of the five so-called independent companies which produce about five per cent. of the gas used within the City, the average thermal content was 659.

The companies contend, however, that such an average should not be taken into consideration in the fixing of a measure of a heat standard in changing from a light standard of 22 candle power. They contend that candle power is variable and therefore the heat content is variable; that there is no exact relation between a lighting and heating content; that, as these variations are so great, devices must be so designed as to meet these variations without the opportunity of constant adjustment, with resulting loss in efficiency; that gas produced under a standard which would obviate the greater part of the variations would allow a higher percentage of efficient use, and that gas at a standard of 585 British Thermal Units would give consumers at least as much efficiency as gas of 22 candle power.

In support of these contentions the Consolidated System produced as a witness Captain O. H. Fogg, formerly an employee of the company in charge of the Bureau of Utilization, who testified that using, under exact laboratory conditions, a 22 candle power gas, which happened to have a thermal content of 660, he was able to
1906 design devices which developed in the laboratory an efficiency of sixty-seven per cent. of the thermal content and that when such devices were put out in service they were so inefficient as to require a re-study, and that testing these devices in the laboratory under the variations incident to gas actually furnished to the consumer, an efficiency of only fifty-eight per cent. was developed; that the gas furnished under a thermal standard would be free in large measure of such variations that caused the drop from sixty-seven per cent. to fifty-eight per cent. in efficiency, and that, therefore, gas furnished under a standard of 585 British Thermal Units would allow consumers to utilize more thermal units per cubic foot than would be possible with 22 candle power gas.

It will be noticed that this conclusion cannot necessarily be

drawn from such premises. Captain Fogg admitted that he had made no tests other than of 22 candle power gas. He did not test gas of the 660 quality, other than as the 22 candle power gas happened to contain that content, nor did he test gas with the 585 content, either under laboratory or service conditions, nor did he test gas of decreasing thermal or lighting content in order to determine at what point the greatest efficiency was obtainable. In his tests as to the percentage of efficiency he used only range burners, whereas other users of gas than cooking may utilize the heat content much in excess of sixty-seven per cent whether the measure be 660, 585 or lower. It would appear, therefore, that his tests and his testimony cannot sustain the conclusion that was sought to be drawn from his testimony, and its effect is largely negatived by the following question and answer, at page 216 of the record:

"Commissioner Whitney: Assuming that you have two tanks of gas, and one is 585 gas and the other is 660 gas, of uniform quality in two tanks, and the devices you are going to use are adjusted to their highest efficiency for the particular quality of gas, of which gas will you have to use the greater quantity in order to raise a given quantity of water to a given number of degrees?

The Witness: You have to use the greatest quantity of the low-heat-value gas under those conditions.

Commissioner Whitney: That is the 585 gas?

The Witness: Yes."

The fact is that consumers using gas for essentially heating purposes now have the opportunity of utilizing, as far as may be scientifically possible, the heat content of the gas actually furnished at 22 candle power, and Captain Fogg's answer above clearly discloses the fact that, if gas be furnished having a thermal content substantially lower than that now actually received by consumers, such consumers will have to use a greater quantity of gas in order to produce the results possible under the gas now actually furnished. In further substantiation of this admission by Captain Fogg is the testimony of Mr. W. F. Hine and Mr. R. S. McBride, associate scientist of the Bureau of Standards of Washington. Mr. Hine testified, at pages 52 and 53 of the record, as follows:

1907

"By Mr. Ransom:

Q. That is, a man who now was using, say 8,000 cubic feet of gas per month, if there was a lowering of the standard through abolition of the candle power standard and substitution of 565 or 585 B. T. U.'s, that man would have to use, to obtain equal service and results, more than 8,000 cubic feet in a month.

A. Yes.

Q. So that unless the change is to mean in effect an increase in the rates or an increase in the returns of the company, a decrease in the number of B. T. U.'s required as a minimum standard must be accompanied by a proportioned change in the cost per thousand cubic feet of gas.

A. Generally speaking that is so."

"Chairman Straus: What I want to find out, and I think the witness has answered very clearly, is that if the number of B. T. U. units are materially lowered, that in order to obtain the same light or heat more feet of gas would have to be used than before?

The Witness: Yes, sir.

Chairman Straus: You are clear about that?

The Witness: Yes, sir.

By Mr. Ransom:

Q. In so far as light is concerned you would have to use very much more gas to obtain an equal quantity of illumination based on the illuminating basis?

A. Through an open flame burner, yes.

Q. Very much more?

A. Very much more.

Q. On the heat proposition, whether heat is a means of generating light or heat for other purposes, you would have to use more gas to obtain equal service?

A. Yes, sir."

Mr. McBride, at pages 98, 101 and 107 of the record testified as follows:

"Q. So that would you say that the usefulness of a given quantity of gas, let us say a thousand cubic feet, and the results secured by the customer were increased or decreased by a decrease in the number of thermal units per thousand cubic feet of gas?

A. The service which a customer can get from any gas
1908 depends primarily upon the amount of heat which that gas will give when burned.

"Q. So that the relation between the price of the gas and the efficiency of gas is a relation between the price per thousand feet and the number of B. T. U.'s and it is not a relation merely between price and number of thousand feet irrespective of B. T. U.'s.

A. I think that the heat unit must be taken into account in determining which is the better gas to supply.

Q. And the correct price?

A. Yes, and in a certain sense the price must always enter into any determination of standard, because the quality of a thing is not the only thing that determines its desirability to a user. The amount of service which you get for each dollar that you pay out determines the satisfaction, whether it be gas or any other commodity that you buy.

Q. So, if the consumers were ordinarily receiving gas, let us say, of 685 B. T. U.'s and that was reduced so that they began to receive gas containing 300 B. T. U.'s that would necessarily have a relation to price?

A. Unquestionably.

Q. And the price would be based upon the decreased number of heat units obtained?

A. I would rather say that the desirability of changing the heat

unit supply would depend upon whether you could make an appropriate change in price.

Q. That is, the desirability of change in the standard, would in your judgment, depend upon the possibility of bringing about a proportionate and appropriate reduction in price?

A. If the price cannot be reduced in at least approximately the same percentage as the heat utility is reduced, I see no reason for reducing the heat units.

Q. Taking for example, a thousand cubic feet of gas which at the present time we will say contains 685 B. T. U.'s and the company changes its standard and its method so that they only supply 500 or 550 B. T. U.'s per thousand cubic feet of gas. The price per thousand cubic feet of gas for the 685 B. T. U.'s is 80 cents. Would you say that the price should be such that for his 80 cents after the change in standard, the customer should get approximately exactly the same number of B. T. U.'s which he formerly got for his 80 cents?

A. I think he should."

"By Commissioner Hervey:

Q. Do you think the value of the gas to the consumer reduces in exact proportion as the reduction of B. T. U.'s?

A. Almost exactly.

Q. Would you regard a 325 B. T. U. gas as worth half as much as a 650 B. T. U. gas to the consumer?

A. With certain appliances it would be difficult to accomplish a change as great as that, but assuming appliances were properly replaced or readjusted, I should say that the relation was approximately two to one."

1909 It would seem, therefore, that from all the data and testimony available the Commission must conclude at the present time that on a change of standard the actual thermal content of gas now furnished must be taken as the basis of measurement for a thermal standard. In respect to Exhibit 1 herein previously referred to Mr. McBride testified, at pages 130 and 131 of the record, as follows:

"Q. What do you think 22 candles means interpreted in heat units?

A. Varying according to the kind of gas, that is, whether straight water gas or mixed coal and water gas, depending upon the skill of the manufacturers and depending upon the kind of oil which he gets in the making of water gas, or the kind of coal for the making of coal gas. I consider that 22 candles means from perhaps 630 to 675 annual average. I mean by that if the gas maker regularly meets the 22 candle power requirement he can be expected to supply from 630 to 675 B. T. U.'s per cubic foot on the average throughout the year, depending upon the various conditions which I have stated."

"Q. You would not attempt to draw any definite conclusions from the results shown by these tests in Exhibit I, would you?

A. I would, for the reason that they confirm very closely the experience which I have had in examining results from many other localities, and from localities where tests have extended over considerable periods of time. However, figures are more pertinent, in any locality than data from any other locality."

Accordingly, the standard herein proposed provides that without derogation of standards now fixed by statute any company may, either because of proposed or actual contracts with the National Government, or otherwise, have the option to adopt as a standard for the furnishing of gas to consumers a thermal content of 650 B. T. U.'s per cubic foot to be furnished at the statutory rate. This, in the opinion of the Commission, taking into consideration deviations below the legal candle power, represents as nearly as can now be determined, the thermal content of gas now furnished under the legal requirement of 22 candle power. The order further provides that if the thermal content is reduced, whether through national requirements for large quantities of by-products, through economy in manufacture, or otherwise, a discount shall be allowed on the bills for gas to consumers equivalent to the reduction in the thermal content from the standard fixed by the order.

I must be clearly understood, however, by the public that 1910 the price of gas is not hereby affected and is to remain as fixed by statute unless changed by a legal process outside of this proceeding. If a discount on bills is allowed, it must be understood to be only because national authorities are requiring by-products in such quantities as to cause a reduction in thermal content. The national authorities are anxious that consumers shall not suffer in the amount of their gas bills because of the abstraction of by-products, and the order, therefore, provides for a discount on bills corresponding to a reduction in content. The Commission has no doubt, from information given to it, that in the contracts between the Government and the gas companies due allowance will be made, as a part of the cost of furnishing by-products, for any reduction in income to the companies arising from discounts made necessary by such reduction in thermal content.

Obviously when the Government ceases to require by-products there will be no necessity for discounts on consumers' bills. In fact, not later than three months after the termination of the war the companies will have the right to return, upon proper notice to the Commission, to the candle power standard fixed by statute.

Whether the Commission will change permanently the standard for gas is a matter for future and further evidence and consideration. The occasion of national requirements, with the financial guarantees that the Federal contracts will contain, presents an opportunity for a study, during the period of the war, of methods of manufacture, of efficiency of utilization and extension of the uses of gas, for heating purposes.

The Commission is mindful that it promised an opportunity for

public discussion and argument before reaching a conclusion as to a permanent change of standard. Exigencies presented directly to the Commission by Gen. Crozier and other officers of the War Department are such that the Commission feel under the paramount necessity, without any further loss of time, of suspending further hearings, at this time, and reaching the conclusion herein expressed, and as further set forth in detail in the order herein, in order that the national authorities may be free to use the conclusions herein as a basis for negotiations and contracts with the gas companies that must be entered into at once. The public may be assured that its interests have been fully protected by the Commis-
1911 sion, while at the same time, the companies, because of the attitude of the national authorities, will not be put at any loss or disadvantage by reason of the change. Such status is now affected as are all individuals and corporations by the conditions and requirements of the war and must be dealt with outside of any consideration of a change of standard.

The Commission appreciates the expressed readiness of the companies to place themselves at the disposal of the Government. It has, therefore, in order to expedite negotiations to the extent of its power given the companies the option and freedom to conclude contracts based on the option now allowed, so that without loss of any time they may proceed to the production of the necessary by-products.

1912 COMPLAINANT'S EXHIBIT 39.

Pltff.'s Ex. 39. J. A. F.

Kings County Lighting Company.

Gas Made, Sold and Unaccounted For.

Year.	Gas made.	Gas sold.	Gas made less gas sold.	Rates of loss to make.
1909.....	609,656	520,671	88,985	14.60
1910.....	686,522	580,728	105,794	15.41
1911.....	748,758	634,101	114,657	15.31
1912.....	835,512	701,483	134,029	16.04
1913.....	892,453	730,295	162,158	18.17
1914.....	954,996	818,392	136,604	14.30
1915.....	1,012,633	851,459	161,174	15.92
1916.....	1,070,266	934,406	135,860	12.69
1917.....	1,232,741	1,047,420	185,321	15.03
1918.....	1,463,088	1,232,848	230,240	15.74
1919.....	1,566,628	1,287,353	279,274	17.83
Six Months of 1920.....	948,810	808,087	140,723	14.83

Pltff.'s Ex. 39.

1913

COMPLAINANT'S EXHIBIT 40.

Pltf.'s Ex. 40. J. A. F.

Kings County Lighting Company.

Uncollectible Gas Bills (as per P. S. C. Reports).

	M c. f. gas sold.	Uncollectible bills, gas bills.	Cost per M c. f. sold.	Per cent of gross revenue from coml. ltg.
1908	460,210	5,843.96	.0127	.0153
1909	520,671	2,748.75	.0053	.0062
1910	580,728	3,897.71	.0067	.0078
1911	634,101	4,168.86	.0066	.0075
1912	701,482	5,958.76	.0085	.0096
1913	730,295	6,584.04	.0090	.0092
1914	818,391	6,699.27	.0082	.0094
1915	851,459	7,526.39	.0088	.0094
1916	934,406	7,526.70	.0081	.0093
1917	1,047,420	7,481.90	.0071	.0081
1918	1,232,847	10,714.04	.0115	.0096
1919	1,279,845	10,816.48	.0118	.0093
1920	778,181	5,542.13	.0071	.0075

10-Year Average.

Cents per M. (10 yr. average 1908-17)	.008
% of Gross (10 " " " ")	.009

Pltffs. Ex. 40.

1914

COMPLAINANT'S EXHIBIT 41.

Plff.'s Ex. 41. J. A. F.

Kings County Lighting Company.

Oil Received 1919.

Gallons billed.	Gallons received.	Variation. Plus.	Minus.
277,214	277,215	1	....
194,616	192,378	....	2238
205,227	205,227	....	....
229,638	229,140	....	498
202,701	200,944	....	1757
204,110	202,116	....	1994
101,405	100,650	....	755
170,977	169,130	....	1847
196,914	194,876	....	2038
166,697	166,731	34	....
166,761	168,465	1704	....
194,545	196,065	1520	....
203,267	199,262	....	4005
169,530	169,530	....	....
212,349	209,427	....	2922
144,996	144,996	....	....
208,780	202,608	....	6172
167,735	166,079	....	1656
173,582	170,329	....	3253
171,879	168,465	....	3414
169,272	167,751	....	1521
201,535	200,312	....	1223
162,700	164,182	1482	....
184,268	172,841	....	11427
165,255	180,951	15696	....
162,418	161,683	....	735
169,825	168,980	....	845
172,399	172,491	92	....
166,937	161,933	....	5004
169,792	167,751	....	2041
99,867	98,866	....	1001
5,587,191	5,551,374	20529	56346

Variation minus 35817

" " % ..... .0064

Pltff.'s Ex. 41.

1915 COMPLAINANT'S EXHIBIT 42.

PLFF.'s EX. 42. J. A. F.

Kings County Lighting Company.

Available Assets—Actual Liabilities.

July 31, 1920.

Current available assets:

Cash on hand and in bank	$19,641.06	
Special Deposit	12,500.00	
Accounts Receivable, Commercial	118,535.08	
City of New York	41,995.42	
Miscellaneous	10,019.38	
Total current available assets		$202,690.94

Current actual liabilities:

Accounts Payable for Labor and Materials	$124,494.77	
Bills Payable (Demand Notes Payable)	225,000.00	
Taxes Accrued	291,008.17	
Accrued Interest on Unpaid Taxes	25,052.34	
Accrued Interest on Notes Payable	1,162.50	
Wages Accrued	411.74	
Water Accrued	1,814.85	
Accrued Bond Interest	27,279.17	
Total actual liabilities		696,223.54
Excess of actual liabilities		$493,532.60

Pltff.'s Ex. 42.

1916 COMPLAINANT'S EXHIBIT 43.

PLFF.'S EX. 43. J. A. F.

Kings County Lighting Company.

Year 1919.

Sale of Appliances.

Revenue from Sales of Appliances		65,630.80
Cost of Appliances		43,732.17
Gross Profit		21,898.63
Selling Expenses:		
Promotion Expenses	9,945.43	
Installing ranges, cookers and laundry stoves	1,965.81	
Installing:		
Water Heaters	1,303.49	
Heating Devices	165.73	
Lighting Devices	96.73	
Industrial Appliances and Bake Ovens	1.18	
Other outside appliances	110.00	
Instantaneous Heaters	179.99	
Measuring & transporting appliances to point of installation	1,120.65	
Jobbing Work	58.43	
Installing Repair Parts	74.80	
Maintaining Lighting Devices	1,237.35	
Regulating Ranges, Heaters, etc	1,817.84	
Setting & Removing Arc Lamps	90.49	
	8,222.49	
		18,167.92
Net Profit from Sales of Appliances		3,730.71

Pltff.'s Ex. 43.

1917 COMPLAINANT'S EXHIBIT 44.

PLFF.'S EX. 44. J. A. F.

Unaccounted for Gas.

1917—P. S. C., 2nd Dist., Report.

	%
Nassau & Suffolk Lighting	23.2
N. Y. State G. & E. Corp. (Cortland)	15.4
Niagara L. H. & P. Co.	19.0
Adirondack E. P. Corp. Oneida	18.8
Long Island Lighting Co. Bayshore	20.7
New York State G. & E. Corp. (Ithaca)	15.1
Albany Southern R. R. Renselar/Hudson \	21.0
Orange Co. Pub. Service Corp. Port Jervis/Middletown \	15.1
Peekskill Lighting & R. R. C. Peekskill	13.8
Niagara Falls G. & E. Lt. Co. Niagara Falls	13.1
N. Y. State G. & E. Corp. Norwich	17.9

Pltff.'s Ex. 44.

PLFF.'s EX. 45. J. A. F.

Statement Showing True Rate of Interest Paid by Companies Based on Records of Public Service Commission, Second District, State of New York, Showing Selling Price of Securities Authorized to be Sold as Fixed in Commission's Order.

	Utica Gas & Electric Company.	Buffalo General Electric Company.	Empire Gas & Coke Company.	Tonawanda Power Company.
Nature of Business.	Gas and Electricity...	Electric Light and Power.	Gas and Electricity...	Electric Light and Power.
Location	Utica and Herkimer, N. Y. and surrounding territory.	Buffalo, N. Y. and adjacent territory.	Auburn, Geneva, N. Y. and surrounding territory.	Tonawandas, N. Y.
Date of Order.....	July 1, 1920.....	April 27, 1920.....	June 24, 1920.....	June 17, 1920.
Nature of Issue....	General Mortgage Series A Bonds.	Convertible Debentures..	Convertible Gold Bonds.	Debentures.
Amount of Issue....	$2,000,000	$2,000,000	$300,000	$640,000.
Nominal Rate of Interest.	7½%	7%	7%	7%.
Period	5 years.....	5 years.....	5 years.....	7 years.
Selling Price.....	92.97	93	90	90.
True Rate of Interest.	9.30+	8.75	9.5+	8.90+.
Number of times interest charges were earned.	2+	2.25+		2.5+.

Pl't'ff's Ex. 45.

1919 COMPLAINANT'S EXHIBIT 46.

PLF'S EX. 46 FOR IDENTIFICATION. 8/19/20. A. J. F.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

Before the Public Service Commission for the First District, No. 49 Lafayette Street, Borough of Manhattan, City of New York, 2nd day of July, 1920.

Present: Honorable Alfred M. Barrett, Deputy and Acting Commissioner.

Case No. 2320.

In the Matter of the Complaint, Petition and Application of THE BROOKLYN BOROUGH GAS COMPANY in Respect of the Standard and Price of Gas Manufactured, Furnished, and Sold by Said Company in the Borough of Brooklyn, City of New York.

Order Fixing Maximum Price of Gas, Effective On and After July 2, 1920, and Directing Change of Standard.

An order having been made herein on March 30, 1920 fixing the maximum price to be charged by the Brooklyn Borough Gas Company for gas on and after April 1, 1920 to and including December 31, 1920 at 1.15 per thousand cubic feet; and said order having been based in part upon the expectation that the cost of gas oil from and after the month of August, 1920 would not exceed $7\frac{3}{4}$ cents per gallon and said company having addressed a letter to the Commission dated June 18, 1920 from which it appears that the lowest price at which the company can procure such oil from and after the month of August, 1920, is 14 cents per gallon, which will have the effect of materially increasing the actual cost of manufacturing gas over what was contemplated at the time said order of March 30, 1920 was made, and said company having therefore requested that this proceeding be reopened, and that an increase in said rate be granted; and this proceeding having been reopened, and a further hearing having been duly had herein, Hon. Alfred M. Barrett, Deputy and Acting Commissioner, presiding, Messrs. Bassett, Thompson and Gilpatric, by Edward H. Bassett, Esq., and Wilson W. Thompson, Esq., appearing for said Brooklyn Borough Gas Company in support of said application, and no one appearing in opposition to said application; and the Commission having made an investigation for the purpose of enabling it to ascertain the facts requisite to the exercise of the powers conferred upon it, and being of the opinion that the rate or charge for gas now made or demanded by the Brooklyn Borough Gas Company under and by virtue of said order of March 30, 1920, is insufficient to yield a reasonable compensation for the service rendered and is unjust and unreasonable, and

that the standard of said company should be changed as hereinafter provided, it is

Ordered

I. That the maximum price to be charged by the Brooklyn Borough Gas Company for gas shall be as follows:

(*a*) On and after the date of this order to and including July 31, 1920, $1.15 per thousand cubic feet of gas sold and delivered consumers.

(*b*) On and after August 1, 1920 to and including July 31, 1921 $1.40 per thousand cubic feet of gas sold and delivered to consumers, except as hereinafter provided.

1920 II. That said Brooklyn Borough Gas Company be and it hereby is authorized and required not later than October 1, 1920 to change its standard from its present 22 candle power standard to the British Thermal Unit (B. T. U.) standard, the number of heating units to be furnished to be not less than 525 B. T. U.'s per thousand cubic feet of gas manufactured, distributed and sold, which British Ternal Unit standard is hereby fixed by the Commission.

III. That immediately upon the inauguration of such change of standard as hereinbefore provided, and concurrently therewith, and continuously thereafter during the term of this order, said company shall make such reduction in the maximum rate hereinbefore specified as shall be warranted by the economies effected by such change of standard, and shall make such reasonable reduction in such maximum rate as may be prescribed by the Commission by supplemental order, and shall charge for the gas manufactured, distributed and sold under such new standard not to exceed a reasonable rate and not to exceed such reasonable rate as may be fixed by the Commission by supplemental order as aforesaid.

IV. That on or before July 20, 1920, and from time to time thereafter, as may be necessitated by the requirements of this order, said Brooklyn Borough Gas Company shall issue, file and post amendments or supplements to its schedule to carry into effect the provisions of this order.

V. That this order is made upon the express condition that said company will not later than October 1, 1920 change its standard from the candle power standard to the British Thermal Unit standard as hereinbefore provided, and will immediately upon the inauguration of such change, and concurrently therewith, and continuously thereafter during the term of this order, make such reduction in the maximum rate hereinbefore specified as shall be warranted by the economies effected by such change of standard, and will make such reasonable reduction in the maximum rate hereinbefore specified as may be prescribed by the Commission by supplemental order and will charge for the gas manufactured, distributed and sold under such new standard not to exceed such reason-

able rate as may be fixed as a maximum by such supplemental order of the Commission.

VI. That said company shall keep and shall file promptly with the Commission such records as will show month by month, during the continuance of this order in effect, the revenues, expenses and reserves of said company and its additions to and deductions from capital account.

VII. That this order shall take effect upon its formal acceptance by said Brooklyn Borough Gas Company, and shall continue in force until changed or abrogated by further order of the Commission.

VIII. That within five days from the date hereof said Brooklyn Borough Gas Company shall notify this Commission in writing whether the terms and conditions of this order are accepted and will be obeyed.

By the commission.

[L. S.] JAMES B. WALKER,
Secretary.

1921 COMPLAINANT'S EXHIBIT 47.

Same as Complainant's Exhibit 48.

(Here follows Complainant's Exhibit No. 48, marked pages 1922, 1923, 1924, and 1925, inclusive.

1926 COMPLAINANT'S EXHIBIT 49.

There is no Exhibit 49.

1927 COMPLAINANT'S EXHIBIT 50.

Original Franchise

Not printed.

1928 COMPLAINANT'S EXHIBIT 51.

Extension of franchise.

Not printed.

Complainant's Exhibit 48.
Sheet 1

KINGS COUNTY LIGHTING COMPANY

SUMMARY OF OPERATING EXPENSES

1917 - 1918 - 1919 - SIX MONTHS ENDED

JUNE 30, 1920.

	1917	1918	1919	Six Months June 30th 1920.	M.C.F. SOLD 1917	M.C.F. SOLD 1918	M.C.F. SOLD 1919	M.C.F. SOLD 1920
Production Expenses	$464691.96	$667652.96	$757641.72	$571945.87	44.36	55.78	59.20	71.07
Distribution Expenses	60491.88	50660.49	61926.79	48877.46	5.78	4.11	4.84	6.07
Street Lighting Expenses	1667.28	1669.78	515.98	2292.13	.16	.13	.04	.26
Commercial Expenses	48200.10	92000.80	66994.35	46670.27	4.60	7.46	6.80	5.80
Promotion Expenses	11392.90	12040.64	9945.43	7918.75	1.09	.98	.77	.98
General Expenses	48152.94	49689.37	72778.67	44156.20	4.60	4.03	5.69	5.49
Pl. Withdrawn from Serv.	10510.46	12326.50	12872.46	8079.40	1.00	1.00	1.00	1.00
Taxes	65696.02	79647.43	87362.98	47657.63	6.20	6.46	6.82	5.92
Uncollectible Bills	7481.90	10714.04	10816.48	5542.13	.72	.87	.85	.69
Rent of Office Building	3283.56	3689.00	---	---	.31	.30	--	--
TOTAL OPERATING EXPENSES	741969.02	1000113.01	1100856.86	783139.64	70.64	81.12	86.01	97.30

Sheet 2

KINGS COUNTY LIGHTING COMPANY

DETAILED OPERATION EXPENSES

1917 - 1918 - 1919 - SIX MONTHS ENDED

JUNE 30, 1920.

	1917	1918	1919	1920	M.C.F. MADE 1917	M.C.F. MADE 1918	M.C.F. MADE 1919	M.C.F. MADE 1920
PRODUCTION EXPENSES								
Work Superintendence	$12127.61	$14145.81	$15866.43	$11639.26	.0098	.0096	.0101	.0123
Boiler House Labor	10452.82	20938.49	24213.75	20835.66	.0085	.0144	.0155	.0220
Generator House	17531.82	29912.87	35983.05	29772.07	.0142	.0205	.0230	.0314
Purifier House Labor	930.34	2720.56	2462.19	940.86	.0008	.0019	.0016	.0010
Miscellaneous Labor at Works	5436.70	7099.55	6230.56	4077.69	.0044	.0049	.0040	.0043
Total Gas Making Labor	$46479.29	$74817.28	$84755.98	$67265.54	.0377	.0513	.0542	.0710
Boiler Fuel	$51139.59	116996.07	114768.08	68215.31	.0415	.0800	.0733	.0719
Water	1803.77	7386.91	9922.66	12873.45	.0015	.0050	.0063	.0136
Generator Fuel	109142.15	168955.99	189943.68	125130.17	.0885	.1155	.1212	.1318
Water Gas Oil	242530.46	332487.50	347171.13	273668.40	.1967	.2273	.2216	.2884
Purification Supplies	1655.48	4076.02	2078.31	1107.09	.0014	.0028	.0013	.0011
Miscellaneous Works Expenses	5734.40	7958.20	8358.66	7296.56	.0047	.0054	.0053	.0077
Repairs of Works & Station Structures	991.47	3247.50	2062.49	4178.17	.0008	.0022	.0013	.0044
" " Furnaces, Boilers & Acc.	3375.27	3895.08	14329.03	6103.53	.0027	.0027	.0091	.0064
" " Steam Engines	402.59	907.76	986.37	1296.49	.0003	.0006	.0006	.0014
" " Gas Engines	386.57	1059.85	14.15	255.43	.0003	.0008	-	.0003
" " Misc. Power Plant Equip.	855.04	2242.21	2156.49	1073.58	.0007	.0015	.0014	.0011
" " Water Gas Sets & Acc.	6408.06	7413.99	17405.77	10175.57	.0052	.0051	.0111	.0107
" " Purification Apparatus	18.74	111.67	164.46	101.13	-	-	.0001	.0001
" " Holders	1273.45	4157.96	386.91	5479.00	.0010	.0028	.0003	.0058
" " Miscellaneous Equip.	1670. 20	2244.55	5491.63	2780.24	.0014	.0014	.0035	.0029
" " Works Tools	-	58.91	48.38	441.10	-	-	-	.0005
Gas Storage	4995.76	5977.65	6856.34	7787.38	.0041	.0041	.0044	.0082
Total Production Cost	478862.29	743995.10	806900.52	595228.14	.3885	.5085	.5150	.6273
Residual Credits	13970.33	56342.14	49258.80	23282.27	.0114	.0385	.0315	.0245
Net Station Cost	464891.96	687652.96	757641.72	571945.87	.3771	.4700	.4835	.6028
Gas Made M. C. F.	1,232,741	1,463,088	1,566,628	948,810				
Gas Sold M. C. F.	1,047,419	1,232,848	1,279,845	804,693				

Complainant's Exhibit 48
Sheet 3

KINGS COUNTY LIGHTING COMPANY

DETAILED OPERATING EXPENSES

1917 - 1918 - 1919 - SIX MONTHS ENDED

JUNE 30, 1920

	1917	1918	1919	1920	M.C.F. SOLD 1917	M.C.F. SOLD 1918	M.C.F. SOLD 1919	M.C.F. SOLD 1920
DISTRIBUTION EXPENSES								
Transmission & Pumping	$ 980.63	$ 2375.69	$ 1246.10	$ 749.94	.0009	.0020	.0009	.0005
Distribution Superintendence	12253.99	6350.07	5462.17	3777.38	.0117	.0052	.0043	.0047
Distribution Supplies & Expenses	2541.60	1954.90	4616.21	2114.11	.0024	.0016	.0036	.0028
Meter & Installation Work	7331.70	9591.48	10836.32	6303.62	.0070	.0078	.0085	.0079
Work on Consumers' Premises	15763.67	10520.98	9433.25	7264.36	.0151	.0085	.0074	.009[illegible]
Repairs Mains	8925.84	5424.73	3559.11	13293.33	.0085	.0044	.0028	016[illegible]
" Services	2572.15	2616.36	2816.88	3826.14	.0025	.0021	.0022	.004[illegible]
" Meters	8162.62	11595.55	22900.98	11222.79	.0078	.0094	.0179	014[illegible]
" Appliances	1199.88	-	227.10	-	.0012	-	.0002	-
" Distribution Building	-	203.82	669.70	-	-	.0001	.0005	
" General Structure	759.80	-	-	16.48	.0007	-	-	-
" Distribution Tools	-	26.91	160.97	219.31	-	-	.0001	.000[illegible]
TOTAL	$ 60491.88	50660.49	61928.79	48877.46	.0578	.0411	.0484	.060[illegible]
STREET LIGHTING EXPENSES								
Street Lamp Operating	$ 502.33	78.99	67.37	8.04	.0005	-	-	-
Street Lamp Repairs	1184.95	1610.79	448.61	2284.09	.0011	.0013	.0004	.002[illegible]
TOTAL	$ 1687.28	1689.78	515.98	2292.13	.0016	.0013	.0004	.002[illegible]
COMMERCIAL EXPENSES								
General Labor	$ 18616.87	37480.21	23118.15	16366.73	.0178	.0304	.0181	.020[illegible]
Accounting	10561.23	17086.02	21194.87	8931.22	.0100	.0139	.0166	.011[illegible]
Contracts	1985.32	2678.30	3762.93	1582.49	.0019	.0021	.0029	.002[illegible]
Collecting	9827.07	22119.87	18082.07	9443.35	.0094	.0179	.0141	.012[illegible]
Meter Reading	3619.39	5451.65	6357.46	4481.78	.0035	.0045	.0050	.005[illegible]
Supplies & Expenses	3590.22	7184.75	14478.87	5364.70	.0034	.0058	.0113	.003[illegible]
TOTAL	$ 48200.10	92000.80	86994.35	46670.27	.046C	.0746	.0680	.058[illegible]
PROMOTION EXPENSES								
Office Expense	$ 2862.50	3415.57	7615.50	6303.07	.0027	.0028	.0059	.007[illegible]
Canvassing & Soliciting	7222.94	4079.76	418.94	-	.0069	.0033	.0003	. -
Advertising & Sundries	1307.46	4545.31	1910.99	1615.68	.0013	.0037	.0015	.002[illegible]
TOTAL	$ 11392.90	12040.64	9945.43	7918.75	.0109	.0098	.0077	.009[illegible]

Complainant's Exhibit 48
Sheet 4

KINGS COUNTY LIGHTING COMPANY

DETAILED OPERATING EXPENSES

1917 - 1918 - 1919 - SIX MONTHS ENDED

JUNE 30, 1920

	1917	1918	1919	1920	M.C.F. SOLD 1917	M.C.F. SOLD 1918	M.C.F. SOLD 1919	M.C.F. SOLD 1920
GENERAL EXPENSES								
Salaries & Expenses General Officers	$14150.11	$15222.31	$16944.83	$ 9140.21	.0135	.0123	.0132	.0114
Salaries & Expenses G. O. Clerks	150.00	-	29906.75	16442.00	.0001	-	.0234	.0204
General Office Supplies & Expenses	5.05	-	-	1643.64	-	-	-	.0020
General Law Expenses (Excld. Rate Case)	10594.06	5450.65	2909.33	400.66	.0101	.0044	.0023	.0005
Miscellaneous General Expense	3949.52	4786.93	16748.65	8753.38	.0036	.0039	.0131	.0109
Insurance	3841.49	4371.19	6829.68	6317.48	.0037	.0036	.0053	.0079
Accidents & Damages	1244.00	1305.29	562.01	828.26	.0012	.0011	.0004	.0010
Legal Expense connected with damages	25.00	-	-	-	-	-	-	-
General Stationery & Printing	6346.52	6881.67	5901.56	3824.39	.0061	.0056	.0046	.0047
Stable Expense	9986.07	15994.42	-	-	.0095	.0129	-	-
Undistributed Adjustments	929.40	-	42.78	108.79	.0009	-	-	.0001
Cost of Mfg. Residuals Sold	1333.27	-	-	-	.0013	-	-	-
Residuals & By-Products Expense	30.96	69.73	-	-	-	-	-	-
Duplicate Charge Credits	4432.51	4392.82	6981.36	3085.03	.0042	.0035	.0054	.0038
TOTAL	$48152.94	$49689.37	$72778.67	$44156.20	.0460	.0403	.0569	.0549
Plant Withdrawn From Service	10510.46	12328.50	12872.46	8079.40	.0100	.0100	.0100	.0100
TAXES								
Real Estate	$35750.97	$40654.56	$47364.02	$25623.40	.0341	.0329	.0380	.0318
Speical Franchise	36846.40	32712.00	33276.00	17907.00	.0352	.0266	.0260	.0223
State Gross Earnings	6833.27	6129.57	6206.38	3929.69	.0065	.0050	.0038	.0049
State Excess Dividends	-	-	-	-	-	-	-	-
Federal Income Tax	6000.00	-	-	-	.0057	-	-	-
Capital Stock Tax	465.38	151.30	516.58	197.54	.0005	.0001	.0004	.0002
TOTAL	$85896.02	$79647.43	$87362.98	$47657.63	.0820	.0646	.0682	.0592
Uncollectible Bills	$ 7481.90	10714.04	10816.48	5542.13	.0072	.0087	.0085	.0069

1929 COMPLAINANT'S EXHIBIT 52.

PL'FF'S. EX. 52. AUG. 27, 1920. J. A. F.

Unaccounted-for Gas, Year 1918.

Abstracted from Sworn Reports of Companies Filed with Public Service Commission, Second District.

Name of company.	Location of plant.	Per cent.
Empire Gas and Electric Co.	Auburn	32.5
Northern New York Utilities, Inc.	Watertown	12.5
Troy Gas Company	Troy	10.7
Long Island Lighting Company	Long Island	19.0
New York State Gas and Elec. Corp.	Ithaca, Cortland, Norwich, Oneonta	18.0
Cohoes Gas Light Company	Cohoes	16.0
Albany Southern Railroad Company	Hudson	26.0
Peekskill Light and Railroad Co.	Peekskill	15.0
Elmira Water, Light & Railroad Co.	Elmira	14.0
Nassau & Suffolk Lighting Company	Nassau and Suffolk Counties, Long Island	21.0
Niagara Light, Heat & Power Co.	Tonawanda	16.0
Sea Cliff and Glen Cove Gas Co.	Long Island	21.0

Year 1919.

Limited to Long Island Companies.

Nassau and Suffolk Lighting Co.	Long Island	14.0
Sea Cliff and Glen Cove Gas Co.	" "	18.0
Long Island Lighting Company	" "	16.3

1930 DEFENDANTS' EXHIBIT D-1.

EXHIBIT D-1. J. A. F.

Kings County Lighting Company.

Comparative Statement of Percentages of Gas Unaccounted For of Certain Companies in New York City, 1917-1919.

(From Reports to Public Service Commission, First District.)

	1919.	1918.	1917.
The Bronx:			
Bronx Gas & Electric Co.	11.03	15.21	13.17
Brooklyn:			
Brooklyn Union Gas Co.	9.98	8.12	8.92
Flatbush Gas Co.	8.00	8.00	8.00
Kings County Lighting Co.	17.83	15.45	14.72
Brooklyn Borough Gas Co.	11.00	12.00	12.57
Queens:			
N. Y. & Queens Gas Co.	11.02	8.07	7.36
Newton Gas Co.	8.00	8.00	8.00
Woodhaven Gas Light Co.	8.00	8.00	8.00
Richmond Hill & Queens Co. Gas	8.00	8.00	8.00
Jamaica Gas Light Co.	8.00	8.00	8.00
Queens Borough Gas & Electric	10.29	11.66	11.67
Richmond:			
N. Y. & Richmond Gas Co.	11.70	12.50	6.98

1931 DEFENDANTS' EXHIBIT D2.

DEFDTS'. EX. D2 FOR IDENTIFICATION. 8/19/20. A. J. P.

N. W. Cor. Broad and Arch Sts.

Philadelphia, August 3, 1914.

Mr. J. A. Pearson,
Purchasing Agent,
Public Service Gas Co.,
Philadelphia, Pa.

DEAR SIR:

Confirming our verbal quotation, we are pleased to offer you 252,000,000 gallons of Gas Oil, specifications to be the same as specified in the present contract, dated 25th day of May 1913, at 3.95c per gallon, delivered by barge to your Newark, N. J., and your Jersey City, N. J., plants, and the usual difference for delivery by rail.

In consideration of your accepting this offer, we will cancel contract dated May 25th, 1913, as of the end of business July 31, 1914; the new contract to date from August 1, 1914, and end July 31, 1919.

Yours truly,

GULF REFINING COMPANY.
G. R. NUTTY,
General Sales Manager.

Accepted, August 3, 1914:
PUBLIC SERVICE GAS COMPANY.
J. A. PEARSON,
Purchasing Agent.

1932 This agreement, made this fifth day of August, in the year of our Lord one thousand nine hundred and fourteen, between Gulf Refining Company, a corporation and body politic of the State of Texas, hereinafter called "Seller," party of the first part, and Public Service Gas Company, a corporation and body politic of the State of New Jersey, hereinafter called "Buyer," party of the second part:

Witnesseth: That the said parties hereto have mutually bargained and agreed and by these presents do mutually bargain and agree as follows, that is to say:

First. Seller has sold and hereby agrees to deliver to Buyer, or its assigns, for the price or sum hereinafter named, Two Hundred and Fifty Two Million (252,000,000) gallons of straight run Gas Oil, to be made from Indian Territory crude oil.

Second. Not more than five per centum (5%) of the said oil shall distill over above seven hundred degrees (700°) Fahrenheit, and it shall not contain more than one-half of one per centum (½ of 1%) of sulphur nor more than three per centum (3%) of coke; it being understood and agreed, however, that Buyer shall have the right to specify oil of the same character and description as that at the present being delivered to the Twenty-fifth Ward Gas Works in Philadelphia, Pennsylvania, by Seller.

Third. Said oil is to be delivered from time to time by said Seller to said Buyer during the period beginning August 1, 1914, and ending July 31, 1919, for the manufacture of gas at the various gas works of Buyer in the State of New Jersey.

Fourth. Seller is to deliver and Buyer is to take said oil at the following points of delivery, for the prices hereinafter respectively named, that is to say: Barge deliveries in the tanks of Buyer at Camden gas works, Camden, New Jersey, West End Works, Jersey City, New Jersey, Hackensack gas works, Hackensack, New Jersey, Hoboken works, Hoboken, New Jersey, New Brunswick works, New Brunswick, New Jersey, and Market street works, Newark,
1933 New Jersey, at three and five hundredth cents (3.05¢) per gallon; by barge delivery in the tanks of Buyer at Trenton gas works, Trenton, New Jersey, at three and thirty hundredth cents

(3.30¢) per gallon, in one hundred thousand (100,000) gallon lots, and at three and fifty-five hundredth cents (3.55¢) per gallon in fifty thousand (50,000) gallon lots; by rail delivery on Buyers' siding at Consumers Gas Works, Jersey City, New Jersey, at three and eighteen hundredth cents (3.18¢) per gallon, and on Buyers' siding at Paterson gas works, Paterson, New Jersey, at three and forty-two hundredth cents (3.42¢) per gallon; by rail delivery on Buyers' siding at Sixth Street works, Jersey City, New Jersey, and on Buyers' siding at Plainfield gas works, Plainfield, New Jersey, at three and thirty-eight hundredth cents (3.38¢) per gallon.

Fifth. Deliveries of the oil are to be made where and as specified by Buyer, it being understood and agreed that the Buyer shall give at least sixty (60) days' notice to Seller of deliveries to be required under this agreement.

Sixth. It is mutually agreed between the parties hereto that should Buyer desire during the period of this agreement to increase its installations of coal gas apparatus so as to reduce its requirements of oil, that then and in such case it shall be at liberty to make such decrease as it desires, it being required to give Seller six months' written notice of its intention to install the coal gas apparatus and reduce its requirements for oil.

Seventh. It is agreed and understood between the parties hereto that Buyer is to take all of the oil required by it in the operation of its aforesaid plants during the period of this Agreement from Seller.

1934 Eighth. The quantity of oil delivered in the tanks of Buyer from time to time shall be determined by Meyer and Company, official gaugers, or some other equally reliable person or firm, as agreed upon by the parties hereto.

Ninth. Buyer agrees to provide all necessary pipe lines between its wharves or rail sidings and tanks for unloading barges and tank cars promptly.

Tenth. It is agreed between the parties hereto that payments shall be made monthly in cash for deliveries during the preceding month.

In witness whereof, the parties hereto have caused these presents to be duly executed, dated the day and year first above written.

GULF REFINING COMPANY.
G. R. NUTTY,
General Sales Manager.
PUBLIC SERVICE GAS COMPANY.
J. A. PEARSON,
Purchasing Agent.

Approved:
E. A. A.,
Assistant General Counsel, and
E. H. E.,
Asst. General Manager.

1935 [Endorsed:] E. No. 3019. Public Service Gas Co. 125,000,000 Gals. Gas Oil Between June 1st, 1910 & Dec. 31st, 1913. U. S. District Court. S. D. of N. Y. Filed Sep. 22, 1920.

1936 DEFENDANTS' EXHIBIT D3.

Defds.' Ex. D3 for Identification. 8/9/20. A. J. P.

This agreement, made this twenty-fifth day of May, in the year of our Lord one thousand nine hundred and thirteen, between Gulf Refining Company, a corporation and body politic of the State of Texas, hereinafter called "Seller," party of the first part, and Public Service Gas Company, a corporation and body politic of the State of New Jersey, hereinafter called "Buyer," party of the second part:

Witnesseth: That the said parties hereto have mutually bargained and agreed and by these presents do mutually bargain and agree as follows, that is to say:

First. Seller has sold and hereby agrees to deliver to Buyer, or its assigns, for the price or sum hereinafter named, straight run gas oil, to be made from Indian Territory crude oil, of not less than twenty-seven million (27,000,000) and not more than thirty-three million (33,000,000) gallons.

Second. Not more than five per centum (5%) of the said oil shall distill over above seven hundred degrees (700°) Fahrenheit, and it shall not contain more than one-half of one per centum (½ of 1%) of sulphur nor more than three per centum (3%) of coke; it being understood and agreed, however, that Buyer shall have the right to specify oil of the same character and description as that at present being delivered to the Twenty-fifth Ward Gas Works in Philadelphia, Pennsylvania, by Seller.

Third. Said oil is to be delivered from time to time by said Seller to said Buyer during the calendar year nineteen hundred and fourteen (1914) for the manufacture of gas at the various gas works of Buyer in the State of New Jersey.

Fourth. Seller is to deliver and Buyer is to take said oil at the following points of delivery, for the prices hereinafter respectively named, that is to say: Barge deliveries in the tanks of Buyer at Camden gas works, Camden, New Jersey, West End works, Jersey City, New Jersey, Hackensack gas works, Hackensack, New Jersey, Hoboken works, Hoboken, New Jersey, New Brunswick works, New Brunswick, New Jersey, and Market Street
1937 works, Newark, New Jersey, at four and one-half cents (4½¢) per gallon; by barge delivery in the tanks of Buyer at Trenton gas works, Trenton, New Jersey, at four and seventy-five hundredths cents (4.75¢) per gallon, in one hundred thousand (100,000) gallon lots, and at five cents (5¢) per gallon in fifty thousand (50,000) gallon lots; by rail delivery on Buyer's siding at Consumers Gas Works, Jersey City, New Jersey, at four and sixty-three

hundredths cents (4.63c) per gallon, and on Buyer's siding at Paterson gas works, Paterson, New Jersey, at four and eighty-seven hundredths cents (4.87c) per gallon, by rail delivery on Buyer's siding at Sixth Street works, Jersey City, New Jersey, and on Buyer's siding at Plainfield gas works, Plainfield, New Jersey, at four and eighty-three hundredths cents (4.83c) per gallon.

Fifth. It is understood and agreed between the parties hereto that the above prices are based on the present price of eighty-eight cents (88c) per barrel for Oklahoma crude oil, and that the above prices shall be increased or reduced at the rate of one-fortieth of one cent (1-40c) per gallon for every one cent (1c) increase or reduction in the said price of Oklahoma crude oil during the period of this agreement, provided, however, that the maximum price to be charged by Seller under this agreement shall not be more than five cents (5c) per gallon for the deliveries by barge, rail deliveries and barge deliveries to Trenton in proportion thereto; and that the minimum price to be charged by Seller under this agreement shall not be less than three and one-half cents (3½c) per gallon for the deliveries by barge with rail deliveries and barge deliveries to Trenton in proportion thereto.

1938 It is further understood and agreed between the parties hereto that the price for each month for the oil delivered under this agreement shall be based on the daily average price of Oklahoma crude oil for the month preceding the deliveries of said oil, the quotations in the oil, paint and drug reporter to be taken as binding upon both parties to this agreement.

Sixth. Deliveries of the oil are to be made where and as specified by Buyer, it being understood and agreed that the Buyer shall give at least sixty (60) days' notice to Seller of deliveries to be required under this agreement.

Seventh. It is mutually agreed between the parties hereto that should Buyer desire during the calendar year nineteen hundred and fourteen (1914) to increase its installations of coal gas apparatus so as to reduce its requirements of oil, that then and in such case it shall be at liberty to make such decrease as it desires, it being required however to give Seller six months' written notice of its intention to install the coal gas apparatus and reduce its requirements for oil.

Eighth. It is agreed and understood between the parties hereto that Buyer is to take all of the oil required by it in the operation of its aforesaid plants during the calendar year nineteen hundred and fourteen (1914) from Seller, provided Buyer shall not be required to take beyond the maximum herein agreed.

Ninth. The quantity of oil delivered in the tanks of Buyer from time to time shall be determined by Meyer and Company, official gaugers, or some other equally reliable person or firm, as agreed upon by the parties hereto.

Tenth. Buyer agrees to provide all necessary pipe lines between its wharves or rail sidings and tanks for unloading barges and tank cars promptly.

1939 Eleventh. It is agreed between the parties hereto that payments shall be made monthly in cash for deliveries during the preceding month.

In witness whereof, the parties hereto have caused these presents to be duly executed, dated the day and year first above written.

GULF REFINING COMPANY,
By G. R. NUTTY,
General Sales Manager.
PUBLIC SERVICE GAS COMPANY,
By J. A. PEARSON,
Purchasing Agent.

Approved:

E. A. A.,
General Counsel.
N. D. W.,
General Manager.

By mutual consent and for good consideration the foregoing contract is hereby rescinded.

GULF REFINING COMPANY,
By G. R. NUTTY,
General Sales Manager.
PUBLIC SERVICE GAS COMPANY,
By J. A. PEARSON,
Purchasing Agent.

Newark, N. J.,
August 10, 1914.

1940 [Endorsed:] (To be returned to the Secretary's File 5451 No. 155 G.) Agreement between Gulf Refining Company and Public Service Gas. Co. Dated: May 25/13. 27,000,000 gallons gas oil for Camden works, West End works, J. C., Hackensack works, Hack., Hoboken works, Market St. works, Trenton works, Consumers works, Paterson works, 6th St. works, J. C., Plainfield works. U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

1941 DEFENDANTS' EXHIBIT D4.

Def'ds' Ex. D4 for Identification. S. 19. 20. A. J. P.

AA58.

AA59.

Public Service Gas Co.

Broad & Arch Streets, Philadelphia, Pa.

Philadelphia, June 3, 1910.

Mr. G. R. Nutty, General Sales Manager,
Gulf Refining Co.,
Frick Bldg. Annex, Pittsburgh, Pa.

DEAR SIR:

Confirming telephone conversation, in view of your agreement to cancel contract between your company and Public Service Corporation of New Jersey, dated July 31, 1908, we agree to purchase from you between June 1, 1910, and December 31, 1913, 125,000,000 gallons of Gas Oil to conform to specifications agreed upon between yourself, Mr. Whitcomb and the writer, at the price of $2.45 per gallon, delivered in our tanks at all tidewater points in the State of New Jersey, rail points to be increased by the same differential as shown in the contract of July 31, 1908, above referred to, formal contract to be exchanged at a later date.

Yours truly,

J. A. PEARSON,
Purchasing Agent.

Accepted:
GULF REFINING COMPANY
G. R. NUTTY,
General Sales Manager.

1942 This agreement, made this first day of June, in the year of our Lord, One Thousand Nine Hundred and Ten, between Gulf Refining Company, a corporation existing under the laws of the State of Texas, party of the first part; and Public Service Gas Company, a corporation existing under the laws of the State of New Jersey, party of the second part.

Witnesseth: That for and in consideration of the mutuality hereof, the parties hereto do hereby agree as follows:

First. The party of the first part sells and agrees to deliver to the party of the second part, or its assigns, at the prices hereinafter designated, and the party of the second part agrees to purchase and receive from the party of the first part, One Hundred and Twenty-five Million (125,000,000) gallons straight run Gas Oil to be made from Indian Territory Crude Oil, deliveries and prices as hereinafter

stated, and to be used by the party of the second part for the manufacture of gas at its Gas Works in the State of New Jersey, during the period beginning June first, Nineteen Hundred and Ten and ending December thirty-first, Nineteen Hundred and thirteen.

The oil to be furnished to conform to the following specifications—

Not more than 5% shall distill over above 700° Fahrenheit and it shall not contain more than one-half of 1% of sulphur nor more than 3% of coke.

provided, however, that the party of the second part shall have the right to specify oil of the same specifications as that being at present delivered to the 25th Ward Gas Works, Philadelphia, Pa., by the party of the first part.

Second. The party of the second part agrees to take the Gas Oil defined in Section First at the following points of delivery and for the following prices, to wit:

1943 Barge deliveries in the tanks of the party of the second part at Hoboken Gas Works; West End Gas Works on Hackensack River; Market Street Gas Works, Newark; (Front Street Gas Works, Newark;) (Fourth Street Gas Works, Harrison;) and Camden Gas Works, at Two and Forty-five Hundredths (2.45) Cents per gallon; by rail delivery at Consumers Gas Works, Jersey City at Two and Fifty-eight Hundredths (2.58) Cents per gallon, and at Paterson Gas Works, Paterson, New Jersey, at Two and Eighty-two Hundredths (2.82) Cents per gallon, deliveries to be made where and as specified by the party of the second part, it being understood and agreed that the party of the second part shall give at least sixty (60) days' notice to the party of the first part of deliveries to be required under this Agreement.

Third. The quantity of oil delivered in the tanks of the party of the second part, from time to time, shall be determined by Mayer & Company, Official Gaugers, or some other equally reliable person or firm, as agreed upon by the parties hereto.

Fourth. The party of the second part agrees to provide all necessary pipe lines between its wharves or rail sidings and tanks for unloading barges and tank cars promptly.

Fifth. It is agreed between the parties hereto that payments shall be made in cash monthly for deliveries during the preceding month.

In witness whereof, the parties hereto have caused this Agreement to be executed the day and year first herein above written.

GULF REFINING COMPANY.
G. R. NUTTY.
General Sales Manager.
PUBLIC SERVICE GAS COMPANY.
J. A. PEARSON.
Purchasing Agent.

(F. B.)

Approved

H. D. WHITCOMB,
General Manager

1944 (Here follow Defendants' Exhibits Nos. D5 and D6, marked pages 1945 to 1956, inclusive.)

[Endorsed:] E8676. Public Service Gas Co. U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

Defendant's Exhibit No 6.

Unaccounted For Gas
New York Public Service Commission, Second District, 1917 Report
Elec. & Gas Corp. (Class A)

Company	Gas Unaccounted for M cu.ft.	Total Gas available M cu.ft.	Per cent unaccounted for
Rochester Ry. & Light	98,017	2,256,713	4.343
Westchester Lighting	205,642	2,128,038	9.663
Syracuse "	98,000	1,165,639	8.407
Municipal Gas, Albany	67,110	711,624	9.430
Central Hudson G. & E.	19,233	358,261	5.368
Empire G. & E.	29,053	400,146	7.260
Troy Gas	41,555	437,523	9.497
Northern N.Y. Utilities	14,012	134,734	10.399
Fulton G. & E.	15,108	167,386	9.025
Rome Gas E.L. & P.	13,063	113,628	11.496
Lockport L. H. & P.	8,375	100,671	8.319
Rockland L. & P.	3,484	38,547	9.038
Northern Westchester	7,243	61,775	11.724
Kingston G. & E.	8,192	109,945	7.450
Ithaca G. & E.	13,238	87,851	15.069
Peoples G. & E. Oswego	5,154	53,803	9.579
Western N.Y. Utilities, Inc.	1,624	8,260	19.561
Glens Falls G. & E.	7,836	74,998	10.448
Cohoes Gas Light	5,499	67,955	8.092
Plattsburgh G. & E.	4,012	50,293	7.977
Orange Co. Lighting	1,905	14,590	13.056
Malone L. & P.	1,458	12,138	12.011
Port Jervis L. & P.	1,584	7,925	19.987
Corning L. & P.	610	7,245	8.419
Upper Hudson El.& R.R.	1,523	9,752	15.617
Southern Dutchess G. & E.	...	...	...
Oneonta L. & P.	5,064	24,927	20.315
Despatch H.L.& P.	...	...	...
Norwich G.& E.	5,558	31,199	17.814
Halfmoon L.H. & P.	893	10,857	8.225
Dansville G. & E.	1,527	10,455	14.605
Elmira Water, L. & R.R.			
Depew and Lancaster Lt.,Pr.& Coal	1,521	43,646	3.484

Coal Gas & Water Gas (Class A)

Defendant's Exhibit D6.

Unaccounted for Gas - Continued

Company	Gas Unaccounted for M cu.ft.	Total Gas available M cu.ft.	Per cent unaccounted for
Elec. & Gas Corporations (Class B)			
Granville Elec. & Gas Co.	648	6,685	9.693
Genesee Gas Lt. Co.	417	4,492	9.283
Central N.Y. Power Co.	2,989	11,171	26.756
Bath Elec. & Gas Lt. Co.	1,666	11,257	14.799
Coal Gas & Water Gas Corporations (Class B)			
Sea Cliffe Glen Cove Gas Co.	3,614	19,193	18.829
Sangerties Gas Lt. Co.	1,154	16,307	7.076
Patchogue Gas Co.	2,976	22,019	13.515
Long Beach Gas Co.	.....	.....	.....
Long Island Gas Corp.	2,347	14,939	15.710
Brockport Gas Lt. Co.	2,365	13,987	16.908
Gas Light Co. of Waverly	.....	.....	.....
Huntington Gas Co.	2,441	13,588	17.964
Penn Yan Gas Lt. Co.	889	9,185	9.678
West Shore Gas Co.	3,186	12,993	24.520
Owego Gas Lt. Co.	1,934	10,460	18.489
Suffern Gas Co.	.....	.....	.....
Adirondack E. P. Corp., Oneida	15,963	84,927	18.796
Albany Southern	11,173	51,929	21.419
Orange Co.Pub.Service Corp.	7,486	49,477	15.130
Peekskill Ltg. & R.R.	7,955	57,719	13.782
Niagara Falls G.& E. LT.CO. Niagara	7,933	60,514	13.109
Nassau & Suffolk Ltg.	87,405	377,444	23.157
Long Island Ltg. Bayshore	24,351	117,513	20.722

Defendant's Exhibit D 60

Company	Gas Unaccounted for — M cu ft	Total ~~Gas Distributed~~ M cu ft	Per Cent Unaccounted for
Rochester Ry & Lt Co	75 017	2 25 713	4.313
Westchester Lighting	213 042	2 128 38	9.663
Syracuse	78 000	1 160 629	8.407
Utica Gas & Elec			
Municipal Gas, Albany	67 110	711,624	9.430
Central Hudson G & E	19 233	358 261	5.368
Empire G & E	29 053	406,146	7.260
Troy Gas	41 555	437.523	9.497
Northern N.Y. Utilities	14 612	134,734	10.394
Fulton G & E	15 105	167,386	9.025
Rome Gas E. L. & P.	13 063	113 628	11.496
Lockport L. H. & P.	8 376	100 671	8.319
Rockland L. & P.	3 484	38 547	9038
Northern Westchester	7 243	61 375	11 754
Kingston G & E	8 112	109 945	7.450
Ithaca G & E	13 238	87 851	15.069
Cooper G & E. Geneva	5 164	53 803	9.579
Western N.Y. Utilities Inc	1624	8 260	19.661
Glens Falls G & E	7836	74 998	10 448
Cohoes Gas Light	5497	67 955	8.092
Plattsburgh G & E	4 012	50 293	7.977
Orange & Rockland Lighting	1905	14 590	13.056
Middletown L & P	1458	12 135	12 011
Port Jervis L & P	1684	7925	19.957
Corning L & P	616	7245	8.419
Upper Hudson E. L. & P.	1523	9752	15.617
Dunkirk Fredonia G & E	- - - -	- - - -	- - - -
Richmond L & P	5064	30427	20.315
Mechanicville H. L. & P.	- - -	-	-
Norwich G & E	5652	31199	17.914

Defendant's Exhibit D6

	Company	Gas manufactured for M cu ft	Total Gas disposed of M cu ft	Per cent unaccounted for
b 151	Buffalo Gas	71 [illegible]	[illegible]	13.089
	Niagara " Subsidiary	30 533	43 478	6.360
	Binghamton Gas Works	11 8[illegible]	33[illegible]	4.477
	Public Service Corp. Long Island	—	—	—
	Elmira Municipal Gas Light	10 427	11 101	9.219
	Homer & Co. Cloud Gas Lt.	5 617	36 745	15.368
	Fulton Fuel & Light	1 840	29 138	6.314
	Canandaigua Gas Lt.	663	23 040	3.008
	Buffalo (Sublease from Hydro)	53 78	2[illegible]	12.386
†	Niagara L. H. & P.	33 5[illegible]	134 31[illegible]	18.877
	Elec & Gas Corporations (Class B)			
b 156	Granville Elec. & Gas Co.	648	6 685	9.693
	Geneseo Gas Lt. Co.	417	11 492	9.283
	Central N.Y. Power Co.	2 859	11 171	26.756
	Bath Elec. & Gas Lt. Co.	1 666	11 [illegible]07	14.799
p 159	Coal Gas & Water Gas Corp (Class B)			
3	Sea Cliff & Glen Cove Gas Co	3 [illegible]4	17 173	18.829
2	Sayerlies Gas Lt Co.	1 134	16 307	9.076
1	Patchogue Gas Co	2 976	32 019	13.515
4	Long Beach Gas Co	—	—	—
5	Long Island Gas Co.	2 [illegible]41	14 [illegible]37	15.710
6	Bridgeport Gas Lt. Co.	2 365	13 187	16.908
7	Gas Light Co of Waverly	—	—	—
8	Huntington Gas Co.	2 [illegible]11	1[illegible]355	17.964
9	Penn Yan Gas Lt. Co	851	9 185	9.678
10	West Shore Gas Co	3 186	12 993	24.520
11	Owego Gas Lt. Co.	1 934	10 960	18.489
12	Suffern Gas Co.	—	—	—
—	Adirondack E.P. Corp. Ausable	15,963	84927	18.796
x	Albany Southern	11 123	51 929	21.419
—	Orange Co. Pub. Service Corp.	7 486	44 487	15.130
—	Peekskill Ltg & RR	7,955	57719	13.782
a	Niagara Falls E L & P Co. Niagara	7 933	60 514	13.109
—	Nassau & Suffolk Ltg	87,405	77444	23.157
—	Long Island Ltg. Bayside	24,381	117 512	20.922

1956

FORM NO. 85024. EIPCO. 1M-6-20

Defendant's Exhibit 78

KINGS COUNTY LIGHTING COMPANY

4802 NEW UTRECHT AVENUE

REQUISITION FOR SUPPLIES AND MATERIALS

3151 S

Requisition No. ..... Date, ... 19

Deliver to .....

Via .....

For Use in ..... Charge to .....

Quantity	ITEMS	Quotation	On Hand	Used Per Month

..... Clerk ..... Eng. or Supt.

Purchase Approved Date ..... 19 ..... Vice-Pres.

Order No. ..... Date ..... 19 ..... Pur. Agent

Order Placed with .....

Address .....

1958

Delivery Promised .....

Defendant's Exhibit No 9.

Form 8501-A—W.P.—10-19

KINGS COUNTY LIGHTING COMPANY

4802 NEW UTRECHT AVENUE

ORDER FOR MATERIAL

No. 18852

BROOKLYN, N. Y.

Please ship to

Via

The material called for on this order, subject to conditions named below:—

IMPORTANT: Itemized delivery tickets **bearing above order number must be left with goods** to insure receipt for the same. If a carrier makes delivery, ticket must be attached to outside of package.

2 This order must not be filled at higher prices than last quoted or charged, without advice.

3. **Invoice each delivery separately,** noting thereon in **every case designation of goods** and **our order number.**

4. No charge for freight, express, carriage or packing will be allowed unless agreed to and indicated on this order.

5. Report immediately any delay in shipment. Address all communications to 4802 New Utrecht Avenue.

6 Send statement of account promptly first of each month.

1959

KINGS COUNTY LIGHTING COMPANY

By

Defendant's Exhibit 19

Form 8501-B—W.P.—10-19.

KINGS COUNTY LIGHTING COMPANY

DUPLICATE

No. 18852

1960

Remark

Made by..... Correct..... Approved.....

General Superintendent

Defendant's Exhibit 779

Form 6501-C—W.P.—10-19.

KINGS COUNTY LIGHTING COMPANY TRIPLICATE

No. 18852

1961

IMPORTANT

STOCK-KEEPER:—Itemized delivery ticket bearing our order number must be left with goods to insure receipt for same.

If a carrier makes delivery, ticket must be attached to outside of package.

Forward this copy to **Main Office immediately** upon completion of order; date and sign name

Remark

Made by ..... **Correct** ..... **Approved** .....

General Superintendent

Defendant's Exhibit DJ

Form 850-D—W.P.—10-19.

KINGS COUNTY LIGHTING COMPANY

No. 18852

1962

IMPORTANT

STOCK-KEEPER:—Itemized delivery ticket bearing our order number must be left with goods to insure receipt for same.

If a carrier makes delivery, ticket must be attached to outside of package.

This copy is to be retained by you for your file.

Correct ..... Approved .....

General Superintendent

Defendant's Exhibit 10

Form 85-17-A 4M-1-19 T

KINGS COUNTY LIGHTING COMPANY

Material Delivered from

No. ..... Date .....

Address .....

To be used for .....

Charged to .....

CLASS NO.	QUANTITY	ARTICLES	UNIT PRICE	AMOUNT	

Delivered by Received by

1963

Remark

Made by Correct Approved

General Superintendent

KINGS COUNTY LIGHTING COMPANY

Material Delivered from .....

No. ..... Date .....

Address .....

To be used for .....

Charged to .....

CLASS NO	QUANTITY	ARTICLES	UNIT PRICE	AMOUNT

Delivered by ..... Received by 1964

Remark .....

Made by ..... Correct ..... Approved .....

General Superintendent

Defendant's Exhibit JJ 11

Form No. 6016-2M-12-19-W.P.

KINGS COUNTY LIGHTING COMPANY

COAL WEIGHERS DAILY REPORT

Name of Coal Weigher..... Date..... 192_

TARE	TARE	TARE	TARE	TARE	REMARKS

Legendary Crews in a

KINGS COUNTY LIGHTING COMPANY
DAILY REPORT OF MANUFACTURE
FIRST AVENUE STATION

FOR PERIOD BEGINNING 7 A. M. ..... 19.....

	This Yr.	Last Yr.	To Date This Year			
Weather		Min. Daily Make		Date	Max. Daily Make	Date
Thermometer		Min. Daily Send-out		Date	Max. Daily Send-out	Date
Barometer						

	This Year	Last Year	Inc. or Dec.	% Change	Candle Power	Av'g	Per Gal.
Gas on Hand Beginning Day					At Works		
Gas on Hand Close of Day					At 65th Street		
Gas Make					City Test		
Gas Send Out					British Thermal Units	CO_2	
Monthly Make to Date					Make per Sq. Ft. Grate		
Monthly Send-out to Date					Make per Man		
Yearly Make to Date					Make per Run		
Yearly Send-out to Date					Make per Hr. Av'g		
Day of Week Send-out					Tar Made % Oil Used	Gravity	
Average Hourly Send-out					Water Evaporated per lb. Fuel		

Material Used per M. Make		This Yr	Last Yr	Inc or Dec	LABOR	No Men
Gas Oil Gravity	Gals.				Operating	
Generator Fuel	Lbs				*Works Superintendence*	
Generator Ash	Lbs				*Boiler House*	
Boiler Coal	Lbs.				*Generator House*	
Boiler Tar	Lbs				*Purification*	
					Miscellaneous	
Boiler Fuel Total	Lbs.				Maintenance	
Boiler Ash	Lbs.				*Rep. of Whs. & Sta. Struct.*	
Steam	Lbs.				*Rep. of Power Plant*	
Water, City	Cu. Ft.				*Rep. of Gas Apparatus*	
Water, Well	Cu. Ft.				*Rep. of Misc. Equip.*	
Water, Salt (Est.)	Cu. Ft.				Other	
Thomas Meter	Watts				*Unloading Coal*	
					Unloading Oil	
					Miscellaneous	

Mat. Used from First of Year to Date	Total	Per M
Gen. Coal		
Bit. Coal		
Barley Coal		
Breeze Coal		
City Water		
Gas Oil		

Other Material Used This Date		
City Water	Cu. Ft.	
Well Water	Cu. Ft.	
Salt Water	Cu. Ft.	
Gas	M Cu. Ft.	

Hourly Load Factor This Date

Hourly Load Factor to Date This Month

Materials	Gas Oil	Anthracite Coal, Lbs.			Screenings	Bituminous	Steam Coal	Tar	Oxide	Shavings
		Broken	Breeze	Barley	Lbs.	Coal, Lbs.	65th St.	Gals.	Bu.	Bales
On Hand										
Received										
Total										
Used Generators										
Used Boilers										
Used Elsewhere										
Transfers										
Sold										
Total Used & Sold										
On Hand						1966				

Remark

Made by ..... Correct ..... Approved .....

General Superintendent

Defendant's Exhibit D 15

FORM 38019

Sheet No. .....

KINGS COUNTY LIGHTING COMPANY

PAYROLL

Department ..... *Changes* ..... 19 .....

P. R. No.	EMP. No.	NAME	CHANGES

1971

Certified *Examined*

FEB.		FEB.	
MAR.		MAR.	
APR.		APR.	
MAY		MAY	
JUNE		JUNE	
JULY		JULY	

1972

Defendant's Exhibit #16

FORM 2330

METER READING RECORD

7-45 C. E. SHEPPARD CO., N. Y. 28503

DATE	NAME	DATE	METER NO.

DATE	INDEX	C. O.	T. O.	REMARKS	DATE	INDEX	C. O.	T. O.	REMARKS
AUG.					AUG.				
SEPT.					SEPT.				
OCT.					OCT.				
NOV.					NOV.				
DEC.					DEC.				
JAN.					JAN.				
FEB.					FEB.				
MAR.					MAR.				
APR.					APR.				
MAY					MAY				
JUNE					JUNE				
JULY					JULY				

1972

1957

DEFENDANTS' EXHIBIT D7.

Stockholders, Kings County Lighting Company.
Not printed.

(Here follow Defendants' Exhibits Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, marked pages 1958 to 1975, inclusive.)

1976 DEFENDANTS' EXHIBIT D19.

DEF'D'S EX. D19 for Identification. 9/1/20. G. J. P.

Contract Between Gulf Refining Company and Boston Consolidated Gas Company.

Dated September 29, 1916.

1977 This contract made this twenty-ninth day of September, 1916, between the Gulf Refining Company, a corporation organized under the laws of the State of Texas, (hereinafter called the "Refining Company"), and Boston Consolidated Gas Company, a corporation organized under the laws of the Commonwealth of Massachusetts, (hereinafter called the "Gas Company").

Witnesseth:

I. Quantity of Oil.

The Refining Company hereby agrees to sell and deliver to the Gas Company and the Gas Company agrees to purchase from the Refining Company all oil which may be required by the Gas Company and by the East Boston Gas Company, in addition to oil actually on hand, for the manufacture of water gas, for the period of five (5) years, commencing April 1, 1917, provided that the total amount sold and purchased shall not exceed fourteen million (14,000,000) gallons for each year during such period.

II. Quality of Oil.

The Refining Company guarantees that the oil to be delivered under this contract shall be the quality known as "Red River Crude" produced in the State of Louisiana and similar to the sample submitted to the Gas Company about June 28, 1916.

If Red River Crude is found unsatisfactory at any time during the first year of the contract, the Gas Company is to have the option of demanding and receiving Gas Oil Distillate (known as "Solar Oil") of 30/32 Beaume gravity for the remainder of the contract period.

1978 If the Refining Company's supply of Red River Crude should become inadequate to take care of the contract requirements at any time during the life of this contract, it is further understood and agreed that the Refining Company shall have the privilege of delivering Solar Oil to meet such requirements at the price fixed below for Solar Oil.

The Refining Company guarantees that all oil delivered under this agreement shall be suitable for the manufacture of water gas at the plants of the Gas Company at all seasons of the year.

III. Delivery.

The oil shall be delivered by the Refining Company into the tanks of the Gas Company at Everett, and at the Calf Pasture and Commercial Point in the City of Boston, and into the tanks of the East Boston Gas Company in East Boston. The amount to be delivered from time to time at each place to be determined by the Gas Company. It is understood, however, that approximately from eighty to ninety per cent of the oil will probably be delivered into the tanks of the Gas Company at Everett.

The Gas Company agrees that discharge pipes of not less than six (6) inches in diameter will be provided by it in connection with its own tanks and the tanks of the East Boston Gas Company for the use of the Refining Company in delivering the oil into said tanks, and that the Gas Company will also provide the necessary platforms for supporting said discharge pipes.

1979 The Gas Company further agrees that it will furnish docks of piers at Everett to which vessels drawing a maximum of twenty-three and one-half (23½) feet of water can safely go and lie afloat. No agreement is made by the Gas Company with respect to docking facilities at any other points.

The Gas Company also agrees to cooperate in giving the utmost possible despatch in the discharging of vessels, and agrees that there will be a berth available within two (2) hours after notice that vessel can be docked.

If the Refining Company makes any deliveries at Everett by rail, the Gas Company will provide discharge pipes of not less than six (6) inches in diameter for the use of the Refining Company from the Gas Company's tanks to the cars containing the oil.

It is understood that the Refining Company does not carry Red River Crude Oil in stock at Beverly and that deliveries by barge from its Beverly plant contemplate the delivery of the Gas Oil Distillate only and at the price named below for Solar Oil.

IV. Price.

The Gas Company agrees to pay to the Refining Company for all oil delivered into its tanks or into the tanks of the East Boston Company 3.625 cents per gallon for the net amount of Red River Crude delivered into said tanks and 3.875 cents per gallon if Solar Oil is delivered, payments to be made in cash on the twentieth of each month for all oil delivered during the preceding month. If more than twenty per cent. (20%) of the oil delivered during the year

is required by the Gas Company to be delivered into tanks 1980 other than the tanks at Everett, the Gas Company will pay to the Refining Company for the excess of oil so delivered 3.745 cents per gallon for Red River Crude, or if Solar Oil is delivered 3.995 cents per gallon.

V. Notice.

The oil shall be delivered into such of the tanks of the Gas Company and of the East Boston Gas Company at such times and in such amounts as may be required by the Gas Company, provided that at least thirty (30) days' notice is given for steamer cargoes and at least five (5) days' notice for barge cargoes and deliveries, which notices may be given to the Refining Company's representatives at Boston, Massachusetts; and provided, also, that the total amount of oil to be delivered during any one year of the contract shall not exceed the amount of fourteen million (14,000,000) gallons as hereinabove mentioned.

VI. Reserve Supply.

In order that the Gas Company may be assured of a sufficient supply of oil at all times for the operation of its works, the Refining Company agrees that it will keep at all times in reserve in its storage tanks at Beverly not less than five hundred thousand (500,000) gallons of oil which shall at all times be available for the purpose of supplying the requirements of the Gas Company, and it agrees that if at any time it shall allow the amount so held in reserve by it in its tanks at Beverly to fall below said five hundred thousand (500,000) gallons, or if the amount on storage in
1981 the tanks of the Gas Company shall fall below five hundred thousand (500,000) gallons owing to the failure of the Refining Company to deliver oil in accordance with the requirements of the Gas Company, the Gas Company may, in such event, go into the market and purchase oil of a similar quality to such an amount as in its judgment is necessary to insure an adequate supply of oil for the operation of its works, and that in such event the Refining Company will pay to the Gas Company the excess, if any, in cost of the oil so purchased over and above the price of the oil to be delivered under this contract, or such excess in cost may be deducted by the Gas Company from any amounts which may become due to the Refining Company hereunder. The Gas Company agrees that its own tanks and the East Boston Gas Company's tanks combined have a storage capacity of not less than two million (2,000,000) gallons.

VII. Exemption Clause.

In case either party shall be temporarily prevented from carrying out the provisions of this contract by wars, riots, fires, strikes, explosions or causes beyond its control, no claim for damages shall accrue to either party against the other, and the contract shall remain in full force.

In witness whereof the parties have hereunto set their corporate seals and caused these presents to be executed in their names and behalf by their respective officers thereunto duly authorized, all on

	Jan		Feb		Mar
	Water	Do	Water	Do	Water
1	4323	4217	4374	4480	4346
2	4051	4276	4219	4657	4448
3	4108	4629	4401	4252	4401
4	4400	4684	4354	4502	4005
5	5241	5007	3959	4260	4148
6	4973	4961	4583	4376	4133
7	4501	4584	4717	4536	4556
8	4399	4489	4528	4478	4510
9	4710	4658	4637	4677	4394
10	5246	5083	4535	4496	4421
11	4755	4710	4704	4602	4176
12	4821	4974	4476	4385	4518
13	4634	4857	4179	4228	3824
14	4454	4411	4309	4409	5216
15	4456	4480	4464	4377	4327
16	4386	4338	4562	4602	4430
17	4100	4336	4469	4395	4353
18	4266	4288	4495	4473	3940
19	4593	4418	4833	4679	4388
20	4044	4321	4364	4376	4337
21	4740	4420	4607	4556	4402
22	4128	4256	4465	4357	3756
23	4024	4173	4312	4349	4690
24	4186	4526	4347	4348	4047
25	4479	4446	4348	4495	3604
26	4844	4393	4406	4479	4586
27	4459	4416	4358	4382	4050
28	4338	4332	4426	4348	4578
29	4285	4366			4703
30	4222	4239			4175
31	4464	4399			4694
	135444	135907	124394	124892	135559

1983

— 1919 —

March		April		May		June		July		Aug		Sept	
Lo		Make	Ld	Make	Lo	Make	Lo	Make	Lo	Make	Lo	Make	Lo
4334		4594	4589	4349	4184	4074	4160	3686	3720	3721	3624	3695	3624
4366		4201	4263	3976	3972	3948	3860	3838	3854	3628	3803	3849	3888
4247		4064	3976	3991	3887	4140	4252	3810	3818	3940	3845	3924	3924
4107		4093	4132	4027	4013	4154	4058	3807	3833	3781	3865	3906	3777
4190		3978	3987	4068	4036	4088	4093	3801	3806	3854	3854	4000	4037
4252		4158	4253	4180	4142	3898	3885	3853	3825	3786	3786	3902	3886
4447		3859	3976	3909	3855	3894	3976	3877	3848	3659	3676	3902	3898
4108		4369	4389	3838	3838	4252	4253	3870	3676	3676	3676	3902	3776
4252		4150	4212	4305	4225	3852	3851	3878	3854	3827	3818	4000	4020
4254		4030	4158	4305	4225	3852	3827	3848	3812	3854	3687	3902	3918
4214		3876	3967	4035	4054	3833	3829	3768	3765	3623	3676	3902	4032
4130		4122	4158	4025	4054	3870	3821	3855	3853	3876	3848	4000	4020
4366		4171	4171	3920	3918	3825	3846	3830	3855	3887	3878	4000	4018
4431		4360	4376	4025	4076	3805	3883	3855	3848	3678	3698	4000	4018
4280		4252	4274	4305	4308	3835	3890	3829	3660	3854	3803	4184	4154
4366		4002	3992	3860	3824	4000	4313	3822	3807	3887	3878	4184	4154
4183		4181	4209	4025	4054	3807	3962	3700	3848	3854	3827	4000	4025
4263		4217	4220	3980	4025	3898	3962	3836	3858	3878	3854	4000	4043
4202		4264	4264	4020	4006	4092	4059	3820	3858	3869	3878	4000	4000
4380		4214	4218	4072	4120	3848	3848	3848	3858	3828	3878	4000	4010
4161		4217	4200	3920	3896	3881	3880	3810	3848	3850	3854	4000	4000
4204		4084	4088	4048	3972	3962	3962	3855	3848	3891	3854	4000	4000
4211		4097	4149	3884	3906	3906	3906	3820	3831	3854	3854	4000	4000
4184		4634	4594	4196	4020	4036	4036	3794	3831	3854	3854	4000	4000
4393		4367	4376	3947	3946	3946	3946	3894	3836	3854	3854	4000	4000
4319		4034	4010	4086	4076	3909	3902	3889	3895	3854	3854	4000	4000
4252		4012	4012	4058	4076	3976	3976	3854	3866	3854	3854	4000	4000
4249		4047	4100	4076	4076	4000	4000	3832	3832	3854	3854	4000	4000
4296		4052	4067	3729	3729	3960	3960	3885	3895	3316	3316	3854	3854
4283				3969	3969			3854	3854	3854	3854	3854	3854
125714		126862	126902	125303	125381	126591	126851	123111	123111	123111	123111	123111	123111

Defendant Exhibit 7 2,0
Sheet 1

	July		Aug		Sept		Oct		Nov		Dec	
FO	Snake	SO	Snake	SO	Snake	SO	Snake	SO	Snake	SO	Snake	SO
160	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	3688	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
860	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
081	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
85	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
885	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
660	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
453	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
85	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
627	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
230	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
78	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
546	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
883	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
911	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
890	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	7400
43 3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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867	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
659	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
48	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
85	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
720	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
639	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
49	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
360	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
37 6	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
4000	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
3960	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

	Jan		Feb		Mch	
	Made	Sent out	Made	S O	Made	S O
1	6200	5475	5086	5060	4155	4463
2	5825	5126	4798	5047	4324	4270
3	4627	5120	4779	4960	4174	4351
4	4633	4878	5310	5374	4555	4353
5	4553	4487	5410	5963	4208	4220
6	4515	4376	5600	5557	3945	3976
7	4521	4637	5117	4718	4044	3901
8	4519	4612	4436	4744	3770	4066
9	4641	4643	4699	4777	3981	4120
10	4723	4538	4688	4633	3969	4061
11	4503	4589	4760	4035	4097	4364
12	4667	4630	4140	4143	4026	4075
13	5047	5338	3965	4114	3885	3888
14	5214	4863	3800	4181	4153	4169
15	4607	4695	4376	4344	4374	4373
16	4513	4556	4437	4550	4035	4207
17	4396	4455	4199	4484	3635	3856
18	4491	4607	4756	4851	3564	3616
19	4466	4645	4704	4514	3660	3671
20	4615	4604	4340	4334	3985	3936
21	4595	4704	4504	4590	3161	3505
22	4611	4710	4723	4953	4321	4089
23	4653	4773	5126	4501	3870	3958
24	4770	4775	4458	4812	4085	4072
25	4774	4779	3470	3973	4160	4108
26	4	4592	4115	4124	3980	4222
27	5140	5201	4576	4526	4353	4304
28	5244	5476	4184	4153	4300	4307
29	5268	5151			4543	4455
30	5254	5226			3649	3781
31	5264	5062			4150	3882
	5403	150075	130073	130060	127921	127951

April		May		June		July			Aug		Sept	
Make	Lo	Make	Lo	Make	Lo	Make	Lo		Make	Lo	Make	Lo
								1				
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								30				
								31				

Oct		Nov		Dec	
Male	Fe	Male	Fe	Male	Fe
4548	4[illegible]	[illegible]	4819	4[illegible]	4[illegible]
4[illegible]	4[illegible]	[illegible]	4568	4559	4500
4[illegible]	4[illegible]	[illegible]	4555	4539	4[illegible]
4[illegible]	4[illegible]	[illegible]	4397	4[illegible]	4[illegible]
4[illegible]	4[illegible]	[illegible]	4305	4178	4[illegible]
4[illegible]	4[illegible]	[illegible]	5046	4534	4[illegible]
4[illegible]	4[illegible]	[illegible]	[illegible]	4691	4[illegible]
4[illegible]	4[illegible]	[illegible]	4557	4342	4[illegible]
4[illegible]	4[illegible]	[illegible]	4[illegible]	4031	4[illegible]
4[illegible]	4[illegible]	[illegible]	4[illegible]	4[illegible]	4[illegible]
4[illegible]	4[illegible]	[illegible]	4[illegible]	4[illegible]	4[illegible]
4[illegible]	4[illegible]	[illegible]	4[illegible]	4145	4[illegible]
4[illegible]	4[illegible]	[illegible]	4[illegible]	4[illegible]	4[illegible]
4[illegible]	4[illegible]	[illegible]	4300	4[illegible]	4[illegible]
4[illegible]	4[illegible]	[illegible]	4[illegible]

Mare	Geld	Mare	Geld	Mare	Geld
4320	4554	4230	4196	4250	4174
4060	4533	4560	4574	3930	3881
4530	4261	4520	4590	3800	3853
4550	4690	4010	4027	3833	3985
4090	3946	3710	3686	3600	3609
4540	4270	4100	4088	3980	3946
3600	3860	4520	4306	3720	3758
4410	4160	4110	4124	3710	3710
4610	4151	4530	4361	3760	3751
4170	4164	3980	3980	3850	3820
4300	4310	4110	4139	3530	3562
3760	4138	3980	3908	3510	3532
5020	4600	4110	4119	3970	3960
4126	4104	4050	4041	3530	3555
4212	4232	3710	3840	3330	3375
3755	3826	4160	4162	3500	3526
3820	4156	3720	3621	3620	3610
4870	4254	3950	3921	3650	3654
4360	4277	3840	3857	3810	3691
4570	4357	4130	4102	4170	4193
3980	4235	4010	4020	3650	3669
4260	4370	4250	4252	4020	3958
4070	4376	4250	4354	3810	3891
4020	4231	3937	3877	3970	4111
4670	4503	4010	4134	3980	3777
4000	3947	4580	4322	3665	3695
4230	4222	4050	4174	3980	4095
4060	4050	4170	4028	4035	3835
4260	4267	3780	3988	3410	3961
3730	3968	4510	4350	3980	3848
		3900	4000	3750	4020
134611	134611	129321	129967	117830	118911

Jan

	Jan		Feb	
	Omaha	Ba	Omaha	Ba
1	5960	5212	6900	6986
2	6074	6026	5717	8625
3	6179	6249	5599	9555
4	6764	6597	5636	5759
5	6876	6389	6460	6363
6	6997	6597	6078	6069
7	5-15	5155	5674	5895
8	5635	5215	6419	6555
9	6231	5695	5638	8095
10	6795	5555	5705	5625
11	6635	6695	5353	6121
12	7-25	6885	5115	5115
13	6665	6851	5895	6395
14	6229	6262	6253	6715
15	8969	6-85	5117	8969
16	6-19	6859	5256	6179
17	8569	7165	5775	9965
18	6-25	6860	5169	8405
19	6229	6559	5505	6255
20	6519	6219	5109	6565
21	10-5	6855	6669	5035
22	6115	6615	7359	9859
23	6-15	6165	6195	6555
24	5-16	6695	6205	6205
25	6-59	6229	5695	5705
26	6269	6559	6286	6216
27	9155	8155	6870	6189
28	6555	6-95	5695	5595
29	5919	6-09	5800	6295
30		6609		
31	5884	5049		
	186.409	186.338	169.697	170.601

June. 30.

March		April		May		June		July		August	
Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
5501	5060	4677	4759	4053	4759	4320	4554	4230	4196	4250	4174
5341	5150	5552	5354	5282	5354	4062	4538	4062	4074	3930	3881
5142	5050	4784	4965	5054	5058	4530	4261	4050	4090	3800	3853
5104	5125	5470	5390	5058	4690	4550	4690	4010	4027	3830	3855
5426	4555	4954	4802	4923	4090	3906	3710	3686	3600	3609	
6303	5070	5110	5050	4830	4270	4100	4084	3980	3946		
6177	5200	5050	4930	5166	4110	3860	4146	4306	3730	3758	
5659	5300	5251	4800	4975	4110	4116	4110	4124	3710	3710	
5417	5603	5669	4750	4836	4610	4151	4030	4361	3760	3751	
4630	4850	5201	5170	4917	4170	4164	3980	3980	3850	3829	
4263	5150	5176	5250	5070	4300	4310	4112	4139	3539	3564	
4123	5070	5091	5030	5036	3960	4128	3980	3904	3510	3524	
5301	4770	4815	5010	4918	5020	4002	3840	4119	3970	3960	
5881	4900	4987	4704	5262	4126	4104	4050	4081	3430	3505	
5463	4910	4976	4630	3865	4212	4234	3740	3840	3330	3375	
5043	5080	5011	4960	4764	3755	3826	4166	4168	3500	3528	
5181	4970	4976	4780	3838	3820	4156	3720	3691	3680	3610	
5157	4960	5476	4800	3884	4870	4254	3950	3921	3650	3654	
5411	5170	5465	4910	4964	4360	4277	3840	3857	3810	3691	
5465	5080	5052	4823	4962	4570	4557	4130	4102	4170	4153	
5385	4890	5244	4910	4962	3980	4235	4010	4020	3650	3669	
5065	4590	5258	4781	4970	4260	4370	4050	4052	4020	3958	
5096	5020	5016	4930	5021	4570	4376	4050	4354	3810	3891	
5096	5040	5050	4980	4707	4020	4231	3937	3877	3970	4111	
4763	5054	5039	5010	5026	4670	4505	4010	4134	3980	3777	
5119	5110	5054	4950	4794	4000	3827	4058	4332	3665	3695	
4670	5115	5054	4910	4743	4230	4111	4045	4171	3940	4095	
4935	5180	5188	5120	4736	4060	4054	4170	4028	4035	3835	
4961	4970	4981	3820	4858	4260	4267	3780	3988	3810	3951	
5111	5070	4805	5020	4774	3930	3926	4010	4050	3960	3848	
4636			4340	4334			3900	4054	3850	4020	
161948	154790	157451	150190	150329	127483	117497	126777	117839	110911		

the day and year first above written, as well as to two other instruments of like tenor and effect.

GULF REFINING COMPANY,
By G. R. NUTTY,
Vice President.

[SEAL.] BOSTON CONSOLIDATED GAS COMPANY,
By J. L. RICHARDS,
President.

1892

Attest:
W. J. GUTHRIE,
Secty.

Attest:
A. S. BULL,
Clerk.

(Here follows Defendants' Exhibit No. 20, marked pages 1983-1985.)

1986 DEFENDANTS' EXHIBIT D 21.

Clinker.
Not produced.

DEFENDANTS' EXHIBIT D 22.

There is no Ex. D 22.

(Here follows Defendants' Exhibit D 23, marked pages 1987 to 1991, inclusive.)

Defendant's Exhibit 723

KINGS COUNTY LIGHTING COMPANY

GENERAL BALANCE SHEETS, DECEMBER 31, 1917, 1918 AND 1919, AND JUNE 30, 1920

ASSETS SIDE	1917	1918	1919	1920
Cash	$37,021.78	$79,433.03	$23,138.03	$22,072.75
Special construction fund	.....	.....	.....	.....
Sinking fund deposit	17,331.19	21,279.07	25,404.60	29,715.77
Coupon deposits	65,325.00	61,400.00	75,700.00	75,750.00
Accounts receivable, City of New York	21,634.68	30,294.91	33,417.63	48,987.01
Consumers' accounts receivable	122,611.58	92,107.56	115,348.12	136,906.09
Other accounts receivable	19,875.03	38,703.53	22,722.71	12,199.64
Bills receivable	1,478.90	1,478.90	1,535.87	1,535.87
Rate deposit	173,433.11	.....	.....	.....
Other deposits and suspense balances	5,634.68	11,477.26	59,772.25	71,248.48
Current assets	$464,345.95	$336,174.26	$362,039.21	$398,415.61
Materials and supplies	115,780.58	138,687.60	149,396.32	124,977.74
Prepayments	1,948.27	2,447.87	2,484.44	6,388.54
Total	$582,074.80	$477,309.73	$513,919.97	$529,781.89
Fixed capital:				

Fixed capital:				
Fixed capital Dec. 31, 1908	$4,909,681.88	$4,902,471.00	$4,899,788.14	$4,899,776.14
Installed since Dec. 31,1908	1,042,468.95	1,144,228.21	1,347,831.14	1,409,977.06
Book cost, gross	$5,952,150.83	$6,046,699.21	$6,247,619.28	$6,309,753.20
Less: Accrued amortization (a)	184,424.52	205,242.36	240,100.90	264,339.10
Fixed capital - net	$5,767,726.31	$5,841,456.85	$6,007,518.38	$6,045,414.10
Work in progress	$10,543.76	$60,939.90	$82,640.35	$80,286.03
Unamortized debt discount and expense	21,577.17	20,861.46	20,113.54	19,731.37
Grand total	$6,381,922.04	$6,400,567.94	$6,624,192.24	$6,675,213.39
LIABILITIES SIDE				
Taxes accrued	$74,065.15	$151,090.42	$242,953.00	$282,762.46
Interest on funded debt	74,700.00	77,604.18	85,075.00	87,025.00
Bills payable	85,000.00	.....	145,000.00	225,000.00
Consumers' deposits	131,265.00	145,826.09	171,591.13	192,509.62
Accounts payable	79,616.65	95,434.95	102,756.87	119,697.09
Other unfunded debt	31,107.37	71,763.99	81,640.85	98,965.09
Total current liabilities	$475,754.17	$541,719.63	$829,016.85	$1,005,959.26
Funded debt	$3,178,000.00	$3,178,000.00	$3,178,000.00	$3,178,000.00
Capital stock	2,000,000.00	2,000,000.00	2,000,000.00	2,000,000.00
Reserve for 95¢ rate	.....	.....	.....	.....
Sinking fund reserve	15,882.30	19,203.30	22,673.76	24,447.15
Suspense credit balances	.....	6,965.04	7,216.42	12,934.80
Corporate surplus	712,285.57	654,679.97	587,285.21	453,872.18
Grand total	$6,381,922.04	$6,400,567.94	$6,624,192.24	$6,675,213.39

Contingent Liabilities: - To consumers for collections of excess of 15 cents per M cubic feet over the statutory rate of 80 cents.

(a) Comprises:				
"Contingency" Reserve	$124,677.82	$141,988.21	$167,171.09	$183,329.89
Reserve for Plant withdrawn from service	59,746.70	63,254.15	72,929.81	29,989.28

Defendant's Exhibit D 23 23@ 2/1917

KINGS COUNTY LIGHTING COMPANY

STATEMENT OF OPERATING REVENUES, EXPENSES AND TAXES FOR THE YEARS ENDED DECEMBER 31, 1917, 1918 AND 1919, AND SIX MONTHS ENDED JUNE 30, 1920

	1917	1918	1919	Six months ended June 30,1920
Gas sold - M cu.ft.:				
Municipal street lighting	67,082	49,946	49,885	23,876
Municipal light, heat and power	3,218	3,797	3,647	2,635
Commercial sales	977,119	1,179,105	1,226,313	778,181
Total - M cu. ft. sold	1,047,419	1,232,848	1,279,845	804,692
Operating Revenues				
Municipal street lighting	$50,312.34	$37,459.41	$37,411.55	$17,906.85
Municipal light, heat and power	2,413.50	2,848.20	2,735.40	1,976.85
Commercial sales	928,261.91	1,119,483.83	1,164,751.65	738,951.34
Total sales of gas	$980,988.25	$1,159,796.44	$1,204,898.60	$758,835.04
Miscellaneous revenue	33,352.27	17,455.19	21,898.63	11,778.10
Total operating revenue	$1,014,034.75	$1,177,251.63	$1,226,797.23	$770,613.14
Revenue Deductions				
Production expense	$464,891.96	$687,652.96	$757,641.72	$571,945.87
Transmission and distribution expense	60,491.88	50,660.49	61,928.79	48,877.46
Municipal street lighting	1,687.28	1,689.78	515.98	2,292.13
Commercial administration	48,200.10	92,000.80	84,180.35	(a) 46,670.27
Promotion of business	11,392.90	12,040.64	9,945.43	7,918.75
General law expense (incl.rate case)	43,454.18	43,097.27	24,020.00	12,400.66
Other general expense	37,558.88	44,235.72	68,931.34	(a) 43,755.54
Amortization	10,510.46	12,328.50	12,872.46	6,079.40
Total operating expenses	$678,187.64	$943,709.16	$1,020,036.07	$741,940.08
Taxes	85,896.02	79,647.43	87,362.98	47,657.63
Uncollectible bills	7,481.90	10,714.04	10,816.48	5,542.13
Total revenue deductions	$771,565.56	$1,034,070.63	$1,118,215.53	$795,139.84
Office rent (main office)	3,283.58	3,689.00	3,752.00	(a)
Total deductions (incl.rents)	$774,849.14	$1,037,759.63	$1,121,967.53	$795,139.84
Operating income	$239,185.61	$139,492.00	$104,829.70	Def$24,526.70
Rent revenue (Morse-net)	6,190.02	19,264.43	(b) 17,638.25	8,557.43
Interest revenue	6,470.18	2,312.36	1,672.92	3,860.94
Gross corporate income	$251,845.81	$161,068.79	$124,140.87	Def$12,088.33
Average per M cu.ft. of gas sold				
Operating revenue	96.81	95.49	95.85	95.76
Revenue Deductions				
Production expense	44.38	55.78	59.20	71.08
Distribution expense	5.78	4.11	4.84	6.07
Municipal street lighting	.16	.14	.04	.29
Commercial administration	4.60	7.46	6.58	5.80
Promotion expense	1.09	.97	.77	.98
General law expense	4.15	3.50	1.88	1.54
Other general expense	3.58	3.59	5.39	5.44
Amortization	1.00	1.00	1.00	1.00
Total operating expenses	64.74	76.55	79.70	92.20
Taxes	8.20	6.46	6.82	5.92
Uncollectible bills	.72	.87	.85	.09
Office rent (net)	.31	.30	.29	(a)
Total deductions (incl. rents)	73.97	84.18	87.66	98.81
Balance, applicable to investment	22.84	11.31	8.19	Def 3.05

1988

(a) Rent of office building included in Commercial administration and Other general expense.

(b) Comprises: Rent from Morse Dry Dock & Repair Co., net, $17,423.15; profit from sale of materials and supplies, $250.52; less other non-operating taxes, $35.40.

Defendants Exhibit 123

KINGS COUNTY LIGHTING COMPANY

DISPOSITION OF GROSS CORPORATE INCOME FOR THE YEARS ENDED DECEMBER 31, 1917, 1918 AND 1919, AND SIX MONTHS ENDED JUNE 30, 1920

	1917	1918	1919	Six months ended June 30, 1920
Gross corporate income	$251,845.81	$161,068.79	$124,140.87	Def.$12,088.33
Deductions from gross income:				
Interest on First mortgage bonds -5%	$37,500.00	$37,500.00	$37,500.00	$18,750.00
Interest on First refunding bonds-5%	121,400.00	128,229.18	121,400.00	60,700.00
Total interest on funded debt	$158,900.00	$165,729.18	$158,900.00	$79,450.00
Interest on consumers' deposits	7,932.61	8,702.49	9,790.35)	19,795.92
Other interest	10,147.31	7,164.38	12,147.31)	
Sinking fund accruals	3,178.00	3,321.00	3,470.46	1,773.39
Amortization of debt discount & expense	684.89	715.71	747.92	382.17
Income tax on security holders	1,492.25	2,243.50	1,357.22	780.73
Total deductions	$182,335.06	$187,876.26	$186,413.26	$102,182.21
Net corporate income for the year (Deficit)	$69,510.75	D $26,807.47	D $62,272.39	D $114,270.54
Surplus brought forward	651,385.54	712,285.57	654,679.97	587,285.21
Surplus credits affecting taxes and operating accounts	1,586.55	188.67	16,038.73)	1,298.71
Other additions to surplus	19,336.07	2,000.00	7,758.73)	
Total credits	$741,818.91	$687,666.77	$616,205.04	$474,313.38
Surplus debits affecting taxes and operating accounts	7,584.42	1,377.93	2,150.47)	20,441.20
Amortization Elsewhere Unprovided For	485.85	5,977.36	.....)	
Other deductions (b)	21,463.07	25,631.51	26,769.36)	
Final surplus	$712,285.57	$654,679.97	$587,285.21	$453,872.18

(b) Appropriations for Contingency Reserve included here are: 1917, $21,020.92; 1918, $24,521.51; 1919, $25,744.92; 1920, $16,158.80.

1989

1994

Defendant's Exhibit DD 23

KINGS COUNTY LIGHTING COMPANY

TAXES CHARGED TO INCOME FOR YEARS ENDED DECEMBER 31, 1917, 1918 AND 1919, AND SIX MONTHS ENDED JUNE 30, 1920

Class of Tax	1917	1918	1919	Six months ended June 30, 1920
Charged to Gas Operations:				
Real estate	$35,750.97	$40,654.56	$47,364.02	$25,623.40
Special franchise	36,846.40	32,712.00	33,276.00	17,907.00
Gross earnings, State	6,833.27	6,129.57	6,206.38	3,929.69
Federal income	6,000.00	.....	.....	.....
Federal capital stock	465.38	151.30	516.58	197.54
Total	$85,896.02	$79,647.43	$87,362.98	$47,657.63
Charged to Non-operating Income:				
Real estate tax on Morse property	906.63	3,399.84	4,980.78)	2,717.04
Real estate tax on other property	.....	.....	35.40)	
Total charged to income	$86,802.65	$83,047.27	$92,379.16	$50,374.67

ASSESSED VALUATION OF REAL ESTATE

Tax Rates	2.07	2.40	2.37	2.54
Land	$501,500	$537,000	$750,000	$750,000
Improvements	1,270,900	1,297,500	1,469,000	1,481,500
Special franchise	1,780,020	1,363,000	1,410,000	1,410,000

1990

1994

Defendant's Exhibit DD23

KINGS COUNTY LIGHTING COMPANY

SIGNIFICANT OPERATING DATA FOR THE YEARS 1917, 1918 and 1919

	1917	1918	1919
Number of Consumers (meters)	34,871	36,308	37,942
Annual increase per cent	9.32	4.12	4.50
Per mile of main	182.90	189.80	194.87
Number of services	18,525	18,919	20,288
Length of mains (miles)	190.66	191.30	194.70
Annual increase per cent	0.25	0.34	0.18
Manufacturing capacity (24 hrs.)	7,300,000	7,300,000	9,100,000
Average daily make (cu.ft.)	3,377,370	4,008,460	4,292,130
Gas made during year - M cu.ft.	1,232,741	1,463,088	1,566,628
Gas sold during year - M cu.ft.	1,047,420	1,232,848	1,279,845
Annual increase " "	113,014	185,428	46,997
" " per cent	12.10	17.70	3.81
Per mile of main - M cu.ft.	5,493	6,445	6,573
Gas made less gas sold (M cu.ft.)	185,321	230,240	286,783
Ratio of loss to make	15.03	15.74	18.31
Coal used - tons of 2000 lbs.	229,495.90	39,922.70	40,003.03
Total cost	$149,709.20	$238,629.66	$256,130.62
Cost per ton	$5.08	$5.98	$6.40
Cost (cents)per M cu.ft. Mf'd	12.14	16.31	16.35
Gas oil:			
Gallons used	5,018,086	4,905,614	5,375,887
" per M cu.ft. Mf'd	4.07	3.35	3.43
Cost per gal. (cents)	4.83	6.78	6.46
Cost per M cu.ft. Mf'd (cents)	19.67	22.73	22.16

1991

1994

Defendants' Exhibit Y 24

KINGS COUNTY LIGHTING COMPANY

COMPARATIVE STATEMENTS SHOWING OPERATING RESULTS AND FINANCIAL CONDITIONS 1904-1918

Accountant's Schedules prepared by Chas. Frank, of the Bureau of Statistics & Accounts and Introduced as Exhibits in the Supreme Court, in suit of company to set aside the 8oG Act of 1916.

White Print-Act #3

1993

1994

Defendant's Exhibit 1124

KINGS COUNTY LIGHTING COMPANY

COMPARATIVE STATEMENTS SHOWING OPERATING RESULTS AND FINANCIAL CONDITIONS 1904 - 1918

Accountant's Schedules prepared by Chas. Frank, of the Bureau of Statistics & Accounts and Introduced as Exhibits in the Supreme Court, in suit of company to set aside the 80¢ Act of 1916.

Exhibit	
D 44	Comparative General Balance Sheet Dec. 31, 1904 to 1908 inclusive.
D 44'	Dec. 31, 1909 to 1917 inclusive.
D 44C	General Balance Sheet Dec. 31, 1918.
D 45	Comparative Statement of Operating Revenues and Expenses, Income and Surplus for years ending Dec. 31, 1904 to 1908 inclusive.
D 45A	Comparative Statement of Operating Revenues, Expenses and Taxes for the years ending Dec. 31, 1909 to 1917 inclusive.
D 45C*	Same for 1918.
D 45B	Disposition of Gross Corporate Income for the years ending Dec. 31, 1909 to 1917 inclusive.
D 45 C	Same for 1918.
D 46	Detail of Operating Expenses for the years 1909 to 1917 inclusive.
D 46C	Same for 1918.
D 46A	Detail of Operating Expenses for the years 1909 to 1917 inclusive (Concluded).
D 46C	Same for 1918 (Concluded).
D 46	Tax charges and payments for the years ended Dec. 31, 1912 to 1917 inclusive.
D 46C	Same for 1918.
D 47	Significant Operating Data for the years ended Dec. 31, 1909 - 1917 inclusive.
D 47C	Same for 1918.

* Exhibits for the year 1918 were prepared and offered as supplementary after the exhibits for the previous years had been admitted. The entire group for the year 1918 were marked Exhibit D 45C.

Henfield

KINGS COUNTY LIGHTING COMPANY

COMPARATIVE GENERAL BALANCE SHEET FOR YEARS ENDING DECEMBER 31, 1904, to 1908 INCLUSIVE

	1904	1905	1906	1907
ASSETS SIDE				
Cash	$36,150.92	$37,742.69	$11,068.06	$44,920.
Coupon deposits	.....	.....	39,725.00	47,300.
Accounts receivable, City of New York	31,832.02	161,223.14	290,508.06	36,805.
Consumers' accounts receivable	36,237.08	48,082.58	68,393.21	59,228.
Other accounts receivable (a)	12,873.67	7,057.55	8,543.32	7,443.
Bills receivable	.....	.....	.....	1,000.
Current assets	$117,093.69	$254,105.96	$418,237.65	$196,697.
Materials and supplies	18,969.10	34,800.31	27,043.40	36,715.
Prepayments	.....	.....	25.35	142.
Total	$136,062.79	$288,906.27	$445,306.40	$233,556.
Fixed capital - Gross:				
Permanent investment	$4,482,936.37	$4,481,888.72	$4,482,802.82	$4,491,802.
Construction	7,319.71	56,862.13	162,652.02	232,812.
Arc lamps	996.34	521.54	664.38	772.
Stable	1,125.00	1,566.00	2,300.00	2,225.
Furniture and fixtures	875.35	2,600.00	2,600.00	3,233.
Total (b)	$4,493,252.77	$4,543,438.39	$4,651,019.22	$4,730,846.
Grand total	$4,629,315.06	$4,832,344.66	$5,096,325.62	$4,964,403.
LIABILITIES SIDE				
Taxes accrued	$28,636.21	$1,965.76	$2,014.33	$6,183.
Interest on funded debt	9,375.00	9,375.00	49,100.00	49,825.
Bills payable	.....	50,000.00	200,000.00	.....
Consumers' deposits	36,757.45	44,532.13	52,663.65	62,023.
Accounts payable	7,104.45	9,193.40	14,391.64	12,924.
Other unfunded debt	1,861.86	2,494.48	3,066.16	2,347.
Total unfunded debt	$83,734.97	$117,550.77	$321,235.78	$133,304.
Funded debt: (b)				
First mortgage bonds (K.C.G.A I. Co.)	$750,000.00	$750,000.00	$750,000.00	$750,000.
Debenture bonds (K.C.G.A I. Co.)	250,000.00	250,000.00	250,000.00	250,000.
First refunding mortgage bonds	$1,205,000.00	1,329,000.00	1,329,000.00	1,329,000.
Total funded debt outstanding	$2,205,000.00	$2,329,000.00	$2,329,000.00	$2,329,000.
Capital stock	$2,000,000.00	$2,000,000.00	$2,000,000.00	$2,000,000.
Corporate surplus ("Profit & Loss")	340,581.09	385,793.89	446,089.84	502,098.
Grand Total	$4,629,316.06	$4,832,344.66	$5,096,325.62	$4,964,403.
(a) Does not include funded debt nominally but not actually issued	$128,000.00	$4,000.00	$4,000.00	$[illegible]74,000.

(b) The cost of the property on Dec. 31,1908, was the capital stock, $2,000,000; the first mortgage and debenture bonds, $1,000,000; and plus cash, $336,367. (Petition of the Kings County Lighting Co., in case No. 1474, application for approval of issue of bonds). Such $2,113,000 issued for the New Utrecht lighting contract. (Petition of the Kings County Lighting Co., for rehearing in case No. 1273, - Lighting Co., vs. Wilcox, et al, page 870; also statement of Morgan J. O'Brien, counsel for company, page 842 ibid.)

Defendant's Exhibit 11a 1

NTY LIGHTING COMPANY

SHEET FOR YEARS ENDING DECEMBER 31, 1904, to 1908 INCLUSIVE

1905	1906	1907	1908
$37,742.69	$11,068.06	$44,920.20	$107,499.63
.....	39,725.00	47,300.00	46,850.00
161,223.14	290,508.06	36,805.29	37,065.31
48,082.58	68,393.21	59,228.44	68,376.33
7,057.55	8,543.32	7,443.56	49,885.83
.....	.....	1,000.00	1,000.00
$254,105.96	$418,237.65	$196,697.49	$310,677.10
34,800.31	27,043.40	36,716.91	29,194.10
.....	25.35	142.40	175.48
$288,906.27	$445,306.40	$233,556.80	$340,046.68
$4,481,888.72	$4,482,802.82	$4,491,802.82	$4,766,938.09
56,862.13	162,652.02	232,812.22	164,542.74
521.54	664.38	772.80	1,001.75
1,566.00	2,300.00	2,225.00	2,845.00
2,600.00	2,600.00	3,233.55	4,039.44
$4,543,438.39	$4,651,019.22	$4,730,846.39	$4,939,367.02
$4,832,344.66	$5,096,325.62	$4,964,403.19	$5,279,413.70
$1,965.76	$2,014.33	$6,183.95	$4,588.54
9,375.00	49,100.00	49,825.00	56,225.00
50,000.00	200,000.00	.....	.....
44,532.13	52,663.65	62,023.95	69,860.15
9,193.40	14,391.64	12,924.16	22,644.66
2,494.48	3,066.16	2,347.65	995.33
$117,550.77	$321,235.78	$133,304.71	$154,313.68
$750,000.00	$750,000.00	$750,000.00	$750,000.00
250,000.00	250,000.00	250,000.00	250,000.00
1,329,000.00	1,329,000.00	1,329,000.00	1,603,000.00
$2,329,000.00	$2,329,000.00	$2,329,000.00	$2,603,000.00
$2,000,000.00	$2,000,000.00	$2,000,000.00	$2,000,000.00
385,793.89	446,089.84	502,098.48	522,100.02
$4,832,344.66	$5,096,325.62	$4,964,403.19	$5,279,413.70
$4,000.00	$4,000.00	$274,000.00	.....

Grand total $5,400,467.94

(J) Composed of "Contingency Reserve," $141,988.71; and "Reserve for Plant Withdrawn from Service," $[illegible]54.15.

00,000; the first mortgage and debenture bonds, $1,000,000; and the refunding bonds, $1,603,000; total,$4,603,000; case No. 1474, application for approval of issue of bonds). Such cost includes securities of the face value of f the Kings County Lighting Co., for rehearing in case No. 1273, - record on appeal People ex. rel. Kings County J. O'Brien, counsel for company, page 842 ibid.)

Denfenda

KINGS COUNTY LIGHTING COMPANY

COMPARATIVE GENERAL BALANCE SHEET FOR YEARS ENDING DECEMBER 31, 1909, to 1917 INCLUSIVE

	1909 (a)	1910	1911	1912	1913	1914
ASSETS SIDE						
Cash	$268,443.96	$240,674.94	$121,033.18	$98,796.48	$147,411.39	$124,842.43
Special construction fund	.....	.....	.....	350,000.00	153,297.16	31,644.41
Sinking fund deposit	.....	.....	.....	.....	3,168.00	6,478.56
Coupon deposits	102,025.00	139,200.00	139,025.00	117,000.00	62,425.00	64,200.00
Accounts receivable, City of New York	33,025.24	36,473.96	39,819.58	40,509.69	39,663.95	39,986.06
Consumers' accounts receivable (b)	80,185.70	97,870.83	105,899.92	(c) 123,717.76	97,283.94	111,868.52
Other accounts receivable	10,716.82	9,529.04	9,034.12	12,523.26	12,094.04	14,532.01
Bills receivable	1,000.00	1,000.00	1,000.00	1,000.00	1,055.00	1,305.00
Rate deposit (d)	.....	.....	.....	.....	.....	.....
Other deposits and suspense balances	.....	.....	.....	.....	.....	.....
Current assets	$495,396.72	$524,748.77	$415,811.80	$743,547.19	$516,398.48	$394,851.99
Materials and supplies	31,823.61	39,643.16	28,478.39	54,995.52	54,168.15	68,406.70
Prepayments	1,164.81	1,422.92	1,375.49	1,309.10	1,744.52	2,875.18
Total	$528,385.14	$565,814.85	$445,665.68	$799,851.81	$572,311.15	$466,133.87
Fixed capital:						
Fixed Capital Dec.31,1908 (e)	$4,932,967.57	$4,929,993.37	$4,927,065.70	$4,924,435.11	$4,921,514.51	$4,918,884.88
Installed since Dec.31,1908 (f)	117,787.33	201,798.99	360,179.63	427,003.74	633,481.43	799,865.40
Book cost, gross	$5,050,754.90	$5,131,792.36	$5,287,245.33	$5,351,438.85	$5,554,995.94	$5,718,750.28
Less: Accrued amortization (g)	19,811.92	40,927.78	60,339.21	65,137.06	76,086.53	97,717.67
Fixed capital-net	$5,030,942.98	$5,090,864.58	$5,226,906.12	$5,286,301.79	$5,478,909.41	$5,621,032.61
Work in progress	.....	.....	.....	.....	.....	.....
Unamortized debt discount and expense	.....	.....	.....	$24,719.16	$24,144.81	$23,544.64
Grand total	$5,559,328.12	$5,656,679.43	$5,672,571.80	$6,110,872.76	$6,075,365.37	$6,110,711.12
LIABILITIES SIDE						
Taxes accrued	$10,114.04	$6,804.55	$7,163.19	$7,711.01	$8,778.51	$9,714.53
Interest on funded debt	111,400.00	154,825.00	148,400.00	126,375.00	71,800.00	73,575.00
Bills payable	.....	(i) 250,000.00	(i) 250,000.00	.....	.....	.....
Consumers' deposits	83,333.38	90,913.00	99,128.00	106,975.00	119,540.00	122,785.00
Accounts payable	17,842.49	32,427.23	20,596.81	45,558.74	41,957.39	58,636.35
Other unfunded debt	1,276.20	2,539.80	5,908.78	9,818.22	17,315.30	15,947.66
Total current liabilities	$223,966.11	$537,509.58	$531,196.78	$296,437.97	$259,391.20	$280,658.54
Funded debt	$2,803,000.00	$2,553,000.00	$2,553,000.00	$3,178,000.00	$3,178,000.00	$3,178,000.00
Capital stock	2,000,000.00	2,000,000.00	2,000,000.00	2,000,000.00	2,000,000.00	2,000,000.00
Reserve for 85¢ rate	.....	.....	15,164.71	108,533.01	238,542.19	.....
Sinking fund reserve (i)	.....	.....	.....	1,302.84	3,968.09	6,752.96

Defendant's Exhibit D24

KINGS COUNTY LIGHTING COMPANY
GENERAL BALANCE SHEET, DECEMBER 31, 1918.

	1918
ASSETS SIDE	
Cash	$79,433.03
Special construction fund	.....
Sinking fund deposit	21,279.07
Coupon deposits	61,400.00
Accounts receivable, City of New York	30,294.91
Consumers' accounts receivable	92,107.56
Other accounts receivable	38,703.53
Bills receivable	1,478.90
Rate deposit	.....
Other deposits and suspense balances	11,477.26
Current assets	$336,174.26
Materials and supplies	138,687.60
Prepayments	2,447.87
Total	$477,309.73
Fixed capital:	
Fixed Capital Dec. 31, 1908	$4,902,471.00
Installed since Dec. 31, 1908	1,144,528.21
Book cost, gross	$6,046,699.21
Less: Accrued amortization (j)	205,242.36
Fixed capital-net	$5,841,456.85
Work in progress	$60,939.90
Unamortized debt discount and expense	20,861.46
Grand total	$6,400,567.94
LIABILITIES SIDE	
Taxes accrued	$151,090.42
Interest on funded debt	77,604.18
Bills payable	.....
Consumers' deposits	145,876.09
Accounts payable	95,434.95
Other unfunded debt	71,763.99
Total current liabilities	$541,719.63
Funded debt	$3,176,000.00
Capital stock	2,000,000.00
Reserve for 85¢ rate	.....
Sinking fund reserve	19,303.30
Suspense credit balances	8,965.04
Corporate surplus	654,679.97
Grand total	$6,400,567.94

(j) Composed of "Contingency Reserve," $141,988.71; and "Reserve for Plant Withdrawn from Service," $63,254.15.

KINGS COUNTY LIGHTING COMPANY

COMPARATIVE STATEMENT OF OPERATING REVENUES AND EXPENSES, INCOME AND SURPLUS, FOR THE YEARS ENDING DECEMBER 31,1904 TO 1908 IN

	1904 (6 mos.)	1905	1906	1907	1908	1904	1905
Gas sold (M.cu.ft.)	127,462	258,916	323,521	386,005	460,211		Avera e p
Revenue:							
Municipal street lighting	$61,129.99	$122,755.92	$127,618.92	$126,101.99	$127,346.49		
Commercial metered lighting	92,357.90	190,467.68	252,366.62	314,875.67	387,188.04		
Miscellaneous	246.49	507.47	784.46	707.49	699.95		
Total	$153,734.38	$313,731.07	$380,770.00	$441,685.15	$515,234.48	120.61	121.22
Production expenses							
Labor	$6,452.47	$12,761.12	$16,814.88	$19,162.56	$18,633.90	5.06	4.93
Fuel	15,606.56	31,677.22	40,731.05	48,884.49	54,671.11	12.24	12.24
Oil	18,090.24	39,539.85	48,246.25	65,417.49	75,825.76	14.19	16.28
Repairs	1,036.84	4,273.68	5,474.40	5,356.08	7,433.92	.82	1.63
Gas storage and misc. expense	3,175.78	6,741.33	8,095.87	9,711.07	9,653.22	2.49	2.60
Residuals (Cr.)	2,627.02	5,746.46	6,821.86	7,615.92	6,584.98	2.06	2.27
Total production expenses	$41,736.87	$89,196.72	$112,540.79	$141,015.77	$159,632.93	32.74	34.46
Distribution expense (a)	2,535.17	4,796.50	8,702.29	9,688.32	13,348.41	1.99	1.85
Distribution repairs	1,711.40	3,016.22	7,563.22	9,870.66	11,848.89	1.34	1.17
Street lamp repairs and operation	10,452.29	21,991.28	25,440.39	28,611.50	43,554.74	8.20	8.50
Commercial expenses	4,278.35	11,777.59	14,788.89	22,446.96	23,009.07	3.36	4.55
General expenses	1,450.97	5,823.20	6,289.68	8,883.27	(e) 5,215.42	1.14	2.25
Total operating expenses	$62,165.05	$136,601.51	$175,295.26	$220,516.48	$256,607.46	48.77	52.78
Taxes	7,876.12	14,778.82	16,530.99	22,687.24	23,250.00	12.49	5.52
Uncollectible bills	912.42	2,578.03	3,486.04	4,636.62	5,843.06	.72	1.00
Total	$70,953.59	$153,958.36	$195,314.29	$247,840.34	$285,700.52	61.98	59.30
Realized depreciation (c)	.....	1,636.91	335.90	980.13	1,212.05	..	.63
Total expenses, taxes, etc.	$70,953.59	$155,595.27	$195,650.19	$248,820.47	$286,912.57	61.98	59.93
Operating income	$82,780.79	$158,135.80	$185,119.81	$192,864.68	$228,321.91	58.63	61.29
Misc. rent revenue	.....	200.00	200.00	200.00	200.00		
Interest revenues	994.52	2,828.58	1,537.72	32,192.60	2,586.14		
Gross income	$83,775.31	$161,164.38	$186,857.53	$225,257.28	$231,108.05		
Deductions from gross income (f)							
Interest on funded debt	54,236.02	115,650.71	116,450.00	116,350.00	117,978.64		
Interest on consumers' deposits	268.50	784.90	1,386.58	1,910.38	1,835.85		
Other interest	953.74	.....	8,725.00	8,983.34	1,298.62		
Total deductions	$55,458.76	$116,435.61	$126,561.58	$127,243.72	$121,113.11		
Net corporate income	$28,317.00	$44,728.77	$60,295.95	$98,013.56	$109,994.94		
Surplus brought forward	320,140.17	340,581.09	385,793.89	446,089.84	502,098.48		
Profit and loss adjustments - debit	(b) 7,876.13	(b) 484.03	.....	(d) 2,004.92	Cr 6.60		
Dividends	.....	.....	.....	40,000.00	90,000.00		
Final surplus	$340,581.09	$385,793.89	$446,089.84	$502,098.48	$522,100.02		

(a) Includes development expenses account soliciting new business, recorded under the accounts "Competition Special" and "Gas Stove Expense".
(b) Taxes pertaining to prior periods.
(c) Represent loss on abandoned main and plant. In 1907 $500 additional, representing loss on abandoned or sold stable equipment, has been charg
(d) Made up of the following items, -- Debit: Cash shortage, $119.67; deficiency in taxes accrued, $1,276.31; adjustment of consumers ledger account total; $4,135.27. Credits: Recovery from surety company, $1,200; excess of tax liability on books, $930.45; total credits $2,130.45.
(e) Excluding $3,345.20 legal expenses accrued on the books, but later credited to Profit and Loss as not paid.
(f) Exclusive of rent of office building charged to operating expenses.

Defendant's Exhibit #24

ENDING DECEMBER 31,1904 TO 1908 INCLUSIVE

	1904	1905	1906	1907	1908
	Average per M. cu. ft. sold				
	120.61	121.22	117.70	114.42	111.96
	5.06	4.93	5.20	4.96	4.05
	12.24	12.24	12.59	12.66	11.88
	14.19	15.28	14.91	16.95	16.48
	.82	1.63	1.69	1.39	1.61
	2.49	2.60	2.51	2.52	2.10
	2.06	2.22	2.11	1.95	1.43
	32.74	34.46	34.79	36.53	34 69
	1.99	1.85	2.69	2.51	2.90
	1.34	1.17	2.34	2.56	2.88
	8.20	8.50	7.86	7.41	9.46
	3.36	4.55	4.57	5.82	5.00
	1.14	2.25	1.93	2.30	1.13
	48.77	52.78	54.18	57.13	55.76
	12.49	5.52	5.11	5.88	5.06
	.72	1.00	1.08	1.20	1.27
	61.98	59.30	60.37	64.21	62.08
	..	.63	.11	.25	.26
	61.98	59.93	60.48	64.46	62.34
	58.63	61.29	57.22	49.96	49.61

sold' and "Gas Stove Expense".

sold stable equipment, has been charged to various operating expenses.
adjustment of consumers ledger account of bad debts, $2,789.39;
5; total credits $2,130.45.

	1909	1910	1911	1912	1913	1914	1915	
Gas sold – M cu.ft. :								
Municipal street lighting	72,707	73,507	75,871	78,399	80,721	82,644	83,457	
Municipal light, heat and power	4,382	4,220	4,123	3,485	2,542	2,713	2,311	
Commercial sales	443,662	503,001	554,107	619,599	647,032	733,035	765,691	
Total – M cu.ft. sold	520,671	580,728	634,101	701,483	730,295	818,392	851,459	
Operating Revenues								
Municipal street lighting	$127,624.00	$128,993.46	$133,076.03	$137,011.12	$141,667.88	$145,048.58	$146,499.83	$1
Municipal light, heat and power	4,382.40	4,219.90	4,123.30	3,485.20	2,542.70	2,652.13	2,195.45	
Commercial sales	443,581.90	503,000.95	554,106.70	619,598.40	647,037.00	(c)715,071.53	727,406.80	
Gross sales	$575,588.30	$636,214.31	$691,306.03	$760,094.72	$791,247.58	$862,772.24	$876,102.08	
Less discounts, etc.	203.62	289.67	306.32	611.15	329.36	451.57	237.09	
Net sales	$575,384.68	$635,924.64	$690,999.71	$759,483.57	$790,913.22	$862,320.67	$875,864.99	$8
Miscellaneous revenue	5,890.76	6,115.96	6,513.23	9,360.72	13,778.15	11,893.19	14,836.80	
Total	$581,275.44	$642,040.60	$697,512.94	$768,844.29	$804,691.37	$874,213.86	$890,701.79	$8
Revenue Deductions								
Production expense	$157,255.67	$162,084.55	$177,670.49	$215,238.79	$273,226.92	$306,179.89	$335,811.90	$2
Distribution expense	21,538.36	28,231.46	35,702.27	54,717.29	66,603.87	57,916.36	60,393.59	
Municipal street lighting	38,528.92	41,150.67	41,255.60	45,813.30	45,590.05	45,529.13	47,407.63	
Commercial administration	22,836.16	24,799.99	28,036.87	29,629.39	36,316.79	34,309.10	36,960.45	
Promotion of business	2,292.24	2,452.63	2,595.21	3,463.19	7,307.19	5,977.91	7,005.79	
General law expense	2,235.33	10,682.47	27,733.73	12,053.63	2,032.77	14,919.77	13,919.06	
Other general expense	11,829.70	16,262.55	18,493.77	19,373.16	25,802.73	26,877.90	31,764.86	
Amortization	20,039.92	21,893.49	20,243.32	6,410.19	12,964.85	25,290.02	25,826.62	
Total operating expenses	$276,556.30	$307,557.81	$351,731.26	$386,698.94	$469,845.17	$517,000.08	$559,089.90	$6
Taxes	34,792.94	38,336.68	56,893.41	57,203.80	60,408.50	49,818.28	50,426.71	
Uncollectible bills	2,748.75	3,897.71	4,168.86	5,958.76	6,584.04	6,699.27	7,626.39	
Total revenue deductions	$314,097.99	$349,792.20	$412,793.53	$449,861.50	$536,837.71	$573,517.63	617,043.00	$7
Office rent (net)	2,476.33	2,803.00	2,899.00	2,854.47	2,909.55	2,611.00	2,733.41	
Total deductions (incl. rents)	$316,574.32	$352,595.20	$415,692.53	$452,715.97	$539,747.26	$576,128.63	$619,776.41	$7
Operating Income	$264,701.12	$289,445.40	$281,820.41	$316,128.32	$264,944.11	$298,085.23	$270,925.38	$2
Rent revenue (b)	200.00	200.00	200.00	200.00	200.00	200.00	200.00	
Interest revenue	6,457.17	8,768.18	7,293.47	8,939.86	8,882.59	4,537.44	5,097.12	
Gross corporate income	$271,358.29	$298,413.58	$289,313.88	$325,268.18	$269,026.70	$302,822.67	$276,222.50	$2
			Average per M cu.ft. of Gas Sold					
Operating revenue	111.64	110.55	110.00	109.60	110.19	106.82	104.61	
Revenue deductions								
Production expense	30.20	27.91	28.02	30.68	37.41	37.41	39.44	
Distribution expense.	4.14	4.86	5.63	7.80	9.12	7.08	7.09	
Municipal street lighting	7.40	7.09	6.50	6.53	6.24	5.56	5.57	
Commercial administration	4.40	4.27	4.42	4.23	4.97	4.19	4.34	
Promoting expense	.43	.42	.41	.49	1.00	.73	.82	
General law expense	.43	1.84	4.37	1.72	.28	1.82	1.63	
Other general expense	2.27	2.80	2.92	2.76	3.54	3.29	3.73	
Amortization	3.85	3.77	3.19	.91	1.78	3.09	3.03	
Total operating expenses	53.12	52.96	55.46	55.12	64.34	63.17	65.65	
Taxes	6.68	6.60	8.97	8.15	8.27	6.09	5.92	
Uncollectible bills	.53	.67	.66	.85	.90	.82	.88	
Office rent (net)	.47	.48	.46	.41	.40	.29	.34	
Total deductions (incl. rents)	60.80	60.71	65.55	64.53	73.91	70.37	72.79	
Balance, applicable to investment	50.84	49.84	44.45	45.07	36.28	36.45	31.82	

(a) Adjusted as to rentals to conform with previous years.
(b) Includes in 1916 and 1917 dock rentals; and in 1917 net rental received from property leased to Morse Dry Dock & Repair Co.
(c) Commercial rate reduced from $1.00 to 95¢ July 1, 1914.

1915	1916	(a) 1917
83,457	79,538	67,082
2,311	2,566	3,218
765,691	852,302	977,119
851,459	934,406	1,047,419
$146,499.83	$118,691.23	$50,312.84
2,195.45	1,924.35	2,413.50
727,406.80	809,686.71	928,261.91
$876,102.08	930,302.29	$980,988.25
237.09	179.93	305.77
$875,864.99	$930,121.36	$980,682.48
14,836.80	20,240.77	33,352.27
$890,701.79	$950,363.13	$1,014,034.75
$335,811.90	$389,223.27	$464,891.96
60,393.59	74,906.34	60,491.68
47,407.63	32,329.48	1,667.28
36,960.45	39,298.59	46,200.10
7,005.79	8,133.97	11,392.90
13,919.06	22,701.15	43,454.18
31,764.86	36,393.55	37,558.88
25,826.62	39,016.20	10,510.46
$569,089.90	$642,002.55	$678,187.64
50,426.71	75,975.59	85,896.02
7,626.39	7,626.70	7,481.90
617,043.00	$725,504.84	$771,565.56
2,733.41	2,887.50	3,283.58
$619,776.41	$728,392.34	$774,849.14
$270,925.38	$221,970.79	$239,185.61
200.00	5,939.26	6,190.02
3,097.12	1,972.72	6,470.18
$274,222.50	$227,882.77	$251,845.81
104.61	101.71	96.81
39.44	41.65	44.38
7.09	8.01	5.78
5.57	3.46	.16
4.34	4.21	4.60
.82	.87	1.09
1.63	2.43	4.15
3.73	3.89	3.58
3.03	4.18	1.00
65.65	68.70	64.74
5.92	8.13	8.20
.88	.81	.72
.34	.31	.31
72.79	77.95	73.97
31.82	23.76	22.84

Defendants' Exhibit No 24

KINGS COUNTY LIGHTING COMPANY

STATEMENT OF OPERATING REVENUES, EXPENSES AND TAXES FOR THE YEAR ENDING DECEMBER 31, 1918

	1918	
Gas sold - M cu. ft.:		
Municipal street lighting	49,946	
Municipal light, heat and power	3,797	
Commercial sales	1,179,105	
Total - M cu. ft. sold	1,232,848	
Operating Revenues		
Municipal street lighting	$37,459.41	
Municipal light, heat and power	2,848.20	
Commercial sales	1,119,488.83	
Gross sales	$1,159,796.44	
Less discounts, etc.	.....	
Net sales	$1,159,796.44	
Miscellaneous revenue	17,455.19	
Total	$1,177,251.63	
Revenue Deductions		
Production expense	$687,652.96	
Distribution expense	50,660.49	
Municipal street lighting	1,689.78	
Commercial administration	92,000.80	
Promotion of business	12,040.64	
General law expense	43,097.27	
Other general expense	44,238.72	
Amortization	12,326.50	
Total operating expenses	$943,709.15	
Taxes	79,647.43	
Uncollectible bills	10,714.04	
Total revenue deductions	$1,034,070.63	
Office rent (net)	3,669.00	
Total deductions (incl. rents)	$1,037,739.63	
Operating income	$139,492.00	
Rents revenue (Morse-net)	19,264.43	
Interest revenue	2,312.36	
Profit on [illegible] Dealers and supplies		
Gross corporate income	$161,068.79	
Average per M cu. ft. Gas Sold		
Operating revenue	95.49	
Revenue deductions		
Production expense	55.76	
Distribution expense	4.11	
Municipal street lighting	.14	
Commercial administration	7.46	
Promotion expense	.97	
General law expense	3.50	
Other general expense	3.59	
Amortization	1.00	
Total operating expenses	76.55	
Taxes	.87	
Uncollectible bills	.46	
Office rent (net)	.30	
Total deductions (incl. rents)	84.18	
Balance, available to investment	11.31	

* Net after any discounts etc.

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KINGS COUNTY LIGHTING COMPANY

DISPOSITION OF GROSS CORPORATE INCOME FOR THE YEARS ENDING DECEMBER 31, 1909 to 1917 INCLUSIVE

	1909	1910	1911	1912	1913	
Gross Corporate Income	$271,358.29	$298,413.58	$289,313.88	$325,268.18	$269,026.70	$
Deductions from gross income						
Interest on First mortgage bonds - 5%	$37,500.00	$37,500.00	$37,500.00	$37,500.00	$37,500.00	
Interest on Debenture bonds - 5%	12,500.00	12,500.00	12,500.00	7,326.39	.....	
Interest on First refunding bonds - 5%	81,816.67	90,150.00	90,150.00	102,025.00	(g) 106,433.55	(g)
Total interest on funded debt	$131,816.67	$140,150.00	$140,150.00	$147,851.39	$143,933.55	$
Interest on consumers' deposits	2,378.38	5,703.93	6,034.68	6,553.71	7,227.35	
Other interest			97.74	1,360.49	2,976.67	
Sinking fund accruals (a)				1,302.84	2,665.25	
Amortization of debt discount and expense				280.84	574.35	
Income tax on security holders.						
Total deductions	$134,195.05	$145,853.93	$146,282.42	$157,349.27	$157,377.17	$
Net corporate income for the year	$137,163.24	$152,559.65	$143,031.46	$167,918.91	$111,649.53	$
Surplus brought forward	522,100.02	532,362.01	566,169.85	573,210.31	526,598.94	
Surplus credits affecting taxes and operating accounts	228.32	2,504.44	250.57	236.78	3,138.30	
Other additions to surplus	.....	.....	.....	.....	.....	(c)
Total credits	$659,491.58	$687,426.10	$709,451.88	$741,366.00	$641,386.77	$
Surplus debits affecting taxes and operating accounts	216.93	226.70	79.06	203.52	.....	
Amortization Elsewhere Unprovided For	912.64	1,027.55	997.78	1,095.24	813.70	
Other deductions	6,000.00	.....	.....	100.00	100.00	
Reserve for 85¢ rate (b)			15,164.71	93,366.30	130,009.18	Cr
Dividends	120,000.00	120,000.00	120,000.00	120,000.00	115,000.00	
Final surplus (f)	$532,362.01	$566,169.85	$573,210.31	(e) $526,598.94	$395,463.89	$

(a) For the amortization of $116,000 first mortgage refunding bonds.
(b) Represents the difference between the rate charged, $1 per M. cu.ft., and 85¢, the rate ordered by the Commission in Case #1273. The amo
(c) Includes $1,670.02 court costs in rate litigation.
(d) Includes $21,070.92 appropriated for "Contingency Reserve", included in the balance sheet exhibit in Accrued Amortization.
(e) As modified by 1913 adjustments in agreement with corrected report for 1912.
(f) As modified by 1910 adjustments in agreement with corrected report for 1909.
(g) Excluding interest on bonds issued for the Special Construction Fund, Such interest, less interest earned by the fund, has been included

Defendants Exhibit D24

KINGS COUNTY LIGHTING COMPANY

ISPOSITION OF GROSS CORPORATE INCOME FOR THE YEARS ENDING DECEMBER 31, 1909 to 1917 INCLUSIVE

	1909	1910	1911	1912	1913	1914	1915	1916	1917
	$271,358.29	$298,413.58	$289,313.88	$325,268.18	$269,026.70	$302,872.67	$274,222.50	$227,862.77	$251,845.81
	$37,500.00	$37,500.00	$37,500.00	$37,500.00	$37,500.00	$37,500.00	$37,500.00	$37,500.00	$37,500.00
	12,500.00	12,500.00	12,500.00	7,326.39	.....	.....	.....		
	81,816.67	90,150.00	90,150.00	102,025.00	(g) 106,433.55	(g)115,743.43	121,400.00	121,400.00	121,400.00
	$131,816.67	$140,150.00	$140,150.00	$147,851.39	$143,933.55	$153,243.43	$158,900.00	$158,900.00	$158,900.00
	2,378.38	5,703.93	6,034.68	6,553.71	7,227.35	7,676.38	7,524.53	7,512.08	7,932.61
			97.74	1,360.49	2,976.67	.....	1,658.52	11,536.03	10,147.31
				1,302.84	2,665.25	2,784.87	2,910.19	3,041.15	3,178.00
				280.84	574.35	600.17	627.18	658.40	684.89
							847.75	834.00	1,492.25
	$134,195.05	$145,853.93	$146,282.42	$157,349.27	$157,377.17	$164,304.85	$172,468.17	$182,478.66	$182,335.06
	$137,163.24	$152,559.65	$143,031.46	$167,916.91	$111,649.53	$138,517.82	$101,754.33	$45,404.11	$69,510.75
	522,100.02	532,362.01	566,169.85	573,210.31	526,598.94	395,463.89	645,299.59	626,151.67	651,385.54
s accounts	228.32	2,504.44	250.57	236.78	3,138.30	242.26	1,455.33	4,843.52	1,586.55
	.....	.....	.....	.....	.....	(c) 6,034.55	.....	169.65	19,336.07
	$659,491.58	$687,426.10	$709,451.88	$741,366.00	$641,386.77	$640,258.52	$748,509.25	$676,548.95	$741,818.91
accounts	216.93	226.70	79.06	203.52	.....	.....	1,030.48	4,396.10	7,584.42
	912.64	1,027.55	997.78	1,095.24	813.70	726.12	1,327.10	Cr 1,196.92	485.85
	6,000.00	.....	.....	100.00	100.00	7,775.00	.....	1,963.23	(d)21,463.07
			15,164.71	93,368.30	130,009.18	Cr 238,542.19			.....
	120,000.00	120,000.00	120,000.00	120,000.00	115,000.00	125,000.00	120,000.00	20,000.00	.....
(f)	$532,362.01	$566,169.85	$573,210.31	(e) $526,598.94	$395,463.89	$645,299.59	$626,151.67	$651,385.54	$712,265.57

ortgage refunding bonds.
te charged, $1 per M. cu.ft., and 85¢, the rate ordered by the Commission in Case #1273. The amount so reserved is credited back to surplus in 1914.
itigation.
ntingency Reserve", included in the balance sheet exhibit in Accrued Amortization.
ent with corrected report for 1912.
ment with corrected report for 1909.
he Special Construction Fund, Such interest, less interest earned by the fund, has been included in cost of property.

Defendant's Exhibit D24

KINGS COUNTY LIGHTING COMPANY

DISPOSITION OF GROSS CORPORATE INCOME FOR THE YEAR ENDING DECEMBER 31, 1918

	1918
Gross Corporate Income	$161,068.79
Deductions from gross income	
Interest on First mortgage bonds - 5%	$37,500.00
Interest on Debenture bonds - 5%	.....
Interest on First refunding bonds - 5%	128,229.18
Total interest on funded debt	$165,729.18
Interest on consumers' deposits	8,702.49
Other interest	7,164.38
Sinking fund accruals	3,341.00
Amortization of debt discount and expense	715.71
Income tax on security holders.	2,423.50
Total deductions	$188,076.26
Net corporate income for the year (Deficit)	$26,992.47
Surplus brought forward	712,285.57
Surplus credits affecting taxes and operating accounts	188.67
Other additions to surplus	2,000.00
Total credits	$687,666.77
Surplus debits affecting taxes and operating accounts	$77.93
Amortization Elsewhere Unprovided For	5,977.36
Other deductions	(h) 25,631.51
Reserve for 85 rate	.....
Dividends	.....
Final surplus	$654,679.97

(h) Includes 24,531.51 appropriated for "Contingency Reserve", included in the balance sheet exhibit on Accrued Amortization.

2001-1a

KINGS COUNTY LIGHTING COMPANY

DETAIL OF OPERATING EXPENSES FOR THE YEARS 1909 to 1917 INCLUSIVE

	1909	1910	1911	1912	1913
Production expenses:					
Works superintendence	$8,922.54	$7,226.42	$6,795.00	$7,485.09	$9,417.81
Boiler house labor	5,115.49	5,007.00	5,262.21	7,279.75	7,558.04
Generator house labor	6,149.59	5,688.97	7,530.49	9,723.02	10,354.31
Purifier house labor	1,014.91	1,253.57	811.53	644.99	817.48
Miscellaneous labor at works	1,820.14	1,801.74	2,198.36	2,665.69	2,959.34
Gas making labor	$23,022.67	$21,977.70	$22,597.59	$27,798.54	$31,106.98
Boiler fuel	$15,855.48	$18,263.00	$22,181.36	$26,802.45	$28,746.02
Generator fuel	41,709.48	41,870.58	45,836.34	53,370.41	80,409.60
Water-gas oil	67,283.49	70,136.82	75,637.98	98,191.45	147,258.52
Water	152.44	727.13	1,850.38	980.91	1,661.94
Purification supplies	779.42	798.65	739.43	918.83	1,012.76
Gas storage	3,706.55	3,542.03	3,745.15	4,139.40	3,879.83
Miscellaneous works expense	922.00	1,336.97	1,428.10	2,279.92	1,594.07
Supplies and expenses	$5,560.41	$6,404.78	$7,763.06	$8,319.06	$8,148.59
Repairs of works and station structures	$2,357.70	$1,367.38	$396.29	$1,889.73	$2,169.52
Repairs of furnaces, boilers, and accessories	817.89	2,123.20	1,689.72	1,072.57	1,577.79
Repairs of steam engines	186.54	189.71	155.52	260.22	246.72
Repairs of gas engines	.....	.....	.....	.....	.....
Repairs of miscellaneous power plant equipment	154.63	448.62	277.14	349.59	408.42
Repairs of water-gas sets and accessories	2,470.74	3,788.87	4,593.24	5,333.14	3,380.03
Repairs of purification apparatus	1,427.59	228.93	283.49	108.95	114.57
Repairs of holders	1,762.70	325.96	1,786.90	166.50	658.21
Repairs of miscellaneous equipment	1,019.63	877.34	1,126.14	3,376.48	1,054.00
Repairs at works	$10,197.42	$9,340.01	$10,308.44	$10,561.18	$9,609.25
Residuals produced - Cr.	Cr $6,461.28	Cr $5,908.34	Cr $6,654.28	Cr $9,794.30	Cr $10,053.04
Total production expenses	$157,256.67	$162,084.55	$177,670.49	$215,838.79	$273,226.92
Transmission and distribution expenses:					
Transmission pumping	.....	.....	.....	.....	$77.44
Distribution superintendence	$4,285.20	$5,706.28	$4,094.15	$4,205.79	15,248.58
Distribution supplies and expenses	637.78	683.82	607.38	711.20	2,309.46
Gas meter and installation work	2,652.09	3,281.97	5,481.32	6,936.87	7,034.39
Work on consumers premises	4,312.36	6,204.65	7,658.77	9,686.61	10,477.55
Supplies and expenses	$ 11,887.43	$15,876.72	$17,821.59	$21,540.47	$35,147.42
Repairs of mains	$3,527.89	$5,485.72	$8,821.09	$18,295.31	$17,830.24
Repairs of services	937.25	1,365.88	2,260.68	4,850.37	3,254.50
Repairs of meters	4,216.21	4,119.57	5,279.01	7,545.26	8,708.44
Repairs of appliances	969.58	1,383.57	1,519.90	2,485.88	1,663.27
Repairs of distribution buildings	.....	.....	.....	.....	.....
Total repairs	$ 9,650.93	$12,354.74	$17,880.68	$33,176.82	$31,456.45
Total transmission and distribution expense	$21,538.36	$28,231.46	$35,702.27	$54,717.29	$66,603.87

Denfendant's Exhibit 124

KINGS COUNTY LIGHTING COMPANY
DETAIL OF OPERATING EXPENSES FOR THE YEARS 1909 to 1917 INCLUSIVE

1909	1910	1911	1912	1913	1914	1915	1916	1917
$8,922.54	$7,226.42	$6,795.00	$7,486.09	$9,417.81	$11,839.83	$12,620.84	$14,794.72	$12,127.61
5,115.49	5,007.00	5,262.21	7,279.75	7,558.04	7,114.00	7,025.17	7,787.70	10,452.82
6,149.59	6,688.97	7,530.49	9,723.02	10,354.31	11,804.01	12,065.96	13,670.40	17,531.82
1,014.91	1,253.57	811.53	644.99	817.48	80 50	410.75	1,416.65	930.34
1,820.14	1,801.74	2,198.36	2,665.69	2,959.34	3,468.42	3,351.03	3,785.39	5,436.70
$23,022.67	$21,977.70	$22,597.59	$27,798.54	$31,106.98	$34,006.77	$35,473.75	$41,454.86	$46,479.29
$15,855.48	$18,283.00	$22,181.36	$26,802.45	$28,746.02	$29,886.63	29,775.41	$33,163.94	$61,139.59
41,729.48	41,870.58	45,836.34	53,370.41	60,409.60	70,003.14	73,545.48	80,753.30	109,142.15
67,283.49	70,136.82	75,637.98	98,191.45	147,258.52	159,352.01	191,471.95	232,047.12	242,530.46
152.44	727.13	1,850.38	980.91	1,661.94	337.80	26.08	308.85	1,803.77
779.42	798.65	739.43	918.83	1,012.76	1,449.84	1,619.73	1,544.77	1,656.48
3,706.55	3,542.03	3,745.18	4,139.40	3,879.83	4,986.03	4,202.69	4,307.28	4,995.76
922.00	1,336.97	1,428.10	2,279.92	1,594.07	3,004.25	2,739.73	3,175.59	5,734.40
$5,560.41	$6,404.78	$7,763.06	$8,319.06	$8,148.59	$9,777.92	$8,588.23	$9,336.09	$14,189.41
$2,357.70	$1,367.38	$396.29	$1,889.73	$2,169.52	$1,384.96	$1,030.32	$5,075.10	$991.47
817.89	2,123.20	1,689.72	1,072.57	1,577.79	1,499.33	2,250.34	2,577.03	3,375.27
186.54	189.71	165.52	260.22	246.72	132.21	150.14	208.64	402.59
.....	.....	.....	.....	.....	37.93	18.60	50.90	386.57
154.63	448.62	277.14	349.59	408.42	341.26	153.10	1,144.35	855.04
2,470.74	3,788.87	4,593.24	5,333.14	3,380.03	5,055.98	5,658.51	4,631.18	6,408.06
1,427.59	228.93	283.49	106.95	114.57	320.55	237.14	145.35	18.74
1,762.70	325.96	1,786.90	166.50	658.21	2,994.07	542.81	322.86	1,273.45
1,019.63	877.34	1,126.14	3,376.48	1,054.00	940.55	1,103.38	610.87	1,670.20
$10,197.42	$9,340.01	$10,308.44	$10,561.18	$9,609.25	$12,706.84	$11,142.24	$14,766.28	$15,381.39
Cr $6,461.28	Cr $5,908.34 Cr	$6,654.28	Cr $9,794.30	Cr $10,082.04	Cr $9,553.42	Cr $14,185.16	Cr $12,298.32	Cr $13,970.33
$157,256.67	$162,084.55	$177,670.49	$215,838.79	$273,226.92	$306,179.89	$335,811.90	389,263.27	$464,591.96
.....	.....	.....	.....	$77.44	$538.54	$394.36	$528.29	$980.63
$4,285.20	$5,706.28	$4,094.15	$4,205.79	15,248.58	16,830.93	$14,858.66	16,522.37	12,253.99
637.78	683.82	607.36	711.20	2,309.46	2,601.38	2,775.50	2,598.17	2,541.60
2,652.09	3,281.97	5,461.32	6,936.87	7,034.39	5,423.44	6,031.51	7,701.88	7,331.70
4,312.36	6,204.65	7,658.77	9,686.61	10,477.55	8,528.12	10,045.19	13,049.53	15,763.67
$ 11,887.43	$15,876.72	$17,821.59	$21,540.47	$35,147.42	$33,822.41	$34,105.22	$40,400.24	$38,871.59
$3,527.89	$5,485.72	$8,821.09	$18,295.31	$17,830.24	$12,178.95	$14,148.03	$18,664.96	$8,925.84
937.25	1,365.88	2,260.68	4,850.37	3,254.50	3,198.73	3,840.08	4,139.67	2,572.15
4,216.21	4,119.57	5,279.01	7,545.26	8,708.44	6,638.32	6,031.49	8,832.26	8,162.62
969.58	1,383.57	1,519.90	2,485.88	1,663.27	8,077.95	2,268.78	2,812.39	1,199.88
.....	.....	.....	.....	.....	.....	.....	56.82	759.80
$ 9,650.93	$12,354.74	$17,880.68	$33,176.82	$31,456.45	$24,093.95	$26,288.37	$34,506.10	$21,620.29
$21,538.36	$28,231.46	$35,702.27	$54,717.29	$66,603.87	$57,916.36	$60,393.59	$74,906.34	$60,491.88

KINGS COUNTY LIGHTING COMPANY

Tax charges and payments for the year ended December 31, 1912, to 19

Class of tax	1912	1913	1914	1915	1916	
Charged to gas operations:						
Excess dividend, State	$1,200.00	(c)$1,150.00	(d)$1,250.00	$1,200.00	...	
Gross earnings, State (a)	3,627.13	4,004.63	4,157.26	3,514.52	$3,759.05	$(
Special franchise	35,735.70	37,878.75	26,288.08	27,431.04	35,095.42	3(
Land	5,892.37	8,627.57	8,589.12	9,055.23	9,786.40	(k) 9
Improvements on land	8,888.60	6,687.55	6,850.32	7,825.92	26,434.72	2(
Federal income	1,860.00	1,860.00	(b) 2,683.50	1,400.00	900.00	(
Federal capital stock	...	...	...	...	...	
Total	$57,203.80	$60,408.50	$49,818.28	$50,426.71	$75,975.59	$8(
Accrued and unpaid at beginning of year	7,163.19	7,711.01	8,778.51	9,714.53	7,422.60	4(
Total	$64,366.99	$68,119.51	$58,596.79	$60,141.24	$83,398.19	$12(
Taxes paid during year	56,655.98	59,341.00	48,817.26	52,640.45	41,839.37	52
Reserve for income tax(withheld from salaries)	...	...	Cr 35.00	35.00	...	
Adjustments:						
Excess dividend	...	...	(e) 100.00	(f) Cr 100.00	(i) 200.00	
Federal income	...	...	...	(g) 985.89	(h) 382.80	
State gross earnings	...	...	...	5.05	...	
Real estate tax on Morse property (non-operating)	...	...	...	...	...	Cr
Other minor adjustments	...	...	...	(j) Cr 847.75	12.50	
					Cr 15.60	
Accrued and unpaid at close of year	$7,711.01	$8,778.51	$9,714.53	$7,422.60	$40,979.12	$74

(a) Tax accruals and payments are made on the basis of gross receipts, the tax year being from November 1 to October 31.
(b) Includes $828.50 for tax on bond income payable by company.
(c) Reported as $1,200.
(d) Reported as $1,350.
(e) Reported as an adjustment of excess dividends tax for the year 1913.
(f) Reported as an adjustment of excess dividends tax for the year 1914.
(g) Adjustment of federal income taxes for the years 1911 to 1914 inclusive.
(h) Adjustment of federal income taxes for the year 1915.
(i) Reported as an adjustment of excess dividend tax for 1915.
(j) Income tax on security holders assumed by company.
(k) Exclusive of $906.63 of real estate taxes representing company's apportionment of taxes chargeable against land leased to

	Tax Rate	Assessed Valuation of: Land*	Improvements	Special franchise original	Special franchise as settled
1912	1.87	$477,700	$315,100	$1,911,000	$1,911,000
1913	1.85	466,300	372,300	2,047,500	2,047,500
1914	1.84	466,800	372,300	1,428,700	1,428,700
1915	1.92	471,600	407,600	1,428,700	1,428,700
1916	2.08	473,000	1,270,900	1,687,280	1,687,280
1917	2.07	501,500	1,270,900	1,780,020	1,780,020

In 1916 and 1917
here, although th
In 1917 the total
part of the tax i

Defendant's Exhibit D24

KINGS COUNTY LIGHTING COMPANY

Tax charges and payments for the year ended December 31, 1912, to 1917, inclusive

	1912	1913	1914	1915	1916	1917
	$1,200.00	(c)$1,150.00	(d)$1,250.00	$1,200.00	...	...
	3,627.13	4,004.63	4,157.26	3,514.52	$3,759.05	$6,833.27
	35,735.70	37,878.75	26,288.08	27,431.04	35,095.42	36,846.40
	5,692.37	8,627.57	8,589.12	9,055.23	9,786.40	(k) 9,445.34
	8,888.60	6,687.55	6,850.32	7,825.92	26,434.72	26,307.63
	1,860.00	1,860.00	(b) 2,683.50	1,400.00	900.00	6,000.00
	...	...	...	...	...	465.38
	$57,203.80	$60,408.50	$49,818.28	$50,426.71	$75,975.59	$85,896.02
	7,160.19	7,711.01	8,778.51	9,714.53	7,422.60	40,979.12
	$64,360.99	$68,119.51	$58,596.79	$60,141.24	$83,398.19	$126,875.14

Detail of Accrued Tax Liability, Dec. 31, 1917

	56,655.98	59,341.00	48,817.26	52,640.45	41,839.37	53,716.62			
s)	...	...	Cr 35.00	35.00	...	...	Class of tax	1916 levy	1917 levy	Total
	...	...	(e) 100.00	(f) Cr 100.00	(i) 200.00	...	Gross earnings	$623.81	$6,833.27	$7,457.08
	...	...	...	(g) 985.89	(h) 362.80	...	Federal income	900.00	6,000.00	6,900.00
	...	...	...	5.05	...	...	Special franchise	17,547.71	18,423.20	35,970.91
rating)	...	...	...	...	...	Cr 906.63	Real estate - Operating	18,126.16	4,704.37	22,830.53
	...	...	...	(j) Cr 847.75	12.50	...	Real Estate - Non-oper-	...	906.63	906.63
				Cr	15.60					
	$7,711.01	$8,778.51	$9,714.53	$7,422.60	$40,979.12	$74,065.15		$37,197.68	$36,867.47	$74,065.15

e basis of gross receipts, the tax year being from November 1 to October 31.
payable by company.

dends tax for the year 1913.
dends tax for the year 1914.
he years 1911 to 1914 inclusive.
he year 1915.
dend tax for 1915.
y company.
s representing company's apportionment of taxes chargeable against land leased to the Morse Dry Dock & Repair Co.

ax	Assessed Valuation of			
ate	Land*	Improvements	Special franchise original	Special franchise as settled
.87	$477,700	$315,100	$1,911,000	$1,911,000
.85	466,300	372,300	2,047,500	2,047,500
.84	460,800	372,300	1,428,700	1,428,700
.92	471,600	407,600	1,428,700	1,428,700
.08	472,000	1,270,900	1,687,280	1,687,280
.07	501,500	1,270,900	1,780,020	1,780,020

In 1916 and 1917 a parcel on Senator Street assessed at $1500 is included here, although the tax in that year is not included in operating taxes. In 1917 the total assessment on First Avenue property is shown here although part of the tax is included in non-operating.

	1915	1916	1917
	28,925	31,898	34,871
	9.97	10.28	9.82
	154.68	167.73	182.90
	16,929	18,006	18,525
	187.00	190.18	190.66
	2.74	1.46	0.25
)	7,300,000	7,300,000	7,300,000
)	2,774,340	2,900,240	3,377,370
	1,012,633	1,070,266	1,232,741
	851,459	934,406	1,047,470
	33,067	82,947	113,014
	4.04	9.74	12.10
	4,543	4,913	5,493
	161,174	135,860	185,321
	15.92	12.69	15.03
	22,181.25	23,468.70	29,495.90
	$91,978.42	$103, 197.21	$149,709.20
	4.15	4.40	5.08
	9.09	9.64	12.14
	4,179,926	4,530,841	5,018,086
	4.13	4.22	4.07
	4.58	4.91	4.83
	18.92	20.72	19.07

FORM 6 a 10-27-19 2000

OFFICE MEMORANDUM PUBLIC SERVICE COMMISSION

MR. _____ DATE _____

King Co Htg
Capacity M cu ft

1906	1,500
1907	2,250
1908 - 9	3,300
1910 - 14	5,300
1915 19	7.300

For 1906-7 Co. reports Coal Gas plant - Cap. 675 M cu ft.

SIGNED _____

2005

Manhattan Exhibit 124

KINGS COUNTY LIGHTING COMPANY

Significant Operating Data for the year 1918 and 1919

	1918	1919
Number of Consumers (meters)	36,300	37,542
Annual increase per cent	4.12	4.50
Per mile of main	189.80	194.87
Number of services	18,919	20,288
Length of mains (miles)	191.30	194.70
Annual increase per cent	0.34	0.18
Manufacturing capacity (24 hrs.)	7,300,000	7,300,000
Average daily make (cu.ft.)	4,008,460	4,292,130
Gas made during year - M cu. ft.	1,463,088	1,566,628
Gas sold " " " "	1,242,640	1,279,845
Annual increase " " "	185,428	46,997
" " per cent	17.70	3.81
Per mile of main - M cu. ft.	6,445	6,579
Gas made less gas sold (M cu. ft.)	730,240	286,783
Ratio of loss to make	15.74	18.31
Coal used - tons of 2000 lbs.	29,922.70	30,032.75
Total cost	$230,629.66	$254,126.64
Cost per ton	$ 5.98	$ 6.70
Cost (cents) per M. cu. ft. m'f'd.	16.31	16.35
Gas oil:		
Gallons used	4,906,614.	4,837,897
" per M cu. ft. m'f'd.	3.33	3.08
Cost per gal. (cents)	5.79	6.46
Cost per M cu. ft. m'f'd (cents)	22.13	22.16

1992 *Statement of Louis Ross as Part of His Testimony Regarding Def'ts Ex. D. 23.*

In re Accrued Amortization as Shown in Defendants' Exhibit D 23.

The Defendants' Exhibit D 23 shows on the Assets Side of the balance sheet an item, Accrued Amortization, which a footnote adequately states comprises "Contingency" reserve and reserve for plant withdrawn from service. As explained on the stand this exhibit was designed to show items grouped in the same way as the exhibits entered by Charles Frank (now or recently employed at the plaintiff's office), in the former case before Justice Greenbaum. The grouping of items on this exhibit under the caption Accrued Amortization, is the same as in the Frank exhibits, and the purpose was to continue throughout the whole period covered by the two sets of exhibits, the groupings of items on the same basis.

LOUIS ROSS.

U. S. District Court, S. D. of N. Y. Filed Sep. 22, 1920.

(Here follows Defendants' Exhibit D 24, marked pages 1993 to 2006, inclusive.)

2007 DEFENDANTS' EXHIBIT D 25.

Letter to Standard Oil Company, dated Dec. 7, 1918.
Not printed.

DEFENDANTS' EXHIBIT D 26.

Letter to Prudential Oil Co., dated Nov. 21, 1918.
Not printed.

DEFENDANTS' EXHIBIT D 27.

Letter to Sales Manager of Gulf Refining Company, dated Dec. 1918.
Not printed.

DEFENDANTS' EXHIBIT D 28.

Reply to letter to Gulf Refining Company, dated Dec. 14, 19
Not printed.

DEFENDANTS' EXHIBIT D 29.

Letter from Gulf Refining Company, dated Nov. 25, 1918.
Not printed.

DEFENDANTS' EXHIBIT D 30.

Letter from Texas Company, dated Nov. 23, 1918.
Not printed.

2008 DEFENDANTS' EXHIBIT D 31.

Letter from Texas Company, dated Nov. 27, 1918.
Not printed.

DEFENDANTS EXHIBIT D 32.

Letter from Texas Company, dated Dec. 12, 1918.
Not printed.

DEFENDANT'S EXHIBIT D 33.

Reply to letter of Texas Company, dated Dec. 14, 1918.
Not printed.

DEFENDANTS' EXHIBIT D 34.

Letters (44 in number) oil correspondence.
Not printed.

DEFENDANTS' EXHIBIT D 35.

Unaccounted for gas of other companies.
Not printed.

2009 *Judgment Roll in the Action of Kings County Lighting Company vs. Egbert E. Woodbury and Others, Tried in the Supreme Court, New York County, Before Mr. Justice Greenbaum.*

This exhibit was introduced by the defendants and received in evidence but did not receive an exhibit number.

2010 *Summons.*

Supreme Court, County of New York.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

EGBERT E. WOODBURY, Attorney General of the State of New York; Harry E. Lewis, District Attorney for the County of Kings; Oscar S. Straus, Henry W. Hodge, William Hayward, Travis H. Whitney, Charles S. Hervey, Composing the Public Service Commission for the First District of the State of New York, and The City of New York, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, June 21st, 1916.

O'BRIEN, BOARDMAN, HARPER & FOX, *Plaintiff's Attorneys.*

Office and Post Office Address, No. 120 Broadway, Borough of Manhattan, City, County and State of New York.

2011 *Complaint.*

New York Supreme Court, County of New York.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

vs.

EGBERT E. WOODBURY, Attorney General of the State of New York; Harry E. Lewis, District Attorney for the County of Kings; Oscar S. Straus, Henry W. Hodge, William Hayward, Travis H. Whitney, Charles S. Hervey, Composing the Public Service Commission for the First District of the State of New York, and The City of New York, Defendants.

The plaintiff in this action, by its attorneys, O'Brien, Boardman, Harper & Fox, alleges as follows:

1. The defendant Egburt E. Woodbury, is the duly elected and qualified Attorney General of the State of New York.

2. The defendant Harry E. Lewis is the duly elected and qualified District Attorney of the County of Kings.

3. The City of New York is a municipal corporation organized and existing under the laws of the State of New York.

2012 4. Oscar S. Straus, Henry W. Hodge, William Hayward, Travis H. Whitney and Charles S. Hervey are citizens and residents of the State of New York and are the duly appointed and qualified members of the Public Service Commission for the First District of the State of New York, hereinafter referred to as the "Public Service Commission" which has an office at 120 Broadway in the said Borough of Manhattan, City of New York.

5. The plaintiff, Kings County Lighting Company, is a domestic corporation, duly incorporated on the 26th day of May, 1904, under the Transportation Corporations Law of the State of New York, with its principal place of business at 30 East 42nd Street, Borough of Manhattan in the City of New York, engaged in the business and owning property, powers and franchises hereinafter referred to.

6. The Kings County Gas & Illuminating Company, a domestic corporation organized December 17th, 1889, engaged in the business and owning the property, powers and franchises hereinafter referred to, was, on July 1, 1904, merged with the Kings County Lighting Company, the plaintiff herein, the latter company prior thereto having become the owner of all the outstanding shares of capital stock of the former company, and a certificate of such ownership, with a resolution of its Board of Directors authorizing said merger, was filed by the plaintiff in the office of the Secretary of State of New York on July 1, 1904. As a result of such merger the Kings County Lighting Company acquired and became possessed of all of the estate, property, rights, privileges and franchises of the Kings County Gas & Illuminating Company.

2013 7. The Kings County Gas & Illuminating Company, at all the times herein referred to, until its merger with the Kings County Lighting Company, the plaintiff, was, and the latter company at all the times herein referred to since its organization, has been, engaged in the manufacture, sale and distribution of gas in the Thirtieth and a small part of the Thirty-first Wards of the Borough of Brooklyn, in the City, County and State of New York. The Kings County Gas & Illuminating Company was, up to the time of its merger with the plaintiff, and the latter has been at all times since and is now, the owner of franchises or consents authorizing the Kings County Gas & Illuminating Company and the plaintiff, its successor, to lay and operate mains, pipes and conductors in the streets, highways and public places in said territory, and, acting under the powers granted and performing the obligations upon them imposed by their respective charters and franchises or consents, the Kings County Gas & Illuminating Company, and its successor

plaintiff company, have constructed, installed and otherwise acquired, and the plaintiff now owns valuable properties, including real estate, gas plants, holders, gas mains, pipes, meters, appliances, appurtenances and easements, all located in said territory, which it necessarily uses in the manufacture, sale and distribution of gas in that territory, to the City of New York and also to private customers.

8. The plaintiff, in the manufacture, sale and distribution of gas in the territory served by it, has complied and is complying with the many requirements contained in the laws of the State of New York, with the lawful orders of the Public Service Commission, and with all municipal ordinances of the City of New York regulating the manufacture, sale and distribution of gas in the territory which it serves.

2014 9. The plaintiff and its predecessor have always conducted their business and performed the duties and obligations imposed upon them with the highest regard for the safety and convenience of the public and their consumers, and as economically and skilfully as has been reasonably possible; the quality of the gas furnished by them has been excellent, and better than the average of the gas furnished by the gas companies in the State of New York. The quantity of gas furnished by them has been sufficient at all times.

10. A law of the State of New York, enacted in the year 1906 (Sec. 1, Subdivision 3 of Chapter 125, page 235, Laws of 1906) fixed the maximum price of gas for all corporations distributing and selling same at the rate of $1 per 1,000 cubic feet in the Thirtieth Ward, and $1.25 per 1,000 cubic feet in the Thirty-first Ward, of the Borough of Brooklyn, City, County and State of New York. A later law of the State of New York amending the foregoing one and enacted on or about May 20th, 1916 (Chapter 604, Laws of 1916, State of New York), hereinafter referred to as *the* "the 80-cent gas law," attempts to fix the maximum rate for gas in the Thirtieth and Thirty-first Wards served by plaintiff at 80 cents per 1000 cubic feet. This law is provided to go into effect on July 1, 1916. The plaintiff is the only corporation selling gas in both the Thirtieth and Thirty-first Wards of Brooklyn. The amendatory act of 1916 was passed without any prior investigation or inquiry by the Legislature as to the facts necessary to determine a reasonable rate for gas supplied by the plaintiff. No investigation or inquiry was made by the Legislature, directly or indirectly, as to the present value of the property of the plaintiff employed in the public
2015 service or as to the operating expenses or income of the plaintiff, and the Legislature at no time prior to the passage of said act had before it these and other facts necessary to the proper determination of a reasonable rate for gas so supplied by the plaintiff.

11. Said law above referred to will, if enforced, reduce the gross income of plaintiff below the actual and reasonable cost of manufacturing, selling and distributing gas; will not give a sufficient return to make allowances for depreciation of its plant, or for a fair

profit upon the property owned and used by it in the manufac... sale and distribution of gas in the territory served by the plaint... will prevent plaintiff from fulfilling the purpose of its incorporat... and from performing the duties imposed upon it by its charter a... franchises, the common law and the statutes of the State of N... York, the orders of the Public Service Commission and var... municipal ordinances.

12. The plaintiff has 28,826 consumers and is serving a pop... tion, according to the census of 1910, of approximately 78,406 p... sons. The following table shows all gas companies operating ... cities in the State of New York, outside of the City of New Yo... having a population of more than 50,000, the population served ... cording to the State enumerations of 1915), the net prices charg... to retail consumers per 1,000 cubic feet, the number of active met... connected, the annual sales in 1,000 cubic feet to private consum... and municipalities, and the miles of distribution mains, all as of D... cember 31st, 1915:

City.	Name of company.	Population.	Price per thousand.	Active meters.	Annual sales in 1,000 cubic feet.	Sales for street lamps.	Miles of distribution mains.
Albany	Municipal Gas Co.	108,067	$1.00	22,791	546,630	0	114.13
Binghamton	Binghamton Gas Works	53,668	1.00	10,834	226,421	612	76.44
Buffalo	Buffalo Gas Co.	461,887	1.00	19,192	445,417	131,867	434.28
Rochester	Rochester Ry. & Light Co.	248,465	.95	66,646	1,509,987	0	360.06
Schenectady	Mohawk Gas Co.	80,381	1.00	12,073	274,293 (B)	0	96.63
Syracuse	Syracuse Ltg. Co.	145,237	.95	37,391	815,159	0	206.78
Troy	Troy Gas Co.	75,488	1.00	18,666	347,292	4,380	83.41
Utica	Utica G. & E. Co.	80,589	1.10 (A)	25,567	311,595	0	207.54 (C)
Yonkers	Westchester Ltg. Co.	90,886	1.00	24,367	610,266	44,241	160.04

(A) One Dollar net after July 1, 1916.
(B) Omits 57,206,100 cu. ft. sold to General Electric Company.
(C) Includes outlying towns.

All gas companies operating in the City of New York are charging rates from 95 cents to $1.13 per 1,000 cubic feet, with the exception of the Consolidated Gas Company and the Brooklyn Union Gas Company and their subsidiaries; and the annual sales of each of said two systems are more than sixteen times as large as those of the plaintiff.

13. The plaintiff is supplying gas to the City of New York, for municipal buildings and for lighting the streets, in said wards. The gas so supplied for street lighting is charged for under the terms of two contracts between said Kings County Gas & Illuminating Company and the Board of Improvement of the Town of New Utrecht, and now held by the plaintiff, dated respectively November 26, 1889, and March 19, 1891, both terminating September 2, 1916.

Under the terms of said contracts the company is obligated 2016 (among other things) to supply burners or tips for all gas lamps, to clean, repair and replace all lamps and parts thereof, to supply the gas for lighting said lamps, and to light and extinguish the same, and the price to be paid for all the services rendered by the plaintiff under said contracts is $28 per annum for each and every lamp so lighted and maintained. By Chapter 736, page 2091, of the laws of 1905 of the State of New York, entitled "An Act in relation to the price of illuminating gas furnished or sold to the City of New York and providing a penalty for violation," it was provided that a gas corporation shall not charge the City of New York for such gas a sum in excess of 75 cents per 1,000 cubic feet; and by Section 3 of said act any corporation violating any provision thereof shall forfeit the sum of $1,000 for each offense, to be sued for and recovered in the name of and by the City of New York for its benefit. The City of New York has refused to pay the lighting bills of the plaintiff for lighting the streets for the period from October, 1914, to this date, and the total amount of said unpaid bills rendered in accordance with said contracts dated December 26, 1889, and March 19, 1891, is approximately $250,000. The income accruing to the plaintiff from the gas supplied to street lamps (assuming there is no decrease in the amount so supplied), will be reduced from and after September 2, 1916, more than 43 cents per 1,000 cubic feet, or a total of more than $36,000 per annum.

14. An order of the Public Service Commission entered on May 23rd, 1916, served upon plaintiff and acknowledged in writing by authorized representatives, ordered and directed plaintiff, as a condition to the issuance of bonds by the plaintiff, to charge to 2017 amortization of the property owned and employed by it in manufacturing, selling and distributing gas in the territory served by it, a sum equivalent to 11½ cents for each 1,000 cubic feet of gas sold, less amounts charged to its various repair accounts. The plaintiff avers that said amount is a fair and reasonable one to cover amortization of its said property, and that it is complying with said order; but that if it is compelled to manufacture, sell and distribute its gas in the territory served by it at a rate of 80 cents per 1,000 cubic feet, the return which it will receive from such sales will

be insufficient to enable it to comply with this order, or to earn or set aside this or any other sum for amortization.

15. On September 10, 1910, a petition was filed with the Public Service Commission for the First District, by John G. Mayhew and others representing all the consumers of the plaintiff in said territory, in and by which petition complaint was made that the rate at that time charged by the plaintiff for gas was excessive and unreasonable, and it was therein prayed that the Commission fix by order the maximum price for gas to be charged in said Thirtieth Ward. Notice of said petition was given to the plaintiff herein, and thereafter, from October 17, 1910, to October 5, 1911, a hearing was had thereon before said Public Service Commission. The plaintiff attended by its proper representatives before said Commission, and offered evidence and rendered to said Commission all such reports and information as were called for by said Commission. Thereafter, and on October 20, 1911, said Public Service Commission, acting under the authority of Section 72 of said Public Service Commissions Law, made an order fixing the maximum price of gas to be charged by the plaintiff in said Thirtieth Ward of the Borough of Brooklyn as follows:

2018 From and including November 1, 1911, to and including December 31, 1912, 85 cents per 1,000 cubic feet.

From and including January 1, 1913, to and including December 31, 1913, 80 cents per 1,000 cubic feet.

Thereafter a rehearing was granted the plaintiff by said Commission, and said rehearing was accordingly had on November 3, 1911; and thereafter, on November 7, 1911, said Commission made a further order on said rehearing whereby the said rates so fixed by said order of October 20, 1911, were made to apply only to gas other than that supplied under the aforesaid contracts for street lighting. In and by the findings of said Commission contained in its opinion filed on October 20th, 1911, and reaffirmed on November 7, 1911, upon which each of said orders of said respective dates was based, the Commission found the value of the plaintiff's plant and property devoted to the public service as of date December 31, 1910, as follows:

Net cost of tangible property other than land, etc..	$1,561,628.00
C. Eng., Admin. cont. and incidentals.....	341,149.00
Cost to reproduce new.....	$1,902,777.00
Depreciation.....	415,198.00
	$1,487,579.00
Land, present value.....	650,000.00
Present value of plant, etc.....	$2,137,579.00
Preliminary and development.....	260,000.00
Working capital	80,000.00
	$2,477,579.00

2019 In arriving at the valuation of $2,477,579,00 for the plaintiff's property as of December 31, 1910, said Commission did not make an allowance for "going value" or cost of paving over mains and services. In and by said findings the Commission found that 7½% per annum was a fair net return on the value of the plaintiff's property devoted to the public use. Thereafter, on November 24, 1911, the plaintiff herein applied by petition and obtained an order from the New York Supreme Court, Appellate Division, First Department, allowing a writ of certiorari to review said order of the commission. Thereafter, on May 9, 1913, the Appellate Division rendered a decision in said certiorari proceeding, which decision is reported in People ex rel., Kings County Lighting Company v. Willcox et al., Public Service Commission, 150 App. Div. 603, sustaining the writ, reversing the decision of the Commission and remitting the matter to the Commission for further action in accordance with the opinion of the Court. In its opinion the Appellate Division expressed approval of the findings and decision of the Commission, with certain exceptions, the most important of which were the following: (1) That including in its calculations of income an item of $35,000.00, as the annual increase in the value of the lands of the Company was erroneous; (2) that in making up the item of capital invested the Commission should have taken into consideration going value; and (3) that in determining the cost of reproduction new in appraising the value of the Company's physical property, the Commission should have included the cost of reproducing the existing paving over mains in streets which were unpaved when the mains were laid. Thereafter, on June 13, 1913, the said Public Service Commission made a motion for
2020 an order allowing it to appeal to the Court of Appeals from the order of the Appellate Division, and in the early part of July, 1913, said motion was granted by the Appellate Division. Thereafter briefs were filed on January 6, 1914, oral arguments were made before the Court of Appeals; and on March 24th, 1914, the Court of Appeals handed down its decision, which is reported in People ex rel., Kings County Lighting Company v. Willcox et al., Public Service Commission, 210 N. Y. 479, in which it held, with the Appellate Division, (1) that the annual increase in the value of the land is not income and (2) that the commission should have made allowance for going value. It reversed the Appellate Division with respect to (3) making an allowance for paving over mains in determining the value of the plaintiff's property, and affirmed that part of the decision of the Appellate Division "insofar as it remits the proceedings to the Public Service Commission." Thereafter, on April 23, 1914, the order of the Appellate Division of the Supreme Court was made and filed upon the remittitur of the Court of Appeals in the proceedings by the Kings County Lighting Company, as relator, against Willcox, and others, composing the Public Service Commission for the First District, respondents, and was thereafter duly presented to said Commission. In and by said order of remittitur, the said order and judgment of the Court of Appeals is made the order and judgment of the Appellate Division, and the Com-

mission is thereby "directed to act therein in accordance with the opinion of this Court made herein May 9, 1913, as the said opinion of this Court is amplified or modified by the opinion of the Court of Appeals herein made and filed March 24, 1914, and by the answers given as hereinbefore set forth to the said questions certified to the Court of Appeals." Such of the decision and findings of
2021 said Commission theretofore made in said proceeding as were not directly or indirectly reversed and modified by said opinion of the Appellate Division of May 9, 1913, or by said opinion of the Court of Appeals of March 24, 1914, have not been reversed or modified by any legally constituted authority. Thereafter, on April 28, 1914, said Commission by resolution reopened said proceeding, and set May 7, 1914, as the date for further hearing in the matter; and further hearings were had in said proceeding before the Commission between May 7, 1914, and July 2, 1914, on which last mentioned date the hearing was adjourned subject to notice by the Commission. On said last mentioned date it was agreed and stipulated by and between the parties to said proceeding before the Commission that the plaintiff herein should put into effect a rate of 95c per 1,000 cubic feet for commercial gas furnished by plaintiff beginning July 1, 1914, said rate to continue during the period from July 1, 1914, to July 1, 1915, and that the hearing before the Commission should be held in abeyance until after March 31, 1915 (except for taking testimony of certain named individuals upon notice by the Commission). Thereafter, on April 15, 1915, said complainants reopened their case before the Commission and closed on June 1, 1915, and the plaintiff herein reopened the defense in said proceedings on June 1, 1915, and closed on June 24, 1915; oral arguments were heard by the Commission from June 24, 1915, to June 28, 1915; and said Commission has not since said time entered any final order in said case or granted any reduction of gas rates.

Since December 31, 1910, as of which date said Public Service Commission found the value of this plaintiff's property so
2022 devoted to the public use to be 2,477,579.00, there had been expended by the plaintiff up to April 30th, 1916, in extensions and improvements of its said property the sum of $710,628.92, substantially all of which has been investigated by said Commission from time to time and approved by it as capital expenditure. Upon the basis of the findings of said Commission, therefore, the value of the plaintiff's said property at this time is $3,188,207.92, plus the "going value" so as aforesaid decreed by the Courts to be added thereto, plus appreciation and minus depreciation, if any, occurring since December 31, 1910. Said "going value" is not less than $750,000.00, and said appreciation is more than said depreciation; but ignoring all such items, a return of 7½% upon said valuation of $3,188,207.00 would be $239,115.00; and a rate per 1,000 cubic feet of gas largely in excess of one dollar would be necessary to yield such a return; and that said rate of 80 cents fixed by said act of 1916 would yield no return upon that or any other valuation. The total value of plaintiff's plant and property is in excess of $4,500,000.00.

16. The issued and outstanding paid up capital stock of plaintiff is $2,000,000.00; there are outstanding bonds secured by mortgage or trust deed, which are liens upon its property aggregating $3,178,000.00; and plaintiff has applications pending before Public Service Commission for permission to issue $200,000.00 par value of bonds to reimburse plaintiff for additional capital expenditures made from June 1st, 1911, to March 31, 1916, in accordance with the terms of the mortgage or trust deed securing said bonds, substantially all of which capital expenditures have been approved by said Public Service Commission.

2023 17. The plaintiff's gross receipts from such sales to private consumers are in excess of $50,000.00 per month. A large proportion of its consumers are persons of small means, whose accounts do not exceed $2.00 per month. A number of its consumers are financially irresponsible, and many of them are only temporary residents of the City of New York. Plaintiff renders to each of its consumers monthly statements for gas consumed by them during the previous month, and collects therefor within a short time thereafter. Unless such bills are promptly paid, it discontinues the supply of gas to such customers, pursuant to the provisions of Section 68 of the Transportation Corporations Law, and that is the only method by which plaintiff is enabled to avoid great loss arising from the failure or the inability of such customers to pay the bills for the gas consumed by them. If the plaintiff is obliged to comply with the 80 cent gas law, when it goes into effect July 1, 1916, and said act were later held by this Court to be unconstitutional and void, plaintiff would be unable to collect from a large number of such customers the difference between the amount of the 80 cent rate fixed by this act and the rate now being charged by the plaintiff, and as to many others, such collection could only be enforced with great difficulty, loss and expense to the plaintiff, whereby it would suffer great and irreparable injury.

18. Chapter 125 of the Laws of 1906, as amended by the 80 cent gas law, provided that any corporation violating its provisions shall forfeit the sum of $1,000.00 for each offense, to the people of the State of New York. Plaintiff is advised and believes that this provision may be construed to impose a penalty of $1,000.00 for
2024 every charge made by it to its customers in excess of 80 cents per 1,000 cubic feet for gas. It is informed and believes that the defendant Woodbury, the Attorney General of the State of New York, and the defendant Lewis, the District Attorney of Kings County, intend to institute suits for the recovery of such penalties, Section 1962 of the Code of Civil Procedure of the State of New York making this action obligatory upon their part. The plaintiff is further informed and believes that the defendant Public Service Commission and the defendant City of New York, and various persons interested in the matter by virtue of being consumers of plaintiff's gas, intend to institute mandamus proceedings to compel the enforcement of said 80 cent rate for gas, provided by the 80 cent gas law.

19. If the said 80 cent gas law should be enforced or if the defendant Woodbury, the Attorney General, or the defendant Lewis, the District Attorney, should bring prosecutions against plaintiff for failure to comply with the laws providing for said rate, a large number of consumers would decline to pay a price in excess thereof, and should plaintiff attempt to remove the meters in the houses of such consumers, or attempt to discontinue the supply of gas to them, it would immediately be subjected to a multiplicity of proceedings to compel it to restore the meters and supply gas to such consumers; on the other hand, if plaintiff should permit the bills of such consumers to run until the final determination of such suits or proceedings as might be brought to test the validity or constitutionality of said laws hereinabove referred to, the outstanding bills due and payable to plaintiff would aggregate a very large sum, the exact amount of which the plaintiff is at present unable to calcu-
2025 late, and by reason of the financial irresponsibility of a large number of such consumers, plaintiff, if it should finally succeed in having the 80 cent gas law declared unconstitutional, would be unable to collect the amount to which it would justly be entitled for gas furnished to such customers, whereby it would suffer enormous loss, the amount of which it is unable to calculate at present; and finally, if plaintiff should adopt the course of refusing to comply with the law hereinabove referred to providing for an 80 cent rate for gas, and should charge a rate in excess of that amount, and it should be held that every charge made by plaintiff in excess of said rate constituted a violation of Chapter 125 of the Laws of 1906, as amended by the 80 cent gas law, for which a forfeiture of $1,000.00 should be imposed for each offense, the aggregate sum of the penalties which would be incurred by the plaintiff would during each month amount to over $28,400,000.00, and the resulting damages to plaintiff would be irreparable and absolutely destructive of all its assets, franchises and property.

20. By the terms of the Public Service Commissions Law of the State of New York, it is provided (among other things) that upon complaint of a gas corporation as to the price of gas, the proper commission shall investigate the cause for such complaint, and that after an investigation, the Commission may by order fix the maximum price of gas not exceeding that fixed by statute. The result of the passage of said 80 cent gas law of 1916, is to deprive the plaintiff of the right to appeal to the said Public Service Commission for a fair and reasonable rate in excess of 80 cents, which privilege is, and was at the date of passage of said act, enjoyed by other corporations in the State of New York of the same class as the plaintiff and operating under the same conditions as those surrounding the plaintiff.

2026 21. The plaintiff is advised by counsel and therefore avers and claims that by reason of the foregoing facts there is no remedy except in equity to test adequately and completely the constitutionality of Chapter 125 of the Laws of 1906 of the State of New York as amended by the 80 cent gas law.

22. The enforcement against plaintiff of the provisions of Chapter 125 of the Laws of 1906 of the State of New York, as amended by the 80 cent gas law, would deprive plaintiff of the equal protection of the laws, constitute a taking of its property without due process of law and without just compensation, would impair the obligation of the plaintiff's contractual rights, all in violation of Section 10, Article I, and the Fourteenth Amendment of the Constitution of the United States of America and in violation of Sections 6 and 7 of Article I of the Constitution of the State of New York, all of which laws and constitutional guarantees the plaintiff hereby invokes and relies upon, on which account plaintiff invokes the jurisdiction of this Court to protect it against the aforesaid threatened invasion by defendants of its inherent rights and guarantees under same.

23. If a temporary injunction shall be granted herein restraining the enforcement of the rate prescribed by the said laws during the pendency of this action, plaintiff is willing and hereby offers bond in such sum as to the Court shall seem to be adequate to cover the amounts collected by the plaintiff in excess of the 80 cent gas rate fixed by said law to await the determination of this action, said bond to provide that in case the validity of said rate shall finally be sustained herein, the amounts so collected shall be returned to the persons from whom same were received.

2027 24. Under Section 1962 of the Code of Civil Procedure of the State of New York, where a penalty has been incurred to the People of the State, the Attorney General of the State or the District Attorney of the county in which the action is triable may bring an action to recover such penalty. The defendants Woodbury, Attorney General, and Lewis, District Attorney, have no discretion in the matter, but the absolute duty is imposed upon them by said Section 1962 to institute suits for the recovery of said penalties. Section 74 of said Public Service Commissions Law provides that whenever either Commission shall be of opinion that a gas corporation within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law, or is doing anything or about to do anything or permitting anything to be done contrary to or in violation of law, it shall direct counsel to the Commission to commence an action or proceeding in the Supreme Court of the State of New York in the name of the Commission for the purpose of having such violation stopped and prevented either by way of mandamus or injunction, and that counsel to the Commission shall thereupon begin such action or proceeding by a petition to the Supreme Court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. In the event of plaintiff's failure to comply with the terms of said Act of 1916, the City of New York and the Public Service Commission for the First District will attempt by mandamus or injunction, or otherwise, to enforce the provisions of said act and to compel the plaintiff to comply therewith, and such efforts on the part of the City of New York and said Public Service Com-

mission, or either of them, to compel the plaintiff to comply
2028 with the terms and conditions of said Act, would harass and disturb the plaintiff in the pursuit of its business and affairs as aforesaid, and the plaintiff would lose large sums of money and suffer great and irreparable injury even through the temporary enforcement of said Act.

25. To the end, therefore, that plaintiff may have that relief which it can only obtain in a court of equity, and that defendants may each answer the premises, but not upon oath or affirmation, the benefit whereof is hereby expressly waived by plaintiff, it now prays:

(1) That upon the final hearing hereof, Chapter 604 of the Laws of 1916 of the State of New York, insofar as same attempts to fix a rate of 80 cents per 1,000 cubic feet as compensation for gas supplied to the territory in the Thirtieth and Thirty-first Wards of the Borough of Brooklyn served by plaintiff, may be adjudged and decreed by this Court to be unjust, unreasonable, confiscatory, inoperative, invalid, illegal, null and void, and of no force and effect as against the Kings County Lighting Company, the plaintiff herein.

(2) That such portion of Chapter 125 of the Laws of 1906 of the State of New York as attempts to provide a penalty and forfeiture for the violation of the provisions of said Act as amended by Chapter 604 of the Laws of 1916, be adjudged and decreed by this Court unconstitutional and void and of no force and effect as against the Kings County Lighting Company, plaintiff.

(3) That during the pendency of this action, the Attorney Gen-
eral of the State of New York, Woodbury, defendant, his
2029 assistants, agents and employees, the District Attorney for the County of Kings, Lewis, defendant, his assistants, agents and employees, the defendants, Oscar S. Straus, Henry W. Hodge, William Hayward, Travis H. Whitney and Charles S. Hervey, composing the Public Service Commission for the First District of the State of New York, their and its attorneys, agents, servants and employees, the City of New York, defendant, its Mayor, Chief of Police, Corporation Counsel, and all of its other officers, agents, servants and employees, and each and all of them, except through order of this Court, be restrained from in any way enforcing or attempting to enforce against the Kings County Lighting Company, plaintiff, Chapter 125 of the Laws of 1906, as amended by Chapter 604 of the Laws of 1916 of the State of New York, and from enforcing or attempting to enforce the penalties or forfeitures therein provided, or in any wise interfering with plaintiff or its property or business by the commencement of any other action founded upon said Chapter 604 of the Laws of 1916 of the State of New York or Chapter 125 of the Laws of 1906 of the State of New York as amended by it.

(4) The plaintiff further prays that it at any time hereafter and prior to the final hearing hereof, any consumer or consumers of gas in the territory served by plaintiff, or any other person, associa-

tion or corporation in the City of New York, shall undertake to enforce the provisions of said acts, or any of them, or otherwise proceed or act therein, such persons, or some of them in behalf of all, be made parties defendant hereto, and each of them be enjoined and restrained as heretofore prayed.

2030 (5) The plaintiff further prays that upon motion and hearing a temporary injunction may issue with like effect as hereinbefore prayed, and that upon the final hearing hereof said injunction may be made perpetual; and for such other and further relief in the premises as the nature of the case may require and as may be deemed just and equitable by the Court.

O'BRIEN, BOARDMAN, HARPER & FOX,
Attorneys for the Plaintiff.

Office & Post Office Address, No. 120 Broadway, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
City and County of New York, ss.

G. W. Mead, being duly sworn, states that he is the president of the Kings County Lighting Company, the above-named plaintiff, a corporation organized and existing under and by virtue of the Laws of the State of New York; that the foregoing complaint is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

(Sgd.) G. W. MEAD

Sworn to before me this 29th day of June, 1910.

(Sgd.) ALBERT C. CORNELL,
[SEAL.] *Notary Public, Bronx County, No. 29*

Bronx County Register No. 801.
Certificate filed in New York County No. 2.
New York Register No. 8011.
Commission expires March 30, 1918.

2031 *Answer of Defendant Attorney General.*

Supreme Court, New York County.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

EGBERT E. WOODBURY, as Attorney General of the State of New York, Oscar S. Straus, Henry W. Hodge, William Hayward, Travis H. Whitney, Charles S. Hervey, Composing the Public Service Commission for the First District of the State of New York, and the City of New York, Defendants.

The above-named Egbert E. Woodbury, as Attorney General of the State of New York, one of the defendants herein, appearing in this action, answers plaintiff's complaint as follows.

I.

Denies that he has any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation, matter and thing contained, alleged or set forth in paragraphs of the complaint numbered "8," "9," "16," "17," and "19."

2032

II.

Denies each and every allegation, matter and thing contained, alleged or set forth in paragraph of said complaint numbered "10," except that the defendant admits the enactment of the various laws mentioned in the said paragraph, but refers to the said laws for greater particularity.

III.

Upon information and belief, denies each and every allegation, matter and thing contained, alleged or set forth in paragraph of said complaint herein designated "11."

IV.

Defendant denies that he has knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation, matter and thing contained, alleged, or set forth in paragraph of the complaint herein designated "12," except that he denies that the corporations mentioned in the said paragraph of plaintiff's complaint are in the same class as the plaintiff and operate under the same conditions as those surrounding the plaintiff.

V.

Denies any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation, matter and thing contained, alleged or set forth in paragraph of plaintiff's complaint designated "13," except such matters as are of public record, which such matters, this defendant admits.

2033

VI.

Upon information and belief, denies each and every allegation, matter and thing contained, alleged or set forth in paragraph of plaintiff's complaint designated "14," except such matters as are therein stated to be matters of public record, which such matters, this defendant admits.

VII.

Defendant denies any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation, matter and thing contained, alleged or set forth in paragraph of plaintiff's

complaint designated "15," except such matters as are therein stated to be of public record, which said defendant admits. Defendant, further answering the said paragraph "15," denies that "going value" should be allowed; and denies that the decisions quoted in the said paragraph "15" are applicable to the subject-matter and this litigation, or that plaintiff's cause of action comes within such decisions.

VIII.

Answering paragraph designated "18" of plaintiff's complaint, this defendant denies that the provision contained in the law referred to for One Thousand Dollars penalties may reasonably be construed to impose a penalty of One Thousand Dollars for every charge made by a corporation to its customers in excess of 80 cents per thousand cubic feet of gas; and further alleges that if the said Act be so construed, then these penalty provisions alone are
20:1 unconstitutional; and this defendant denies that he has any knowledge or information thereof sufficient to form a belief as to the truth of the allegation that the defendant Public Service Commission for the First District, the defendant City of New York and various persons interested in the matter by virtue of being consumers of plaintiff's gas intend to institute mandamus proceedings to compel the enforcement of the said 80c rate for gas.

IX.

Denies each and every allegation, matter and thing contained, alleged or set forth in paragraph of plaintiff's complaint designated "20," except such matters as are subjects of legislative enactment and matters of public record which such matters and records this defendant admits.

X.

Denies the allegations, matters and things contained in paragraph of plaintiff's complaint designated "21," that there is no remedy, except in equity, to test adequately and completely the constitutionality of Chapter 125 of the Laws of 1906 of the State of New York, as amended by the 80c Gas Law; but alleges that each, all and every of the matters in said complaint are matters which may be fully tried and determined at law, and with respect to which the said complainant herein is not entitled to any relief from a court of equity.

XI.

20:5 Upon information, denies each and every allegation, matter and thing contained, alleged or set forth in paragraph of plaintiff's complaint designated "22."

XII.

Answering paragraph "24" of plaintiff's complaint, this defendant denies that the defendants Attorney General of the State of

New York and the District Attorney have no discretion in the matter; and that the absolute duty is imposed upon them by Section 1962 of the Code of Civil Procedure to institute suits for the recovery of the said penalties referred to. Denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegation that the City of New York and Public Service Commission will attempt by mandamus or injunction, or both, to enforce the provisions of the 80¢ Gas Law; and denies that such attempts would harass and disturb the plaintiff in the pursuit of its business and affairs.

Wherefore, the defendant Egburt E. Woodbury, as Attorney General of the State of New York, prays that the complaint herein be dismissed with costs.

EGBURT E. WOODBURY,
Attorney General of the State of New York.

Office & Post Office Address, Capitol, Albany, N. Y.

2036 STATE OF NEW YORK,
City of New York,
County of New York, ss:

Edgar Bromberger, being duly sworn, deposes and says: That he is a Deputy Attorney General of the State of New York and in charge of the above-entitled action. That he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

EDGAR BROMBERGER.

Sworn to before me this 22nd day of September, 1916.
ABRAHAM J. LIFSHITZ,
Commissioner of Deeds, New York City.

Certificates filed in County Clerk's Office of New York No. 1180, Bronx No. 37, Queens No. 2646, Kings No. 234 and Richmond.
Certificates filed in Register's Office of New York Co. No. 17095, Bronx Co. No. 7038 and Kings Co. No. 7081.

My commission expires October 19, 1917.

2037 *Answer of Defendant Public Service Commission.*

Supreme Court, County of New York.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT, Impleaded with Others, Defendants.

The defendant, Public Service Commission for the First District, answers the complaint in this action as follows:

First. This answering defendant denies any knowledge or information sufficient to form a belief as to each and every allegation in the 8 article or paragraph of the complaint contained.

Second. This answering defendant denies any knowledge or information sufficient to form a belief as to each and every allegation in the 9 article or paragraph of the complaint contained.

Third. This answering defendant admits and alleges that by Section 1, Subdivision 3 of Chapter 125 of the Laws of 1906 of the State of New York entitled, "An act in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation," it is provided that the maximum
2038 price of gas sold in the Thirtieth Ward of the Borough of Brooklyn shall be $1.00 per thousand cubic feet and $1.25 per thousand cubic feet in the Thirty-first Ward of said Borough, and that by Chapter 604 of the Laws of 1916 of the State of New York, entitled, "An Act to amend Chapter One hundred and twenty-five of the Laws of nineteen hundred and six, entitled, 'An Act in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation,' in relation to price of gas to consumers in such city," said act of 1906 was amended to provide that on and after July 1st, 1916, the maximum price of gas sold in said Thirtieth and Thirty-first Wards of the Borough of Brooklyn should be 80 cents per thousand cubic feet; and this answering defendant admits that the plaintiff is the only corporation selling gas in said Thirtieth and Thirty-first Wards of the Borough of Brooklyn; and, except as hereinbefore expressly admitted, this answering defendant, upon information and belief, denies each and every allegation in the 10 article or paragraph of the complaint contained.

Fourth. Upon information and belief, this answering defendant denies each and every allegation in the 11 article or paragraph of the complaint contained.

Fifth. This answering defendant denies any knowledge or information sufficient to form a belief as to each and every allegation in the 12 article or paragraph of the complaint contained, save that it admits, upon information and belief, that, with the exception therein mentioned, all gas corporations operating in the City of New York charge from 95 cents to $1.15 per one thousand cubic feet of gas.

2039 Sixth. Answering the allegations in the 13 article or paragraph of the complaint contained this answering defendant denies any knowledge or information sufficient to form a belief as to what amount, if any, is due to the plaintiff from The City of New York under the contracts referred to in said article or paragraph or to what extent, if any, the income accruing to the plaintiff on account of gas supplied to street lamps would be reduced from and after September 2nd 1916.

Seventh. This answering defendant admits and alleges that by an order duly made by it on May 23rd, 1916, and served upon and acknowledged in writing by the plaintiff, it ordered and directed the plaintiff, as a condition to the issuance of certain bonds, to set aside and charge to operating expenses a sum equivalent to 11½ cents for each 1,000 cubic feet of gas sold, less amounts charged to its various repair accounts, and that said sum is a fair and reasonable one to provide for the amortization of the property owned and employed by the plaintiff in manufacturing, selling and distributing gas; and, except as hereinbefore expressly admitted, this answering defendant, upon information and belief, denies each and every allegation in the 14 article or paragraph of the complaint contained.

Eighth. Answering the allegations in the 15 article or paragraph of the complaint contained this answering defendant denies, upon information and belief, that in the case or proceeding referred to in said article or paragraph the plaintiff rendered or furnished to this answering defendant all the reports of information called for by it; and this answering defendant further denies that in its opinion, to which reference is hereby had, rendered in said case or pro-
2040 ceeding, no allowance for going value was made; and this answering defendant admits that its order made in said case or proceeding was reviewed under a writ of certiorari by the Appellate Division of this Court, First Department, and a decision rendered by it which was reviewed and a decision rendered upon certain certified question by the Court of Appeals, and as to what was determined in and by said decisions and the legal effect thereof this answering defendant prays that reference may be had thereto as set forth in the official reports and records; and this answering defendant denies that said courts or either of them decreed that any amount should be added to the sum of $3,188,207.92 for going value, and, upon information and belief, denies that said going value amounts to the sum of $750,000 or to any sum whatever; and this answering defendant, upon information and belief, denies that the appreciation of the plaintiff's property since December 31st, 1910, is more than the depreciation; and this answering defendant, upon information and be-

lief, denies that the total value of the plaintiff's plant and property is in excess of $1,500,000, but on the contrary alleges, upon information and belief, that the total value of said plant and property used and useful in the public service does not exceed the sum of $3,100,000; and this answering defendant denies that the price of 80 cents per thousand cubic feet of gas fixed by said Act of 1916 would yield no return upon the present value of the plaintiff's plant and property, and upon information and belief alleges that said price of 80 cents would yield a fair return upon such valuation.

Ninth. This answering defendant denies that the capital expenditures made by the plaintiff from June 1st, 1914 to March
2041 31st, 1916 have been approved by it, but on the contrary this answering defendant alleges that no capital expenditures made by the plaintiff since July 1st 1915 have been approved by this answering defendant.

Tenth. This answering defendant admits, upon information and belief, that plaintiff's gross receipts from sales to private consumers are in excess of $50,000 per month, and denies any knowledge or information sufficient to form a belief as to each and every other allegation in the 17 article or paragraph of the complaint contained.

Eleventh. This answering defendant denies any knowledge or information sufficient to form a belief as to each and every allegation in the 19 article or paragraph of the complaint contained.

Twelfth. Answering the allegations contained in the 20 article or paragraph of the complaint contained, this answering defendant denies that the result of the passage of said Act of 1916 is to deprive the plaintiff of any privilege which at the date of the passage of said act was enjoyed by any other corporation in the State of New York in the same class of the plaintiff or operating under the same conditions.

Thirteenth. This answering defendant denies, upon information and belief, each and every allegation in the 22 article or paragraph of the complaint contained.

Wherefore, this answering defendant demands judgment that the complaint be dismissed with costs.

GEORGE S. COLEMAN,
Attorney for Defendant
Public Service Commission for the First District.

2042 STATE OF NEW YORK
County of New York, ss

Oscar S. Straus, being first duly sworn, deposes and says: That he is the chairman of the Public Service Commission for the First District, one of the defendants in this action; that the foregoing answer is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

Deponent further says that the sources of his information and the grounds of his belief as to all matters not stated to be alleged of his own knowledge are the papers and records in the possession of said defendant and statements made to him by persons acquainted with the facts; and that the reason why this verification is not made by said defendant is that it is a public body created under the Laws of the State of New York.

OSCAR S. STRAUS.

Sworn to before me this 11th day of July, 1916.

GODFREY GOLDMARK,
Notary Public, 122, *New York County*.

2043 *Answer of Defendant The City of New York.*

Supreme Court, New York County.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

EGBURT E. WOODBURY, Attorney General of the State of New York; Harry E. Lewis, District Attorney for the County of Kings; Oscar S. Straus, Henry W. Hodge, William Hayward, Travis H. Whitney, Charles S. Hervey, Composing the Public Service Commission for the First District of the State of New York, and The City of New York, Defendants.

The defendant, The City of New York, one of the above-named defendants, by Lamar Hardy, corporation counsel, its attorney, answers the complaint in the above-entitled action, as follows:

I.

Admits the allegations contained in the paragraphs of said complaint numbered "1," "2," "3," "4," "5," "6" and "7."

2044 II.

Denies that it has any knowledge or information thereof sufficient to form a belief as to the allegation contained in paragraphs "8" and "9" of said complaint.

III.

Denies, upon information and belief, the allegations contained in paragraph "10" of said complaint, except that it admits the enactment of Section 1, subdivision 3 of Chapter 125, page 235, Laws of 1906, but refers to the same for greater particularity, and admits the enactment of Chapter 604 of the Laws of 1916, but refers to the same for greater particularity. Admits that the plaintiff is the only cor-

poration selling gas in both the Thirtieth and Thirty-first Wards of Brooklyn.

IV.

Denies the allegations contained in paragraph "11" of said complaint.

V.

Denies any knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraph "12" of said complaint.

VI.

Denies upon information and belief the allegations contained in paragraph "13" of said complaint, except that it admits that the plaintiff is supplying gas to the City of New York for munici-
2045 pal buildings and for lighting the streets in the same wards.

Admits the enactment of Chapter 736, page 2091, of the Laws of 1905 of the State of New York, but for greater particularity refers to the same.

Admits that the City of New York has refused to pay the lighting bills of the plaintiff for lighting the streets for the period from October, 1914, to this date.

VII.

Denies that it has any knowledge or information thereof, sufficient to form a belief, as to the allegations contained in paragraph "14" of said complaint and denies the relevancy of said allegations and that the amount required for amortization is a charge to operating expenses, except that it admits that an order of the Public Service Commission was entered on May 23, 1916, and for greater particularity refers to the same.

VIII.

Answering paragraph "15" of said complaint, admits that on October 20, 1911, the Public Service Commission for the First District made an order fixing the maximum price of gas to be charged by the plaintiff in said Thirtieth Ward of the Borough of Brooklyn, but for greater particularity refers to the same.

Admits that on October 20, 1911, said Commission filed an opinion reaffirmed on November 7, 1911, but for greater particularity refers to the same.

Admits that on May 9, 1913, the Appellate Division, First Department, rendered a decision in the case entitled, People ex
2046 rel. Kings County Lighting Company v. Wilcox, et al., Public Service Commission, reported in 156 App. Div. 603, but for greater particularity refers to the same.

Admits that on March 24, 1914, the Court of Appeals handed

down a decision in the above case, but for greater particularity refers to the same.

Denies that it has any knowledge or information thereof sufficient to form a belief as to the allegation that the plaintiff since December 31, 1910, has expended the sum of $710,628.92 in extensions and improvements of its said property and that the value of the plaintiff's said property at this time is $3,188,207.92, plus "going value," plus appreciation and minus depreciation occurring since said December 31, 1910.

Denies, upon information and belief, that said "going value" is of the value of $750,000 or has any value.

Denies that said rate of 80 cents per thousand cubic feet of gas, fixed by said Act of 1916, would yield no return upon any valuation, and that the total value of plaintiff's plant and property is in excess of $4,500,000, and alleges that said rate of 80 cents per thousand cubic feet of gas, fixed by said Act of 1916, will allow the company a fair return on its investment and on the total value of plaintiff's plant and property.

IX.

Denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraph "17" of said complaint, and this defendant alleges that by Section 63 of Chapter 219 of the Consolidated Laws of 1909, known as the
2047 Transportation Corporations Law, it is provided that every gas light corporation may require every person to whom such corporation shall supply gas for lighting any building, room or premises to deposit with such corporation a reasonable sum of money according to the number and size of lights used or required, or proposed to be used, for two calendar months by such person and the quantity of gas necessary to supply the same, as security for the payment for gas consumed during such period, and that the said deposits would be sufficient to cover the reduction of 20 per cent. provided by law on the bills of such persons for the next ten months.

X.

Answering paragraph "18" of said complaint, admits the enactment of Chapter 125 of the Laws of 1906, but for greater particularity as to its contents and legal effect, refers to the same.

Denies that said chapter may reasonably be construed to impose a penalty of $1,000 for every charge made by a corporation to its customers in excess of 80 cents per thousand cubic feet of gas, and further alleges that if said act be so construed then these penalty provisions are unconstitutional, as held by the Supreme Court of the United States in the case of Willcox, et al. vs. Consolidated Gas Co., 212 U. S., 19.

Denies, upon information and belief, that the defendant, Woodbury, the Attorney General of the State of New York, and the defendant, Lewis, the District Attorney of Kings County, intend to institute suits for the recovery of such penalties.

Denies that it has any knowledge or information thereof, sufficient to form a belief, as to the allegation that the defendant, Public
2048 Service Commission, and various persons interested in the matter, by virtue of being consumers of plaintiff's gas, intend to institute mandamus proceedings to compel the enforcement of said 80 cents rate for gas.

XI.

Denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraph "19" of said complaint.

XII.

Denies that the other corporations in the State of New York, mentioned in paragraph "20" of said complaint, are of the same class as the plaintiff and operate under the same conditions as those surrounding the plaintiff, or that the said act would deprive plaintiff of the equal protection of the laws.

XIII.

Denies the allegations contained in paragraph "21" of said complaint that there is no remedy except in equity to test adequately and completely the constitutionality of Chapter 125 of the Laws of 1906 of the State of New York, as amended by the Eighty Cent Gas Law, but alleges that all and every of the matters in said complaint are matters which may be fully tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity.

XIV.

Denies the allegations contained in paragraph "22" of said complaint.

2049 Wherefore, the defendant, The City of New York, prays that the complaint served herein be dismissed, with costs.

LAMAR HARDY,
Corporation Counsel,
Attorney for Defendant, The City of New York.

Office and Post Office Address, Municipal Building, Borough of Manhattan, New York City.

New York Supreme Court, County of New York.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

EGBERT E. WOODBURY et al. and THE CITY OF NEW YORK, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Louis H. Hahlo, being duly sworn, says that he has been duly designated as acting corporation counsel of The City of New York, and as such that he is an officer of the defendant The City of New York in the above-entitled action. That the foregoing answer is true to his knowledge except as to the matters therein
2650 stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant The City of New York is that it is a corporation; that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the Law Department and other departments of the city government, and from statements made to him by certain officers or agents of the defendant The City of New York.

LOUIS H. HAHLO.

Sworn to before me, this — day of July, 1916.
MATTHEW F. DUFFY,
Notary Public, Kings Co., No. 105.

Certificate filed in New York Co., No. 31.
Certificate filed in Bronx Co., No. 4.
Term expires March 30, 1917.

2651 New York Supreme Court, New York County.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

MERTON E. LEWIS, as Attorney General of the State of New York; Travis H. Whitney et al., constituting the Public Service Commission of the State of New York for the First District, The City of New York et al., Defendants.

Decision.

The issues herein coming on to be tried by this Court at a Special Term thereof, in Part IV, held by me without a jury, and having begun the trial thereof on the 10th day of October, 1918, and completed the same on the 21st day of April, 1919, and all the allega-

tions and evidence of the respective parties having been heard therein.

Now after hearing Messrs. Ingraham, Sheehan & Moran (Samuel F. Moran, of counsel) for plaintiff; Robert S. Conklin, for the Attorney-General; Godfrey Goldmark (Oliver C. Semple, of Counsel) for the Public Service Commission for the First District; William P. Burr, Corporation Counsel, (John P. O'Brien, Joseph P. Morrissey and Judson Hyatt, of Counsel) for defendant, the City of New York, I decide and find as follows:

Findings of Fact

First. The predecessor of the plaintiff, the Kings County Gas and Illuminating Company, was incorporated in December, 1889, and at about the same time, to wit: December, 26th, 1889, obtained an agreement from the Town of New Utrecht, County of Kings, State of New York, authorizing the Kings County Gas and Illuminating Company to furnish light by gas to the highways of said Town for a period of ten years at an annual rate per lamp lighted per year of $28.00, and to furnish gas to public and private consumers in buildings at a rate of $2.25 per thousand cubic feet. This agreement was extended on March 18th, 1901, to cover a further period of fifteen years concurrent with which was a reduction in the rate for lighting public buildings and also in the rate for gas furnished to private consumers which was changed to $1.75 per thousand cubic feet.

Second. The lighting agreement aforesaid, dated December 26th, 1889, was the principal business reason for the coming into existence of the Kings County Gas and Illuminating Company.

Third. The Kings County Gas and Illuminating Company was authorized by its certificate of incorporation to issue $1,000,000 of capital stock, and it did issue $750,000 in bonds secured by first mortgage on the property of the company. The stock, except $300,000 in cash and first mortgage bonds to the face value of $540,000, by the first of January, 1893, were transferred

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to one George E. Bartlett in consideration of certain land transferred by him to said company and to secure the performance and completion by him of construction contracts and the furnishing and installation of mains and certain apparatus for the use of said company.

The fact appears from the minutes of said Kings County Gas and Illuminating Company that said Company made four separate contracts with said Bartlett whereby the latter agreed to do construction work, and to provide mains, materials and various apparatus, all of which were to be paid for by bonds and stock of said Company. Upon the completion of these contracts, said Bartlett became the owner of all of the capital stock of the company, saving a few shares, and of its bonds to the amount aforesaid. It thus

appears that all of the assets came from Bartlett, who became the virtual owner of the company.

Fourth. The Town of New Utrecht was annexed to the City of Brooklyn in 1894, by virtue of Chapter 451, Laws of 1894. Upon such annexation the company became subject to the provisions of section 70, Chapter 566 of the Laws of 1890, which fixed $1.25 per thousand cubic feet as the maximum rate for gas sold to the private consumer in cities of the first class. By Chapter 125 of the Laws of 1906, the Legislature enacted that on and after May 1st, 1906, the charge for gas in the Thirtieth Ward of Brooklyn should not exceed $1.00 per thousand cubic feet. That act was amended by Chapter 604 of the Laws of 1916, which finally fixed the maximum rate on and after July 1st, 1916, for the Boroughs of Manhattan and Brooklyn at 80 cents per thousand cubic feet.

Fifth. That by January 21st, 1893, the entire capital stock of said company had been issued, and $549,000 of first mortgage bonds of said company issued.

Sixth. That the Kings County Gas and Illuminating Company began to furnish light to customers on September 2nd, 1891. It bought all gas from other Gas Light Companies, first from the Citizens Gas Company up to 1900, and later from the Brooklyn Union Gas Company at 65 cents per thousand cubic feet.

Seventh. That in 1890 the Kings County Gas and Illuminating Company had only one holder of 100,000 cubic feet capacity, situated on its land at 65th Street and Ninth Avenue, City of Brooklyn.

Eighth. That by December, 1892, the Kings County Gas and Illuminating Company had installed a holder having a capacity of 300,000 cubic feet, and had by the same time 488,000 linear feet of gas mains consisting mainly of the four and six inch sizes.

Ninth. That during the year 1892 the Kings County Gas and Illuminating Company had as private customers not much more than 150 consumers, and until about 1900 the said company had not more than 200 consumers; in 1901 it had about 3,000 consumers; in 1902 it had about 3,500 consumers, and in 1904 it had 4,000 consumers.

Tenth. That some time during the years 1895 and 1896 the Kings County Gas and Illuminating Company became by conveyance seized of a block of land at 55th Street and First Avenue, City of Brooklyn, fronting on New York Bay, the total consider-
2653 ation of which, including cash and mortgage was $119,500.

Eleventh. That in August, 1899, the Kings County Gas and Illuminating Company authorized the issuance of $250,000.00 face value debenture bonds, payable in 10 years, carrying an obligation of interest of 5%. That with funds realized on the sale of said bonds it began building a plant for the manufacture of gas by

the coal gas method and began the manufacture and sale of this product in the fall of 1900.

Twelfth. That in September, 1901, according to tax reports of the Kings County Gas and Illuminating Company, the total cost of the plant of said company had been $774,539.

Thirteenth. That the actual cost of the land of the Kings County Gas and Illuminating Company at 55th Street and First Avenue, City of Brooklyn, had been $119,500, and that the cost in face value of bonds of said company of the land of said company at 65th Street and Ninth Avenue, City of Brooklyn, was $20,000.

Fourteenth. That on April 1, 1902, the book value of the "Permanent Investment" Account of the books of Kings County Gas and Illuminating Company, as debited to "Construction" was $2,291,653.46 and that by June 30, 1904, the same book account was increased to $2,441,997.40, being an increase of $150,344.04 as per the books of said company.

Fifteenth. That by the addition of $150,344.04 (shown by the last proposed finding) setting forth the increase in the "Permanent Investment" Account to the total of the cost of the land at 65th Street and Ninth Avenue, and the cost of that at 55th Street and First Avenue, City of Brooklyn, to wit: $139,500 and the cost of the plant as of September, 1901, to wit: $774,539 the total actual cost of the land and plant of the Kings County Gas and Illuminating Company engaged in the production and distribution of gas, on June 30, 1904, could not have exceeded the sum of $1,064,383.04.

Sixteenth. That on June 30, 1904, the "Accounts Receivable" of the Kings County Gas and Illuminating Company were set down in that company's books in the amount of $130.79 and on July 1, 1904, at the opening of the books of the new company, the plaintiff herein, "Accounts Receivable" were set down in said last named books in the amount of $221,130.79. This item of increase has not been explained by plaintiff.

Seventeenth. The outstanding obligations of Bonds, Mortgages, and Capital Stock issues and against the assets and property of the Kings County Gas and Illuminating Company as of September 30th, 1901, were as follows:

Bonds	$831,000.00
Mortgages	84,000.00
Capital Stock	1,000,000.00
Total	$1,915,000.00

Eighteenth. A statement made by the predecessor of the plaintiff to the Department of Taxes and Assessments, as of September, 1901, verified December 10, 1901, reveals that the cost of its plant, exclusive of real estate, was $774,539.

2654 It also appears from the minutes of the former company that the actual cost of the land at Fifty-fifth street was $119,500, and that the cost of the land at Sixty-fifth street was $20,000, paid for in bonds of that amount, making the total cost of the land $139,500, which, added to $774,539, gives us the figure of $914,039, to which should be added some minor items of floating capital amounting to less than $1,000, or a grand total cost of plant, real estate and minor expenditures of $915,039, the figure which reflects the aggregate of the amount of debenture bonds of the company outstanding at the time of $831,000, plus the mortgage debt of $84,000 on the Fifty-fifth street land.

It is thus demonstrated beyond the slightest doubt that, saving a few shares, the entire issue of stock of the company, amounting to $1,000,000, turned over to Bartlett from time to time coincidentally with the delivery of the bonds of the company, was a mere bonus, and that the book value of $1,915,000 was in reality an exaggeration of the then actual value of all of the property of the Illuminating Company to the extent of $1,000,000.

Nineteenth. That in April, 1902, Messrs. Hugh J. Grant, George C. Knapp, W. G. Phillips, Nicholas F. Brady, Anthony N. Brady, Edward J. E. Ward, W. S. Riddle, F. C. Randall, and C. K. G. Billings, obtained control as Stockholders or as representing stockholders of the Kings County Gas and Illuminating Company.

Twentieth. The Kings County Lighting Company was organized under the laws May 26th, 1904, and on July 1st, 1904, the company absorbed by merger the Kings County Gas and Illuminating Company.

Twenty-first. That the merger of the Kings County Gas and Illuminating Company with the Kings County Lighting Company was effected by an offer made by Edward J. E. Ward, a stockholder of the former company on June 19th, 1904, to sell and transfer to the Kings County Lighting Company 10,000 shares of the par value of $100 each of the capital stock of the Kings County Gas and Illuminating Company, being the total authorized and outstanding capital stock of the company in consideration of the transfer of $2,000,000.00 par value of common stock and $1,112,000.00 Five Per cent Gold Mortgage Bonds of the Kings County Lighting Company secured by a first mortgage on all of the property of the latter company, subject only to a mortgage of the Kings County Gas and Illuminating Company to the Peoples Trust Company of Brooklyn, under which $750,000.00 of bonds were issued and outstanding, the bonds of the Kings County Lighting Company so transferred to be part of a total authorized issue of $5,000,000.00 and to be payable on July 1st, 1954, unless previously thereto, and on or after the first day of January, 1940, redeemed at 105 and accrued interest. This offer so made was accepted. The agreement thus made was performed. There was delivered by the Kings County Lighting Company as consideration for said transfer 20,000 shares of the par value of $100 each, of the capital stock of the Kings County Lighting Company,

and $1,112,000.00 of its bonds, secured by a mortgage to the Central Trust Company of New York bearing interest at the rate of 5 per cent per annum.

Twenty-second. That on the 30th day of June, 1904, the Kings County Gas and Illuminating Company closed its books with 20 a "capital account" or "Permanent Investment" account, showing a book value of permanent investment to be $2,441,997.40.

Twenty-third. That on July 1st, 1904, the plaintiff in this case began business with the value of its "Permanent Investment" or "Capital" account set down as $1,482,936.97, thus increasing the book value of the "Permanent Investment" over that of its predecessor to the amount approximately of $2,040,939.57.

Twenty-fourth. The gross "Permanent Investment" expenditures, which include all expenditures due to additions by purchase to the "Fixed Capital" of the plaintiff according to its books, did not exceed, approximately, the sum of $1,603,805.12 during the period between July 1st, 1904, and October 31st, 1918, as per plaintiff's books.

Twenty-fifth. That since July 1st, 1904, the plaintiff herein had received all the benefits, returns, and rights which obtained under the contract made by the Town of New Utrecht with the Kings County Gas and Illuminating Company, dated December 26, 1889, which said contract expired in September, 1916.

Twenty-sixth. That a reduction in the amount of oil used below four gallons per thousand cubic feet in the manufacture of gas reduces the candle power of the gas distributed to the extent of four candles for every half gallon of oil not used.

Twenty-seventh. That under normal conditions as to the supply of materials that go into the manufacture of gas, additional labor is not needed at the works of the plaintiff to maintain gas of 22 candle power.

Twenty-eighth. That the quality of illuminating gas distributed to any consumer is almost wholly dependent upon the amount of gas oil used in the manufacture of the gas.

Twenty-ninth. That the total operating revenue of the plaintiff at least was as follows:

1912	$768,844.29
1913	804,691.37
1914	874,213.86
1915	890,701.79
1916	950,363.13
1917	1,014,034.75
1918	1,177,251.63

Thirtieth. That the total bonded indebtedness of the plaintiff on January 1st, 1919, was approximately $3,112,000.00.

Thirty-first. That on June 30th, 1904, the Kings County Gas and Illuminating Company closed its books with a charge to capital account of assets in hand of approximately $2,586,777.68. That the plaintiff began business on July 1st, 1904, with a charge to the same account of assets in hand of approximately $4,846,772.68, an increase of $2,259,995.00. This increase was made principally to offset to the $2,112,000.00 increase in the stock and bonds outstanding against the property of the plaintiff and its predecessor and did not represent additions to the "Fixed Capital" of plaintiff's plant.

Thirty-second. The prices received by plaintiff for gas furnished to its private consumers was $1.00 per thousand cubic feet up to July 1st, 1914, and from July 1st, 1914, up to the present time 95 2056 cents per thousand cubic feet. The plaintiff received $28.00 per lamp for gas furnished for public lighting under the contract made between the Kings County Gas and Illuminating Company and the Town of New Utrecht until said contract expired on September 2nd, 1916.

Thirty-third. That the plaintiff has always paid the interest due and payable on its bonds, and dividends have been paid upon the outstanding stock of the plaintiff since 1907 at the rate of 6% until 1916, except that in the year 1907 2% was paid, in 1908 when 4½% was paid, and in 1916 when 1% was paid, the total amount of dividends paid from 1907 to 1916, inclusive, being $990,000.00.

Thirty-fourth. The book surplus of the plaintiff excluding interest on funded debt, dividends and reserves for depreciation, increased from December 31st, 1904, when it was set down as $340,581.99 to $626,151.67 on December 31st, 1915. The same item appears on the company's books for December 31st of each year thereafter as follows:

1916	$651,385.54
1917	712,285.57
1918	654,679.97

Thirty-fifth. That according to the claim of the plaintiff on December 31st, 1909, the plaintiff had 15,125 private consumers; said number increased approximately each year about 2,000 in number. That on December 31, 1917, the plaintiff had 34,871 private consumers; during the same period of time the length of mains of the plaintiff in miles increased from 154.91 on December 31st, 1909, to 190.66 on same date of the year 1917; during the same period of time the number of "services" of the plaintiff increased from 11,544 on December 31st, 1909, to 18,525 services on December 31st, 1917; during the same period of time the daily manufacturing capacity of the plaintiff's plant increased from 3,300,000 cubic feet to 7,300,000 cubic feet.

Thirty-sixth. That on December 31st, 1917, the plaintiff had in use not more than 18,525 services.

Thirty-seventh. That the buildings and equipment of the Kings County Gas and Illuminating Company, acquired prior to 1904, are

as set forth in Defendant's Exhibits D-24-F to D-24-L, both inclusive.

Thirty-eighth. That the cost of the wrought iron pipe acquired by the plaintiff during the years 1904 to 1917, inclusive, for the distribution of gas as per bills to the plaintiff, was $46,826.77.

Thirty-ninth. That the weight of each size of cast iron gas pipe purchased by the plaintiff during the years 1904 to 1917, inclusive, as per bills to plaintiff was not more than 13,097,682 pounds and its cost was not more than $159,490.38.

Fortieth. That the weight of the "Specials" purchased by the plaintiff during the years 1904 to 1917 both inclusive, as per bills to plaintiff was 122,482 pounds and their cost was $11,576.61.

Forty-first. That the total number of plaintiff's gas services in use yearly from 1905 to 1917, inclusive, were not more than as set forth in defendant's Ex. D-65.

2957 Forty-second. That according to plaintiff's books, the total original cost of the additions to the "Permanent Investment" and "Construction" accounts, during the period between July 1st, 1904, to and including December 31st, 1917, was $1,438,760.19.

Forty-third. That on December 31st, 1917, there was used by the plaintiff in its distribution of gas not more than 984,840 feet of cast iron gas mains of various sizes and 6,825 feet of wrought iron gas mains of various sizes.

Forty-fourth. That during the period between the years 1890 and 1909, both inclusive, the plaintiff and its predecessor in interest abandoned 74,773 feet of cast and of wrought iron mains of various sizes.

Forty-fifth. That the "estimated as original cost," based on the plaintiff's books and records, of the property, other than land, of the plaintiff, expressed with and without depreciation of same was as follows:

Accounts.	Years built.	Cost.
Mains	1890-1903	$373,730.00
Services	1890-1903	35,701.00
Meters & Connections	1890-1903	32,620.00
Works Equipment	1890-1903	210,381.00
Buildings, assumed per Miller	1890-1903	209,866.00
Total Plant	1890-1903	$862,298.00
Mains	1904-1917	331,084.00
Services	1904-1917	155,228.00
Meters & Connections	1904-1917	272,948.00
Buildings & Equipment per books	1904-1917	677,749.00
Total Plant	1904-1917	$1,437,009.00
Total Plant	1890-1917	2,299,307.00

Forty-sixth. There has been no proof offered by the plaintiff of the deficiency of net earnings below a fair return on the actual investment, due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage and not comprised in the value of the physical property, and that there is no element of going value in the property of the plaintiff used in the Public Service.

Forty-seventh. The average candle power per month of gas furnished by the plaintiff to its customers during the year 1918 was approximately as follows:

January	15.55	July	13.34
February	14.11	August	11.18
March	11.71	September	12.71
April	16.94	October	12.21
May	16.62	November	12.17
June	12.15	December	14.17

Forty-eighth. That the Kings County Gas and Illuminating Company, the predecessor of the plaintiff, manufactured gas by the coal gas method, and later adopted the water gas method, without making substantial changes in the plant.

Forty-ninth. That the plaintiff, during the year 1918, when it furnished an illuminating gas having a quality of candle power of less than twenty candles used more generator coal for each thousand cubic feet thus furnished than has been used in former years for the volume of gas manufactured.

Fiftieth. That at the market prices prevailing for gas oil
2058 during the years 1916 to 1918, inclusive, the production of illuminating gas by coal gas was during the period named a substantially more economical method of gas production than by the water gas method.

Fifty-first. That plaintiff has not shown that the method and system of making gas in use in its plant is the most economical, efficient and least expensive method and system which it might use under conditions now existing.

Fifty-second. The plaintiff's books show that the net earnings for the first six months of its existence ending December 31, 1904, were upwards of $20,000; on December 31, 1905, the net earnings for that year were $45,212.80; on December 31, 1906, $67,485.23; on December 31, 1907, $88,821.36, out of which dividends were declared to the extent of $40,000, being at the rate of 2 per cent on $2,000,000 of capital stock.

The net earnings for 1908 were $106,656.34, out of which dividends to the amount of $90,000 were paid, being 4½% on $2,000,000. For 1909, the net earnings were $128,025.17, from which dividends were paid amounting to $120,000, being 6 per cent on $2,000,000. The net earnings and dividends for the succeeding years were as follows:

Year	Net earnings.	Dividends.
1910	$159,389.86	$120,000
1911	142,215.07	120,000
1912	167,934.42	120,000
1913	117,004.39	115,000
1914	131,975.86	125,000
1915	100,852.18	120,000
1916	45,233.87	20,000
1917	60,900.63	.....
1918	3,000.00	.....

It is thus clearly established that since the inception of the plaintiff it has realized a substantial income and has been fully compensated for the expenses incurred in developing its business.

Fifty-third. That according to the plaintiff's reports to the Public Service Commission during the year 1909, the plaintiff manufactured 609,656,000 cubic feet of gas and sold 520,674,000 cubic feet; that during the year 1910 it manufactured 686,522,000 cubic feet of gas and sold 580,728,000 cubic feet; that for the year 1911 it manufactured 748,758,000 cubic feet of gas and sold 634,101,000 that for the year 1912 it manufactured 835,512,000 and sold 701,483,000 cubic feet; that for the year 1913 it manufactured 892,453,000 cubic feet and sold 730,297,000 cubic feet; that for the year 1914 it manufactured 954,996,000 cubic feet and sold 818,392,000 cubic feet; that for the year 1915 it manufactured 1,012,633,000 cubic feet of gas and sold 851,459,000 cubic feet; that for the year 1916 it manufactured 1,070,266,000 cubic feet of gas and sold 934,406,000 cubic feet; that for the year 1917 it manufactured 1,232,741,000 cubic feet of gas and sold 1,047,420,000 cubic feet. The loss in cubic feet in gas sold over that manufactured stated yearly, was as follows:

1909	88,985,000
1910	105,794,000
1911	114,657,000
1912	134,029,000
1913	161,158,000
1914	136,604,000
1915	161,174,000
1916	135,860,000
1917	185,321,000
1918	230,240,000

2059 * The amount manufactured each year is the aggregate "corrected make." The "corrected make" is the "registered make" less deductions made to cover differences in temperature between the works and 60 degrees; so that in the amount manufactured as shown above allowances have already been made for variations in temperature, and the latter does not explain or excuse the tremendous amount of lost or unaccounted for gas.

Operating Expenses for 1918.

Fifty-fourth. That there has been no explanation given of the increasing overhead expenses for the year 1918 in the face of the generally accepted fact that in cents per thousand cubic feet of gas sold, there ought to be a decrease in overhead expenses with the increased volume of business.

Fifty-fifth. That there has been no satisfactory proof offered as to the actual amount of coal used during the five last years in question.

Fifty-sixth. That 38 pounds of anthracite coal for the generators, 3.8 pounds of anthracite coal for the boilers and 7.2 pounds bituminous coal for the boilers was a sufficient quantity of coal to make 1,000 cubic feet of gas sold in 1918.

Fifty-seventh. That 3.5 gallons of oil was sufficient to make 1,000 cubic feet of gas sold of the quality made by plaintiff in 1918, and that no more of coal or oil than these amounts should have been used in 1918 to produce the gas which plaintiff sold.

Fifty-eighth. That the plaintiff increased the wages of its employes in 1918, increased the number of its employees and in addition went to the expense of securing extra help. No satisfactory explanation was given for the expending of this money for extra help.

Fifty-ninth. That it is claimed that the amount spent for auditing work in 1918 was $8,011.62; that no reports, schedules or audits were produced in court to show the work done by these auditors, nor was this expenditure satisfactorily explained. This item of $8,011.62 should be excluded from the operating expenses of 1918.

Sixtieth. The amount of $5,409.65 for legal services was not satisfactorily explained. This item should be excluded.

Sixty-first. The item of insurance in the operating expenses for the year 1918, claimed by the plaintiff was $7,663.56 as against $3,841.49 in 1917, $2,920.95 in 1916, $3,904.49 in 1915, $2,129.40 in 1914, $663.86 in 1913, $711.33 in 1912, $679 in 1911, $730.00 in 1910 and $488.15 in 1909. There was an increase in ten years from $488.15 in 1909 to $7,663.56 in 1918.

Sixty-second. That the plaintiff's stable expenses for 1918 were excessive at least by $5,000.

Sixty-third. That the "promotion office expenses" for the year 1918 was excessive by at least $6,000 (see Exhibit 45C, D44-D46 and the comparison of these items of expenses for several years).

Sixty-fourth. The items for office supplies and expenses for the year 1918, as claimed by the plaintiff, was $12,585.75. This was excessive.

2060 Sixty-fifth. That the following items were not satisfactorily explained as necessary and reasonable operating expenses for the year 1918; trucking and lighterage excessive $2,000; telephone excess $5,000; salaries of general offices $5,000; repairs at works $5,000; petty cash expenditures excess $11,783.77; car tickets, New York Consolidated Railroad Co., $450; interest on loan, $1,181.73; payment to Duncan, chargeable to capital account, $925.

Sixty-sixth. That in the year 1918, according to the claim of the plaintiff, the difference between the gas made by plaintiff, and the gas sold was 230,240,000 cubic feet, and that according to the claims of the plaintiff it cost $0.47 per thousand cubic feet to make this unaccounted for gas; thus the total cost for the unaccounted for gas for the year 1918 was $108,212.80. There is no proof before the Court that this loss was unavoidable.

Sixty-seventh. That the net revenue conceded by the plaintiff for 1918, is $3,028.

Sixty-eighth. That the plaintiff claims in these reports to the Public Service Commission that it manufactured the following quantities of gas for the years indicated and used therein the tons of coal and gallons of oil set forth:

Year.	Cubic feet of gas manufactured.	Short tons of coal used.	Gallons of oil used.
1909	609,656,000	13,694	2,317,309
1910	686,522,000	14,651	2,700,091
1911	748,758,000	16,513	3,054,858
1912	835,512,000	17,832	3,372,346
1913	892,453,000	19,128	3,521,912
1914	954,996,000	22,593	3,793,171
1915	1,012,633,000	22,181	4,179,926
1916	1,070,266,000	23,468	4,520,841
1917	1,232,741,000	29,495	5,018,086
1918	1,463,688,000	39,922	4,906,614

By computations based upon these figures, it appears that per thousand cubic feet of gas manufactured the following unexplained variations result in the gallons of oil and pounds of coal used in the years set forth below, as follows:

Year.	Pounds of coal per M c. f.	Gallons of gas oil per M c. f.
1909	44.9	3.8
1910	43.7	4.08
1911	44.2	4.08
1912	42.6	4.03
1913	42.8	3.9
1914	47.3	3.97
1915	43.8	4.1
1916	43.8	4.2
1917	47.8	4.8
1918	54.3	3.3

Sixty-ninth. That the coal used in 1918 was good serviceable coal, of standard quality.

Seventieth. That plaintiff has not explained or justified the unusual increase as shown above in the pounds of coal used per thousand cubic feet of gas manufactured in the year 1918 over the previous years.

Seventy-first. That the figures shown in proposed finding Sixty-sixth, indicating the unusual, inordinate and excessive amount of coal used in 1918, confirm the testimony of the City's witness Edgerton as to the uneconomical and wasteful results of attempting to make low candle power gas.

Seventy-second. That the operations of plaintiff during the year 1918 show improvidence.

Seventy-third. That it is conceded by plaintiff that the 2061 gas furnished by it to its consumers during the year 1918 was of a very low candle power—far below the standard required by law.

Seventy-fourth. That the volume of business, as disclosed in the number of plaintiff's consumers and the quantity of gas sold by it, has increased and is increasing much more rapidly than the plant investment, and that such carrying charges as interest, taxes, insurance, depreciation, and the like, have in consequence decreased per consumer and per 1,000 cubic feet of gas sold.

Seventy-fifth. That the production expense of the plaintiff in cents per thousand cubic feet of gas sold, according to its reports to the Public Service Commission, was as follows for the years indicated:

1909	30.20
1910	27.91
1911	28.02
1912	30.68
1913	37.41
1914	37.41
1915	39.44
1916	41.65
1917	44.38
1918	55.78

Operating Expenses for 1917.

Seventy-sixth. That there has been no satisfactory proof offered as to the actual amount of coal used during the year 1917.

Seventy-seventh. That in the year 1917, according to the claim of the plaintiff, the difference between the gas made by plaintiff and the gas sold was 185,322,000 cubic feet (See Exhibit D-45-C) and that, according to the claims of the plaintiff, it cost 37 cents

per thousand cubic feet to make this unaccounted-for gas. Thus the total cost for the unaccounted-for gas for the year 1917 was $69,866.00. There is no proof before the Court that this loss was unavoidable.

Seventh-eighth. That the payment during 1917 of $11,827.77 to W. A. Baehr, a Chicago expert, was not explained or justified and should be excluded from the operating expenses for this year.

Seventy-ninth. That the amount of the mortgage recording tax, $1,530., paid during the year 1917, should be excluded from the operating expenses.

Eightieth. That the losses entailed in the merchandising business, if any, should be eliminated from the operating expenses.

Eighty-first. That the unexplained payment to O'Brien, Boardman & Pitt of $5,000, should be eliminated from the operating expenses for this year.

Eighty-second. That the unexplained payment of $1,000 to W. E. Freeman for auditing expense should be excluded from the operating expenses for 1917.

Eighty-third. That the unexplained payment of $4,710 for appraising and other expenses should be excluded from the operating expenses for 1917.

Eighty-fourth. That the unexplained payment to Whitney, Ricks & Sullivan and O'Brien, Boardman and Platt of $4,912.16 2062 should be excluded from the operating expenses for the year 1917.

Eighty-fifth. That the unexplained payment of $7,293.30 to Thomas E. Byrne, the superannuated superintendent of the plaintiff company, should be excluded from the operating expenses for 1917.

Eighty-sixth. That the amount of $10,594.06 for legal expenses should be excluded from the operating expenses for the year 1917, as unexplained.

Operating Expenses for the Year 1916.

Eighty-seventh. That during the year 1916 the plaintiff manufactured 135,860,000 cubic feet of gas more than it sold, which, at the rate of 36¢ a thousand cubic feet the amount which plaintiff says was the cost to it that year—would represent a total cost of $49,558.00.

Eighty-eighth. That there has been no testimony offered from which the Court may make any fair or legal deduction as to how much of this loss was unavoidable.

Eighty-ninth. That the amount of $7,500 paid to Thomas E. Byrne, the retired superintendent of the plaintiff should be eliminated from the operating expenses for 1916.

Ninetieth. That the amount $1,050.00 rental for the office at 42nd Street and Madison Avenue for the year 1916 should be ex-

cluded from the operating expenses for the year 1916, as an unexplained expenditure.

Ninety-first. That the amount of $6,232.59 paid to Meagher, Whitney, Ricks & Sullivan should be excluded from the operating expenses for the year 1916, as an unexplained expenditure.

Ninety-second. That the amount of $3,400.90 paid to Ingraham, Sheehan & Moran and $1,464.21 paid to William F. Sheehan should be excluded from the operating expenses for the year 1916, as an unexplained expenditure.

Ninety-third. That the amount of $4,338.97 for engineering expenses should be excluded from the operating expenses for 1916, as an unexplained expenditure.

Ninety-fourth. That it appears by Exhibit 190 that the plaintiff used in 1916,—4,525,518 gallons of oil, of which there came in under Exhibit 7 at 4.575c per gallon—2,653,307 gallons and under Contract Exhibit 9 at 5.375c per gallon—1,872,211 gallons, and that the cost in all of this oil used was $22,020.13.

If the Company had not been so hasty in making a contract so far ahead but waited from January until June, 1914, or until sometime in 1915 the entire oil used in 1916 would have been on a basis resulting in a saving of from $50,000 to $84,897.00.

Ninety-fifth. That the amount of gas unaccounted for or lost during the year 1915 was 161,174,000 cubic feet, and that the cost to the plaintiff according to the plaintiff's figures of this unaccounted for gas was $53,000; that there is no proof that this is a reasonable amount of gas unaccounted for or that the loss of this gas was unavoidable and, therefore, this amount of $53,000, should be eliminated from the operating expenses for 1915.

2063 Ninety-sixth. That there was in 1914, 136,000,000 cubic feet of gas unaccounted for. The cost of manufacturing this gas at the rate of 31 cents per cubic foot was $43,000.

Ninety-seventh. The total production expenses of the plaintiff (exclusive of overhead charges, transmission and distribution expenses) for the years 1909 to 1918 and the cost of gas oil for each of these years was as follows:

Year.	Production expenses limited as above.	Cost of gas oil.
1909	$157,255.67	$67,283.49
1910	162,084.55	70,136.82
1911	177,670.49	75,637.98
1912	215,238.79	98,191.45
1913	273,226.92	147,258.52
1914	396,179.89	159,352.01
1915	335,811.90	191,471.95
1916	389,223.27	222,047.12
1917	464,891.66	242,530.46
1918	687,652.98	332,487.50

In other words, the cost of gas oil in 1916 was nearly 60 per cent of the total expense of production, and in 1917 it was somewhat less than 50 per cent.

The number of gallons per M cubic feet of gas manufactured the average cost per gallon and the cost per 1,000 cubic feet manufactured during the years 1909 to 1918:

Year.	Gallons.	Gallons per M cubic feet manufactured	Cost per gal. (cents) average.	Cost per M cubic ft. manufactured (cents)
1909	2,317,309	3.80	2.09	11.03
1910	2,700,091	3.93	2.60	10.21
1911	3,054,858	4.08	2.48	10.10
1912	3,372,346	4.04	2.91	11.76
1913	3,521,912	3.95	4.18	16.51
1914	3,793,171	3.97	4.20	16.68
1915	4,179,926	4.13	4.58	18.92
1916	4,520,841	4.22	4.91	20.72
1917	5,018,086	4.07	4.83	19.67
1918	4,906,614	3.35	6.78	22.73

Ninety-eighth. The result of the operations of the plaintiff's plant show that in the fourteen years and four months subsequent to July 1st, 1904, after paying all operating expenses, the plaintiff's net earnings were as follows:

Bond interest	$2,009,885.97
Dividends paid	990,000.00
Surplus increase	643,478.06
Total	3,643,364.03

Ninety-ninth. That shortly after the organization of the plaintiff in 1904, all the outstanding capital stock issue of the plaintiff amounting to approximately $2,000,000 in face value was placed in the hands of three trustees by thirty-two stockholders of record who own $1,990,000 par value of the stock.

One hundredeth. The decrease in the operating revenues of the plaintiff in 1917 and 1918 was primarily due to the act of the United States Government in declaring war and by commanding and controlling all resources of the country necessary to win the war.

One hundred first. That during the war time period in the City of New York, 4¾ per cent was and is a fair return upon the value of the property, including the land of the plaintiff used in the Public Service.

One hundred second. The plaintiff has never experimented with or put into force and effect the rate of 80 cents per thousand cubic feet as required by Chapter 604 of the Laws of 1916.

One hundred third. The fair reproduction cost of the plain-
2064 tiff's plant, omitting the land, as of December, 1916, in terms of value will be fairly measured by the sum of $2,350,000.00.

One hundred fourth. The sum of $479,259.00 represents a fair valuation of all the lands used in plaintiff's business.

One hundred fifth. That an adequate allowance to the plaintiff for working capital is $212,000.00.

One hundred sixth. That on December 31st, 1916, the value of the capital employed by the plaintiff in its business was $3,041,259.00, and this sum should be taken as the rate base as of that date.

One hundred seventh. The annual sales of gas during these years at a 95-cent rate to the public and the 75-cent rate fixed for municipal lighting were as follows:

1914	$874,213.86
1915	890,213.86
1916	950,653.13
1917	1,104,034.75
1918	1,160,552.00

It thus appears that even at a 95-cent rate there has been a steady increase in business from year to year since the plaintiff began its operations. The 80-cent rate went into effect on July 1, 1916.

The operating revenues, based upon the amount of the gas sold during 1916, calculated at the statutory rate of 80 cents for the latter half of the year, shows a total revenue of $884,721.06, or a decrease in the revenues for that year at a 95-cent rate by the amount of $65,642.07.

The operating expenses for that year, according to plaintiff, were $730,843.05, which if correct would have produced an income to plaintiff at an 80-cent rate of $153,878.01, or a little over 5 per cent, upon the rate base of $3,041,259.

One hundred-ninth. Sufficient has already been shown to indicate that the admitted revenue for 1917 of $133,066.91 would be increased by the items which should be disallowed, aggregating at least $55,000, would bring the net income for 1917 to upwards of $185,000. Taking the rate base as $3,100,000 for 1917, such a revenue would indicate a return of about 6 per cent. If the plaintiff is charged with a substantial sum for unaccounted leakage, the revenue for that year would have been correspondingly increased.

One hundred-tenth. As to the operations for the year 1918 according to the plaintiff's books there was a deficit of upwards of $36,000 for the year. The plaintiff has, however, conceded the propriety of eliminating certain objectionable items, which results in changing the apparent deficit to a net profit of somewhat above $3,000. A comparison of expenses for the years 1917 and 1918 shows that the net production expenses for 1917 amounted to $464,891 and for 1918 to $687,652.96, an increase of $222,761.96.

The "production expenses," according to the method of accounting in vogue in plaintiff's business, is made up of the cost of labor, including superintendence of works and cost of boiler fuel, generator fuel, water-gas oil, various supplies and repairs upon the works.

The cost of the three items of boiler fuel, generator fuel and gas oil for those years was as follows:

2085	Boiler fuel.	Generator fuel.	Gas oil.
1917	$51,139	$109,142	$242,530
1918	116,996	168,955	332,487
Increases	$65,857	$59,853	$89,957

The increase of cost in 1918 in these three items over 1917, according to the plaintiff's books, was $215,627.

That in 1916 the plaintiff's accounts show that in the manufacture of 1,070,266,000 cubic feet of gas there were 23,468 tons of coal used, whereas in 1917, 29,495 tons of coal were consumed in manufacturing 1,232,741,000 cubic feet of gas and in 1918, 39,922 tons of coal were used in the manufacture of 1,463,688,000 cubic feet of gas. Stating it differently, in 1916, there were used 43.8 pounds of coal per 1,000 cubic feet of gas, in 1917, 47.8 pounds, and in 1918, 54.3 pounds. This large increase for 1918 is unexplained. It was not claimed that the coal in 1918 was inferior to that of 1916. Besides it should be stated that the system employed for determining the amount of coal used per year was very unreliable and unsatisfactory. It would seem that approximately 10,000 tons should be deducted from the amount claimed to have been used in 1918.

The number of employees in the "commercial department" alone in 1916 was 48; in 1917 the number was 57, and in 1918 it was 88; that is to say, an increase of 40 employees in 1918 over 1916. The salaries and wages of these employees were $41,144.84 for 1916, $49,625.45 for 1917, and $85,481.76 for 1918. One might expect an increase in salaries during that year, but why there should have been so large an increase in the number of employees was not satisfactorily shown.

There are various other items of expense for 1918, particularly in what are generally known as overhead charges, which appear to be excessive. Instead of finding rigid economy in a year of high prices one is impressed with the idea that a policy of extravagance or recklessness had been established.

The net profits of about $3,000 for 1918 might doubtless have been largely increased by strict economy. The court is of opinion that the items, some of which will appear in the findings of fact, already passed upon and including the excessive use of coal above referred to, and which should be eliminated from the cost account, will amount to approximately $100,000.

One hundred-eleventh. During the entire year of 1918 plaintiff continuously furnished gas of a candle power below the legal standard of 22 candles and varying from a maximum monthly average 16.94 candles to a minimum average of 11.18 candles. There was not a single day during the year 1918 when the plaintiff furnished gas up to the standard prescribed by law. There were many occasions when the gas was found to be below 10 candles. It was

not denied that the plaintiff regularly received copies of the daily reports of the official inspections, and, moreover, the records of previous years show a substantial compliance with the requirements of law in respect of the candle power of the gas sold by plaintiff. In view of these facts and in the absence of any explanation of this seemingly flagrant violation of law, the conclusion seems to be inevitable that the plaintiff's violation of law was deliberate.

The daily tests of gas made by the legal inspectors established that the average quality of the gas supplied by the plaintiff during 1918 was an average of 13.57 candles instead of 22 candles, which is the minimum by law. It follows that the consumer was 2066 either compelled to consume a greater quantity of gas measured by the ratio of 22 to 13.57 at a correspondingly increased price to him or that he suffered from the loss of light in the ratio of 13.57 to 22 for which he paid the price charged for gas of a 22-candle power standard.

Conclusions of Law.

1. The plaintiff in this case has not sustained the burden of proof incumbent upon it to prove that Chapter 604 of the Laws of 1916 was confiscatory as to it at any time during the years 1916, 1917 and 1918.

2. Under the circumstances and conditions shown in the evidence in this case and under the rulings of the United States Supreme Court, the plaintiff must actually experiment with the rate prescribed in the statute before seeking to have the Court nullify the statute.

3. That inasmuch as plaintiff has never put into force and effect the rate of 80 cents per thousand cubic feet as Chapter 604 of the Laws of 1916 required it to do, and no sufficient facts being before the Court as to the effect of the 80 cent rate upon this plaintiff, the duty of the plaintiff was to show to the Court a very clear case on the alleged non-compensatory character of the rate in question. This the plaintiff has failed to perform. (Consolidated Gas Company vs. Willcox and others, constituting the Public Commission of the State of New York for the First District, et al., 212 U. S. 19.)

4. That the plaintiff is not entitled to have added to the rate base herein a "going value," inasmuch as it has not satisfactorily shown to the Court the early career of its predecessor, the Kings County Gas and Illuminating Company, the actual experience of that company in developing and organizing its business, "the original investment, its earnings from the start, the time actually required and expense incurred in building up the business, all expenses not reflected by the present condition of the physical property, the extent to which bad management or other causes prevented or depleted earnings, and any other facts bearing on the question, keeping in mind that the ultimate fact to be determined is not the amount of

the expenditures, but the deficiency of the fair return to the investor due to the causes under consideration." (People ex rel. Kings County Lighting Company vs. Willcox, supra, at page 493.)

5. That the land of the plaintiff at 55th Street and First Avenue, City of New York, Borough of Brooklyn, is waterfront property. The plaintiff is not entitled to have a special value assigned to it due to the excessive demands created by the stress of war-time conditions on waterfront facilities. Under such conditions said land would have more value to a company engaged in maritime commerce than a gas company.

6. That plaintiff has come into equity with unclean hands in that it has conceded that the candle power of gas furnished to its consumers in 1918 was 13.57 candle power instead of 22 candle power as prescribed by Chapter 125 of the Laws of 1906 as amended by Chapter 604 of the Laws of 1916.

7. That the plaintiff has received a fair return on the fair value of its plant including land during the years 1916 and 1917.

8. Plaintiff has not proven beyond a rational doubt that the rate of 80 cents per thousand cubic feet prescribed by Chapter
2067 604 of the Laws of 1916, would or could not give it a fair return during the year 1918 on the fair value of its property used in the public service.

9. That the complaint herein should be dismissed with costs.

10. That during the war time period, in The City of New York, 4¾ per cent was, and is a fair return upon the value of the property, including the land of the plaintiff used in the public service.

11. There was not the slightest evidence adduced by the plaintiff which would show any warrant for the increased capitalization and the increase bonded indebtedness of the plaintiff on July 1st, 1904, over that of its predecessor, in arbitrarily increasing its permanent investment account in the amount of $2,112,500.00 and its bonded indebtedness in the amount of $1,112,500.00.

12. The just or fair compensation to which a public utility is entitled must be based upon a fair return upon the reasonable value of the property at the time it is used for the public. The ascertainment of that value is not controlled by artificial rules, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. The original cost of construction is a relevant fact to be considered in arriving at its present value as well as the estimated reproduction cost of construction.

13. The sum of $1,000,000.00 may be properly regarded as representing the fair value of plaintiff's plant engaged in the production and distribution of gas on July 1st, 1904, for rate making purposes.

14. A valuation of a public utility plant for rate making purposes based only upon a period of war time conditions is wholly untenable.

15. The fair reproduction cost of plaintiff's plant, omitting the land, as of December, 1916, in terms of value will be fairly measured by the sum of $2,350,000.00.

16. The sum of $479,250.00 represents a fair valuation of all the land used in plaintiff's business.

17. That an adequate allowance to the plaintiff for working capital would be $212,000.00.

18. That on December 31st, 1916, the value of the capital employed by the plaintiff in its business was $3,041,259.00, and this sum should be taken as the rate base as of that date.

19. A substantial observance of the requirements of the statute as to candle power should have been shown by the plaintiff, and its failure to do so does not entitle it to the favorable consideration of a court of equity.

20. The plaintiff has failed to establish confiscation.

I, therefore, direct that judgment be entered in favor of the defendants, dismissing the complaint on the merits, with separate bills of costs to each of the defendants appearing by separate attorneys, without prejudice to the commencement of a new action, if, in the future, after an adequate experimentation under an 80-cent rate, it believes it can prove that this rate is confiscatory as to it.

Dated, New York, March 27, 1920.

SAMUEL GREENBAUM,
Justice of the Supreme Court.

2065 At a Special Term, Part IV, of the Supreme Court, Held in and for the County of New York, at the Court House in said County, on the 29th Day of March, 1920.

Present, Hon. Samuel Greenbaum, Justice.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, and The City of New York, Defendants.

The issues in the above entitled action having been duly tried before the Honorable Samuel Greenbaum, Justice, at a Special Term, Part IV, of this Court, commencing on the 19th day of October, 1918, and concluding on the 21st day of April, 1919, and the plaintiff having appeared by its attorneys, Messrs. Ingraham, Sheehan, and Moran (Mr. Samuel F. Moran of counsel), and the defendant Charles D. Newton as Attorney General of the State of New York having appeared in person (Mr. Robert S. Conklin, Deputy — General of Coun-

eral), and the defendant Public Service Commission of State of New York for the First District having appeared by its counsel, Mr. Godfrey Goldmark (Mr. Oliver C. Semple of Counsel), and the defendant The City of New York having appeared by its attorney, William P. Burr, Corporation Counsel (John P. O'Brien, Joseph P. Morrissey and Judson Hyatt, Assistant Corporation Counsel, of counsel), and the Court having heard the allegations and the evidence of the parties and after due deliberation having been had, made and filed its decision herein containing statements of facts and conclusions of law and directing judgment as hereinafter stated, with separate bills of costs to each of the defendants appearing by separate attorneys, and the costs of the defendants having been duly taxed as follows:

Charles D. Newton as Attorney General of the State of New York at the sum of	$115.00
Lewis Nixon constituting the Public Service Commission of the State of New York for the First District at the sum of	$115.00
The City of New York at the sum of	$115.00

Now, on motions of Charles D. Newton as Attorney General of the State of New York, attorney in person, Terence Farley, counsel for the defendant Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, and William P. Burr, Corporation Counsel, attorney for defendant the City of New York, it is

Adjudged that the complaint herein be and the same hereby is dismissed upon the merits, without prejudice to the commencement of a new action, if, in the future, after an adequate expen-2069 mentation under an 80-cent rate, it believes it can prove that the rate is confiscatory as to it, and it is further

Adjudged that the defendant Charles D. Newton as Attorney General of the State of New York, recover of the Plaintiff Kings County Lighting Company the sum of $115.00, the amount of said defendant's costs as taxed, and that said defendants have execution therefor, and it is further

Adjudged that the defendant Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, recover of the plaintiff Kings County Lighting Company the sum of $115.00, the amount of the said defendant's costs as taxed, and that said defendant have execution therefor, and it is further

Adjudged that the defendant the City of New York recover of the plaintiff Kings County Lighting Company the sum of $115.00, the amount of the said defendant's costs as taxed, and that said defendants have execution therefor.

Enter

S. G., *J. S. C.*

[SEAL.] WM. F. SCHNEIDER,
Clerk.

2070 Supreme Court, Special Term, Part IV.

KINGS COUNTY LIGHTING COMPANY, Plaintiff,

vs.

MERTON E. LEWIS, as Attorney-General of the State of New York; Oscar S. Straus, Henry W. Hodge, William Hayward, Travis H. Whitney, and Charles S. Hervey, Composing the Public Service Commission for the First District of the State of New York, and The City of New York, Defendants.

Opinion.

Ingraham, Sheehan & Moran (Samuel F. Moran of Counsel) for plaintiff; Robert S. Conklin for the Attorney-General; Godfrey Goldmark (Oliver C. Semple of counsel) for the Public Service Commission for the First District; William P. Burr, corporation counsel (John P. O'Brien, Joseph P. Morrissey and A. Judson Hyatt of counsel) for defendant City of New York.

Inadequacy of return upon the capital of a public service corporation during an abnormal period is an insufficient ground for declaring unconstitutional a legislative act fixing the price of gas at 80 cents per 1,000 cubic feet. Failure to make a trial of the prescribed rate justifies a dismissal of the complaint in such an action. Continuous failure during a year's operations to furnish gas of a 22 candle-power standard, as required by statute, an important element in denying plaintiff equitable relief.

2071 GREENBAUM, *J.*:

This action is brought by the plaintiff to have declared null and void as to it chapter 604 of the Laws of 1916, effective July 1, 1916, which fixed the price of gas sold to the public in the territory served by the plaintiff at 80 cents per thousand cubic feet, upon the alleged ground that the enforcement of the statute would be confiscatory of the plaintiff's property and violative of the Constitution of the United States (art. 1, sec. 10, clause 1) and the Fourteenth Amendment thereto and of the Constitution of the State of New York (art. 1, secs. 6 and 7).

Before entering into a consideration of the questions involved in this case, it may prove of some value for future trials of similar actions briefly to state the experience of the court upon the trial of this action. The defendants' expert accountants had not made such an examination before trial of the plaintiff's records, papers, documents and vouchers as would have enabled them to verify the correctness of the entries in numerous books bearing upon the cost of its plant and the expenses of operation.

The city's counsel being thus uninformed as to the accuracy of the plaintiff's books and as to the methods in vogue in plaintiff's business of posting entries from original memoranda, insisted upon

strict proof of the correctness of its book entries. A vast amount of time was consumed through the plaintiff's efforts to establish the cost of its plant and operations and in prolonged and tedious cross-examinations of its witnesses. In the interest of economy of time the court permitted the defendants' experts to examine the plaintiff's books and papers pending the trial, and for that purpose adjourned the hearings from time to time and took up the trial of other actions.

There seems to be no substantial reason why, in a rate case, which necessarily involves a critical examination of the books and vouchers of a public utility company, the experts of the defendants, who represent the public interests, should not be afforded full opportunity as a matter of course to make a thorough examination of its books and documents before the trial and thereby obviate a ruthless waste of the time of the court.

As a consequence of the conditions under which the trial was had eighty-three court days were consumed in the presentation of proofs and ten thousand typewritten pages of testimony were taken, embraced in twelve volumes.

The court is convinced that with an adequate preparation on the part of all the parties the trial could have been completed within four or five weeks.

The plaintiff is the immediate successor of the Kings County Gas & Illuminating Company, a corporation which came into existence in 1889. The evidence justifies the conclusion that the formation of that company was prompted by the circumstance that on December 26, 1889, its promoters had secured a ten-year lighting contract to commence September 2, 1891, from the former Town of New Utrecht, now the Thirtieth Ward of the Borough of Brooklyn, in which the plaintiff operates. Under this contract it became entitled to receive $28 per annum for each lamp on the highways lighted by it and to supply gas to public buildings and private consumers at a sum not to exceed $2.25 per 1,000 cubic feet. The contract was subsequently extended on March 19, 1891, for a further period of fifteen years. The new contract differed from the first in providing for a reduction of the rate for public buildings and private consumers to a sum not exceeding $1.75 per 1,000 cubic feet.

2072 Upon its incorporation the Illuminating Company, as it will be hereafter called for the sake of brevity, issued capital stock to the amount of $1,000,000 and at the same time put forth an issue of 5 per cent bonds in the amount of $750,000 to be secured by its first mortgage. So far as the proofs show, this company began business with practically no cash in its treasury.

The Town of New Utrecht was annexed to the City of New York in 1894 by virtue of chapter 451, Laws of 1894. Upon such annexation the company became subject to the provisions of section 70, chapter 566, of the Laws of 1890, which fixed $1.25 per 1,000 cubic feet as the maximum rate for gas sold to the public in cities of the first class. By chapter 125 of the Laws of 1906, the Legislature enacted that on and after May 1, 1906, the charge for gas in the Thirtieth Ward of Brooklyn should not exceed $1 per 1,000

cubic feet. That act was amended by chapter 604 of the Laws of 1916, which fixed the maximum rate on and after July 1, 1916, for the Boroughs of Manhattan and Brooklyn at 80 cents per 1,000 feet.

It appears from the minute books of the Illuminating Company, which were produced by the plaintiff and introduced in evidence by the defendants, that when that company was organized one George E. Bartlett, who was a contractor and builder, owned the land at Sixty-fifth street and Ninth avenue in the Town of New Utrecht, where the present gas holders of the plaintiff company are located. This land he sold to the Illuminating Company in consideration of the transfer to him of the company's bonds in the amount of $20,000 and of its stock in the like amount. It also appears from the minutes that four separate contracts were successively entered into between Bartlett and the company for construction work and for the furnishing of mains, materials and various kinds of apparatus to be used in its gas business all of which were to be paid for by bonds and stock of the company. Upon the completion of these contracts Bartlett became the owner of all of the capital stock of the company saving a few shares and of its bonds to the amount of about $550,000. It thus appears that all of the assets came from Bartlett, who became the virtual owner of the company.

The Illuminating Company commenced to supply gas on September 2, 1891, the date when its first street lamp was lighted. At that time and up to 1900 the company manufactured no gas, but purchased it at the rate of 65 cents per 1,000 cubic feet from other companies. In 1890 a 100,000-foot gas holder was erected on the Sixty-fifth street plot, and in 1892 a 500,000-foot holder was built on the same plot. In 1895 the company acquired a large block of land where the present manufacturing plant is located, situated between Fifty-fourth and Fifty-fifth streets, one side of which fronted on First avenue and the opposite side on New York Bay, for the consideration of $119,500, of which $35,500 was paid in cash and the balance of $84,000 by the execution of a purchase-money mortgage for that amount.

On July 1, 1904, the plaintiff, through merger proceedings, succeeded to the ownership of the assets of the Illuminating Company and assumed all of its liabilities. Before and at the time of the merger, the stock of plaintiff's predecessor company was almost entirely in the hands or under the control of Messrs. C. K. J. Billings, Anthony J. Brady and Hugh J. Grant, who, after the merger, became the voting trustees of the plaintiff company. It is thus evident
that in 1904 the interests which then controlled the Illumi-
2073 nating Company also controlled the plaintiff upon and subsequent to its incorporation. The method for accomplishing the merger, briefly stated, was that one Ward a stockholder of the Illuminating Company, offered to sell all of its capital stock to the plaintiff company in consideration of the transfer of its entire capital stock, which was to be fixed at $2,000,000, and of an issue of first mortgage bonds to be executed in the amount of $1,112,500. The offer was accepted. The effect of this formal transaction was an

immediate increase of the capital stock to $2,000,000 and of its bonded indebtedness by the sum of $1,112,500.

The plaintiff company opened its books as of July 1, 1904, with entries showing the issue of $2,000,000 of shares of stock in place of the $1,000,000 shares of stock of the predecessor company and an increased bonded indebtedness of $1,112,500, making an aggregate corresponding increase of upwards of $2,112,500 in the amount of permanent investment of the new company over that appearing in the books of the Illuminating Company on June 30, 1904.

There was not the slightest evidence adduced which would show any warrant for this increased capitalization and the increased bonded indebtedness. In fact the transaction was clearly an arbitrary new book value of the properties through the medium of a new corporation apparently organized for that express purpose.

The plaintiff contends that the present reproduction cost forms the proper basis of valuation of its plant. The defendant the City of New York insists that the actual original cost of its properties must control. The defendant Public Service Commission claims that the value should be reached upon the consideration of all the relevant facts. The rule now seemingly recognized by the courts is that the fair present value of the property is the basis upon which a fair return should be paid (Smyth v. Ames, 169 U. S. 466, 546; San Diego Land & Town Co. v. National City, 174 U. S. 739, 757; Willcox v. Cons. Gas Co., 212 U. S. 19; Simpson v. Shepard, 230 U. S. 352, 434; Kings County Lighting Co. v. Willcox, 210 N. Y. 479, 485). In other words, the just or fair compensation to which a public utility is entitled must be based upon "the fair return upon the reasonable value of the property at the time it is being used for the public" (San Diego case, supra).

As to the method of arriving at the present value of the property there is no hard and fast rule. "The ascertainment of the value is not controlled by artificial rules; it is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts" (Minnesota Rate Cases, 230 U. S. 352, 434).

In People ex rel. Kings County Light Co. v. Willcox (210 N. Y. 490, 492) the court's opinion by Miller, J., is: "A public service corporation is entitled to a fair rate of return from the beginning of its investment and no more. If the shareholders have been deprived of a fair return on their investment because of the time and expense reasonably and properly required to build up the business, they have to the extent of that deprivation added to their original investment and are entitled to a return upon it. * * * The fair return is to be computed on the actual investment, not on an over-issue of securities."

In Smyth v. Ames (169 U. S. 466, 544) the court said: "If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as
2074 may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization * * *."

Under the authorities the original cost of construction is a relevant fact to be considered in arriving at its present value. In this connection, however, it is instructive to consider the statutes on this subject. The amendment of the Public Service Commissions Law (chap. 289, Laws of 1912) added two new sections to the law, section 55-*a* as to common carriers and section 69-*a* as to gas companies, and provided that the reorganizations of such corporations under sections 9 and 10 of the Stock Corporation Law should be subject to the control of the Public Service Commission, and further, that: "2. Upon all such reorganizations the amount of capitalization, including therein all stocks and bonds and other evidence of indebtedness, shall be such as is authorized by the commission which, in making its determination (sic), shall not exceed the fair value of the property involved, taking into consideration its original cost of construction, duplication cost, present condition, earning power at reasonable rates and all other relevant matters and any additional sum or sums as shall be actually paid in cash, provided, however, that the commission may make due allowance for discount of bonds * * *."

The amendment of 1910 of the Public Service Commissions Law, applicable alike to common carriers and gas and electrical companies, conferred the power upon the commissions to fix maximum rates, having due regard, among other things, to a reasonable average return "upon capital actually expended" and to the necessity for making reservations out of income for surplus and contingencies. This amendment repealed section 38 of the Railroad Law and was transferred to the railroad section of the Public Service Commissions Law (sec. 19, subd. 1), and was also incorporated in the gas and electric section (sec. 72).

In chapter 672, section 97, Laws of 1910, a further amendment was made authorizing the regulation of telegraph and telephone companies, in which it was provided that "the commission shall, with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and of the necessity of making reservations out of income for surplus and contingencies, determine the just and reasonable rates," &c.

It is to be observed that in the case of those public service corporations there is no mention of the "capital actually expended."

In 1911, by chapter 546, the Legislature further amended section 49 of the Public Service Commissions Law, as to common carriers, by striking out the words "upon capital actually expended" and inserting in place thereof "upon the value of the property actually used in the public service." The statute applicable to gas companies, however, does not appear to have been amended since 1910, and hence that statute still remains as amended in 1910, namely: "A reasonable average return upon the capital actually expended." The policy of the state with reference to gas companies has thus been and still appears to be that the money actually expended by investors for construction purposes shall form the basis of measuring their right to a return upon their capital. The court has, nevertheless, proceeded to appraise the value of the plaintiff's properties upon what

it has deemed from all the evidence to be the present value of the plant, in view of the rule now generally recognized by the 2075 courts

The unsatisfactory character of so-called expert opinion on the valuation of a hypothetically reproduced plant at a given time must be apparent to everyone who has had experience with that kind of testimony. Thus in Knoxville v. Knoxville Water Co. (212 U. S. 1, 18) the court referred to "* * * that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. The court has therefore taken into consideration in determining the present value of the plaintiff's business both the original and estimated reproduction cost of construction. In order to satisfy itself as to such cost it has taken into account the increase and decrease in value of materials and labor since the time that the various items of property were acquired; the changes, if any, in the methods, machinery and apparatus in gas manufacture since the time when the machinery and equipment were purchased; the deterioration of the properties and their general condition at the present time and such other relevant facts as have been established during the course of the trial, including such items as contractors' profits, engineering expenses, costs of permanent organization, interest and preliminary and development expenses.

As to the element of what has been termed "going value," however it is primarily to be observed that although an attempt was made by the plaintiff to elicit an opinion thereon from Mr. Alton S. Miller, the plaintiff's expert, he was not permitted to testify in respect thereof for the reason that it became evident after an exhaustive preliminary examination of the witness upon that point that he was not prepared to give estimates on "going value" based upon the meaning of "going value" as those words are understood and interpreted by the courts, as shown by the cases presently to be cited. The witness repeatedly stated that he relied in forming his estimate not on the actual cost of developing the business, but on a hypothetical cost of reproducing it. Moreover, it appeared that this witness had not acquired such an experience as would enable him to qualify as an expert in that regard, nor did he show that he had any knowledge of the actual experiences of the plaintiff company or of other companies as bearing on the question of "going value." No other attempt was made by the plaintiff to introduce evidence of "going value" and, indeed, its counsel formally stated upon the trial that he would abandon the claim for "going value" because of the amount of time that would be consumed if proof were taken to establish the early losses of the company.

Notwithstanding, however, that the court had understood that plaintiff's counsel had abandoned the item of "going value" in estimating the capital of plaintiff, it subsequently developed that he desired to reserve exceptions to the court's ruling as to the competency of the witness Miller in that regard. The court therefore deems it proper to refer to the leading cases which hold that "going value" is based upon the actual experience of a public utility.

In Des Moines Gas Co. v. Des Moines (238 U. S., 153, 165) the court said: "Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property. In this case, what may be called the inception cost of the enterprise entering into the establishing of a going concern had long since been incurred. The present company and its predecessors had long carried on business in the City of Des Moines, under other ordinances, and at higher rates than the ordinance in question established. For aught
2076 that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a company is under the necessity of making up losses and expenditures incidental to the experimental state of its business."

In People ex rel. Kings County Lighting Co. v. Willcox (210 N. Y., 479) the court recognized that "going value" was primarily determinable from the actual experience of the company. The record in the case before it evidently justified the conclusion of the court that there were no records of the company available that would show the actual experience of the company and that no oral evidence on that score was available and that as matter of fact the company had not been compensated for its "going value." Under such circumstances the court held that expert testimony as to "going value" was permissible.

The proofs upon this trial, however, established that the plaintiff proffered no proof that the records were not procurable, and it affirmatively appeared that there were living witnesses who presumably were familiar with the early history of the company, some of them still connected with it, who were not called to state what knowledge they possessed of the fact bearing upon the question of "going value." Besides, as will be presently shown, there is every reason to conclude that the plaintiff has been fully compensated for expenses involved in "going value." Although the court was not called upon to pass upon that question, it would seem that upon the proofs before the court expert opinion testimony of "going value" was not admissable.

It has already been shown that the capital stock of $1,000,000 of the Kings County Gas and Illuminating Company, the predecessor of the plaintiff, did not represent the investment of any moneys or a fair equivalent thereof. The only asset which that company had was a contract for lighting the public streets of the former Town of New Utrecht. When the plaintiff company began its career it acquired all of the assets and assumed all of the obligations of its predecessor company, but nothing of value was added to the assets of the plaintiff. It nevertheless increased the capital stock of $1,000,000 and created a bonded indebtedness of $1,112,500, with interest obligations thereon of 5 per cent. per annum, which have been regularly paid up to the present time.

In studying the net income of the plaintiff's business during the

years of its existence as distinguished from its net earnings, it should be borne in mind that in 1904, when the plaintiff was incorporated, the value of its then assets was slightly in excess of its indebtedness, which aggregated $915,000, made up of the bonded indebtedness of $831,000 and the outstanding mortgage of $84,000 on the Fifty-fourth street property. In other words, for all practical purposes it would be safe to say that the assets of the company did not exceed $1,000,000, and that sum may be fairly taken as the rate base for 1904.

When plaintiff started in business practically its entire capital was represented by its then outstanding bonded and real estate indebtedness. So much of its income which was thereafter periodically applied to this indebtedness was in fact taken from its net earnings, the remaining portion thereof being applicable to the payment of dividends on stock, for which very little or nothing had been paid by the original stockholders.

2077 Bearing in mind the foregoing observations, it will be appropriate to tabulate the yearly net earnings as disclosed by the books of the company.

The plaintiff's books show that the net earnings for the first six months of its existence ending December 31, 1904, were upwards of $20,000; on December 31, 1905, the net earnings for that year were $45,212.80; on December 31, 1906, $67,485.23; on December 31, 1907, $88,821.36, out of which dividends were declared to the extent of $40,000, being at the rate of 2 per cent. on $2,000,000 of capital stock.

The net earnings for 1908 were $106,656.34, out of which dividends to the amount of $90,000 were paid, being 4½ per cent. on $2,000,000. For 1909 the net earnings were $128,025.17, from which dividends were paid amounting to $120,000, being 6 per cent. on $2,000,000. The net earnings and dividends for the succeeding years were as follows:

Year	Net earnings.	Dividends.
1910	$159,389.86	$120,000
1911	142,215.07	120,000
1912	167,934.42	120,000
1913	117,004.39	115,000
1914	131,975.86	125,000
1915	100,852.18	120,000
1916	45,233.87	20,000
1917	60,900.03	.....
1918	3,000.00	.....

It is thus clearly established that since the inception of the plaintiff it has realized a substantial income and has been fully compensated for the expenses incurred in developing its business and that it would therefore not be entitled to now add anything for "going value."

The plaintiff's proofs of the present value of its plant rest upon the expert testimony of Mr. Miller. This witness prepared an

itemized inventory of the plaintiff's equipment and gave his estimates of their value both upon pre-war prices, i. e., in 1913-1914 and upon war-time prices in 1917.

Many of the figures given by the witness were derived from sources that were purely hearsay. As to many items he did not show familiarity with prevailing rates of wages and materials. With respect to such a large item as meters, the witness relied upon assumptions as to their condition without an examination of them. His pre-war revised estimate (1914) of the cost of plant reproduction, omitting the land and without the additional items of contractors' profits, engineering, permanent organization or preliminary and development expenses was $2,321,148, being $2,428,134 less $107,036 for deductions due to elimination of concrete wharf and corrected meter costs. His estimate of the additional items just mentioned, including taxes on land and interest on capital dormant during construction was $941,344, making his total estimate of the value of the plant excluding the land $3,262,492.

These additional items, exclusive of interest and taxes, aggregate $616,194, and consist of contractors' profit of 10 per cent. on sub-contractors' charges for construction, amounting to $207,349; 5 per cent. for engineering expenses, amounting to $131,777; $2\frac{1}{2}$ per cent. for expenses of permanent organization pending construction, amounting to $69,183, and preliminary and development expenses of $207,885, estimated on a 5 per cent. basis.

It may be observed that Miller allows nothing for depreciation, because, as he states, that is an element which is non-existent as
2078 long as the plant is maintained in good condition, and the evidence shows that it is a well-maintained plant.

As to the inventory of the same witness based upon prices prevailing in January, 1917, a war period, the court is of opinion that a valuation during such abnormal times is wholly untenable. The then existing abnormal conditions were such as to make it absolutely unfair to consider the prices then prevailing as the basis of valuation. Indeed, the witness himself admitted that he did not think that the plant could in fact be reproduced under any circumstances whatever at any price during 1917.

As was stated by former United States Supreme Court Justice Hughes, sitting as referee in Brooklyn Borough Gas Co. v. Public Service Commission (17 State Dept. Reports, 81, 98, 99): "To base rates upon a plant valuation simply representing a hypothetical cost of reproduction at a time of abnormally high prices due to exceptional conditions would be manifestly unfair to the public."

The valuation of plaintiff's plant, omitting land, as given by Alton D. Adams, the expert witness called in behalf of the City of New York, was based upon his estimated original cost of the plaintiff's plant. This witness analyzed the cost by dividing the plant into two parts, to wit, the portion acquired between 1890 and 1904, the period of operation of the plaintiff's predecessor company, and the remainder, installed during plaintiff's régime from 1904 to 1917.

The sources upon which this witness relied for ascertaining the cost during the latter period were the books and records of the plain-

tiff. For the earlier period he had recourse to certain documents memoranda, reports and public records, which emanated from the former company's officials. Among them is a so-called black book which was a record of the works kept by a superintendent, a Mr. Byrne, since deceased; a machinery book, which furnished the dates when the buildings and equipment were installed, and a book which contains records of service pipes and connections laid. The regular books of account of the former company were not produced.

Mr. Adams' valuation is based upon the same items and equipment so far as subject-matter and quantities are concerned as those enumerated in Miller's inventory. According to Mr. Adams' figures, the original cost of the plant as of December, 1917, was $2,299,307, of which $862,298 represented the cost of the plant acquired during 1890-1903 and the balance of $1,437,009 the cost of the plant installed during 1904-1917. This witness estimated the depreciation of the plant acquired during the earlier period at $217,540 and of the remainder at $148,168, making a total depreciation of $361,728. His estimate of the actual cost of construction, less depreciation, is thus $1,937,579.

On October 20, 1911, the Public Service Commission for the First District made an order fixing the maximum price of gas at 85 cents per 1,000 cubic feet between November 1 and December 31, 1912, and at 80 cents per 1,000 cubic feet thereafter to December 31, 1913. The order of the Public Service Commission was annulled by the Appellate Division in certiorari proceedings and the matter remitted for rehearing (People ex rel. Kings County Lighting Co. v. Willcox, 156 App. Div., 603, aff'd 210 N. Y., 479).

In these proceedings the commission's valuation of plaintiff's properties and working capital as of December, 1910, detailed in the opinion in the Appellate Division (supra at pages 608, was
2079 $2,477,579, including the land. Deducting the land value fixed at $650,000, and working capital of $80,000, we obtain the sum of $1,747,579 as the reproduction cost of the plant, omitting the land. Adding thereto the sum of $757,508.82, the amount of net additions to the capital from January 1, 1911, to December 31, 1916, as taken from the books of the company, we obtain a reproduction cost as of December 31, 1916, of $2,505,087. These figures included contractors' profits, engineering, administration, preliminary and development expenses and incidentals.

An analysis of cost of the properties as taken from the records of the predecessor Illuminating Company and from its income tax reports up to June 30, 1901, shows that the book cost of the real estate and improvements, including equipment, was $1,831,000, which coincides with the figure obtained if the capital stock of $1,000,000 be added to the amount of the bonds issued by the company up to that date, to wit, first mortgage bonds amounting to $581,000 and debenture bonds amounting to $250,000. On that date the total secured funded debt of the company was $915,000, made up of the above mentioned first mortgage and debenture bonds amounting to $831,000, plus the sum of $84,000, the amount of the outstanding real estate mortgage on its Fifty-fifth street property, as heretofore shown.

A statement made by the company to the department of taxes and assessments, as of September, 1901, verified December 10, 1901, reveals that the cost of its plant, exclusive of real estate, was $774,539.

It also appears from the minutes of the former company that the actual cost of the land at Fifty-fifth street was $119,500, and that the cost of the land at Sixty-fifth street was $20,000, paid for in bonds of that amount, making the total cost of the land $139,500, which, added to $774,539, gives us the figure of $914,039, to which should be added some minor items of floating capital amounting to less than $1,000, or a grand total cost of plant, real estate and minor expenditures of $915,039, the figure which reflects the aggregate of the amount of debenture bonds of the company outstanding at the time of $831,000, plus the mortgage debt of $84,000 on the Fifty-fifth street land.

It is thus demonstrated beyond the slightest doubt that, saving a few shares, the entire issue of stock of the company, amounting to $1,000,000, turned over the Bartlett from time to time coincidentally with the delivery of the bonds of the company, was a mere bonus, and that the book value of $1,915,000 was in reality an exaggeration of the then actual value of all of the property of the Illuminating Company to the extent of $1,000,000.

In the absence of the books of the company, it is impossible to ascertain with accuracy the items of increase in the capital between June 30, 1901, and June 30, 1904, when the merger took place. It appears, however, from the records in evidence that on the latter date the book cost of the company's real estate, improvements and equipment was $2,441,997, indicating additions to the amount of $610,997 during that period, although the tax reports for the years ending June 30, 1902, and June 30, 1903, merely show new construction for these annual periods amounting in the aggregate to $253,385.71.

On July 1, 1904, the plaintiff opened its books with a stated permanent investment of $1,484,936.37. But that figure obviously included the sum of $3,112,500 heretofore discussed, made up of $2,000,000, the amount of its capital stock, plus the sum of $1,112,500, the amount of the bonds created at the time of the merger, both of which represented water and nothing of value entering into the cost of the plant or land. Deducting $3,112,500 from $4,484,936.37 we have $1,372,436.37, the apparent actual capital on July 1, 1904.

On December 31, 1916, the books of the plaintiff showed permanent investment as $5,889,301.18. Deducting from $5,889,301.18 the aforementioned sum of $3,112,500 we obtain the sum of $2,776,801.18 as the value of the fixed capital on December 31, 1916, assuming as correct all the items of costs of the plant and additions thereto as entered in the records of the former company in the books and records of the plaintiff.

Comparing now the results of the expert appraisals with the revised book costs of the plaintiff and the valuation of the Public Service Commission, we reach the following results:

1. Mr. Miller's pre-war reconstruction value..... $3,262,492
2. Mr. Adams' appraisal of original cost, deducting depreciation and including engineering expenses, taxes, and interest..... $1,937,579
3. Public Service Commission's valuation in the certiorari proceeding brought down to December 31, 1916 ..... $2,505,087
4. Book cost, deducting capital stock of $2,000,000 and increased bonded indebtedness of $1,112,500..... $2,776,801

The plaintiff's expert, Miller, testified that values had not materially changed between 1904 and 1914, the pre-war date upon which he based his estimate. He indeed stated that the cost of steel had declined since 1904. It was not claimed that labor had materially increased from 1904 to 1914. His inventory of subcontractors' costs of construction, after making the deductions due to the elimination of the concrete wharf and corrected meter prices was $2,321,148. His estimates of preliminary and development expenses, engineering costs and costs of permanent organization are more or less arbitrary, particularly when one considers that the laying of mains and services and the installation of meters are ordinarily to a very large extent done by the regular employees of a gas company under an established organization, which manages its business generally. Why should an engineer be paid 5 per cent on every gas meter purchased and for every main laid?

Besides, Mr. Miller makes no allowance for depreciation. He claims that a plant adequately maintained accomplishes all that a new plant would accomplish, and hence that it is as good as new. Mr. Adams strongly controverts this view, and contends that depreciation begins to an inappreciable extent from the time it is installed, and that depreciation is a continuing factor, the percentage thereof varying largely in different items of the plant. It is, for instance, conceded that cast-iron gas pipes have a very long life, but nevertheless many of these pipes will in the course of time be injured by extraneous causes, and many of them will become unusable and worthless because of changing conditions in the neighborhood. It would, however, be futile for the court to attempt to pass judgment upon the merits of a controversy as to which reputable engineers appear to differ. It doubtless is a matter of considerable speculation to say to what extent a piece of machinery or other construction has depreciated. The courts, nevertheless, have generally recognized the propriety of taking into account the element of depreciation, and the same course has been quite uniformly
2081 recognized as proper by public service bodies (Knoxville v. Knoxville Water Co., 212 U. S. 1; Ann Arbor R. R. v. Fellows, 236 Fed. Rep. 387; Denver v. Denver Union Water Co., 246 U. S. 178; Brooklyn Borough Gas Co. v. Public Service Comm'n, 17 State Dept. Reports, 81).

It must, however, always be borne in mind that in rate cases the burden is upon the plaintiff to establish confiscation beyond doubt. On the question of original cost, prior to 1904, the plaintiff has

deliberately refrained from calling witnesses who are still alive, and some of whom are still connected with it, who could have testified whether the books of the predecessor company to which it succeeded were not accessible and who even in the absence of such books might have thrown a flood of light upon the matters involving the original cost of construction. The court is justified in applying the rule that the failure of the plaintiff to call these witnesses justifies the conclusion that their testimony would have been unfavorable to it.

The city's expert's estimate of depreciation during 1890 to 1917 is $461,728 upon his valuation of the plant, excluding the land, of $2,299,307. This would represent a depreciation of about 15 per cent during seventeen years.

Considering all the various sources from which one is enabled to derive information as to the fair reproduction cost of the plaintiff's plant, omitting the land, which presently will be considered, the court is of opinion that its value as of December, 1916, will be fairly measured by the sum of $2,350,000, which is close to the estimate given by Mr. Adams as original cost without depreciation.

As to the land owned by the plaintiff, it has been heretofore stated that it consists of two distinct parcels. The larger and more valuable one is located between Fifty-fourth and Fifty-fifth streets and First avenue and New York Bay. Its area is 162,208 square feet. A portion of it, consisting of 111,280 square feet, is under water, and the balance, comprising 61,471 square feet, is upland. A considerable portion of this land is occupied by the Morse Dry Dock & Repair Company under a lease from plaintiff for a term of years commencing September 1, 1917. The remainder of this plot is used in plaintiff's business.

The plaintiff's expert witness values the whole plot at $927,448, upon the basis of an average of $2 per square foot over all. He values the portion leased to the Morse Company at $268,137, and the remainder at $659,310.

The Public Service Commission's witness placed a value of $1.30 a square foot over all. He values the entire piece at $803,972.60, the portion used by the Morse Company at $179,713.60, and the remainder at $424,259.

The city's witness values a square foot over all at $1.14, and on that basis fixes the value of the entire plot at $527,042.63, the leased portion at $187,851 and the remaining portion at $339,-191.13.

It appears that plaintiff's witness had never effected any sales of any water-front property. During the preceding ten or fifteen years there was practically no activity in the sale of real estate in the vicinity where the property is located. Plaintiff's witness seemed to base his views of value largely upon the Morse lease, which he negotiated in 1917 and another lease at Fifty-seventh and Fifty-eighth streets made in 1916. He admits that both of these leases were for war uses. These leases clearly would not be fair criteria of pre-war values. The valuations of the witness are not reflected by 2062 any experience which he had and are largely speculative.

The court is disposed to accept the valuation of the commission's expert, to wit, $424,259.

The other parcel of land is at Sixty-fifth street and Ninth avenue. A portion thereof is not used by the plaintiff. The court is of the opinion that $55,000 would be a fair valuation of the part used by plaintiff. The court finds that the sum of $479,259 represents a fair valuation of all the lands used in plaintiff's business.

As to what would be an adequate allowance for working capital, the parties differ materially. It should doubtless be an amount sufficient to enable the plaintiff to pay its operating expenses in advance of the collection of its outstanding accounts, such as wages, materials and supplies purchased on short credit. The proofs show that there are outstanding at all times uncollected bills due from customers, which cover a period of from six to eight weeks and that the city's delay in paying its gas bills covers a much longer period. It seems to the court that the estimates submitted by the learned counsel for the Public Service Commission are ample for plaintiff's requirements. These are, for 1916, $212,000; 1917, $228,000; 1918, $244,000. Adding the reproduction cost of the plant at $2,350,000, the value of the land at $479,259 and the working capital at $212,000, we have a total of $3,041,259, which represents the value of the capital employed by plaintiff in its business on December 31, 1916, and should be taken as the rate base as of that date.

This action was commenced before the legislative act here assailed went into effect and was not brought on for trial until the latter part of 1918. If the court had before it only the experiences of the plaintiff during 1916 and a few years prior thereto, showing as they do substantial incomes annually, it would have been justified in dismissing the bill upon the evidence, for the reason that the plaintiff had made no practical test by actual operation under the 80 cent rate (Knoxville v. Knoxville Water Co., 212 U. S. 1, 14, 15; Willcox v. Consolidated Gas Co., 212 U. S. 19, 42; Municipal Gas Co. of City of Albany v. Public Service Comm'n, 225 N. Y. 89). As matter of fact the plaintiff has been collecting from its customers since the commencement of this action at the rate of 95 cents per thousand cubic feet of gas, pursuant to an order of the court, the excess of 15 cents above the legal rate having been deposited with a trust company pursuant to such order.

The court, however, took proof as to expense of operations, subsequent to July 1, 1916, and down to December 31, 1918, to afford the plaintiff an opportunity to establish that at an 80-cent rate, confiscation would ensue, despite an economical and efficient operation of the works and a largely increased income because of a lower rate (Wilcox v. Consolidated Gas Co., supra, at p. 42).

It is obvious, unless the evidence is conclusive, that confiscation is inevitable under the present law, that it would be mere speculation in the absence of an actual experimentation to find whether the increased business would or would not sufficiently overcome the reduction in price. Under such circumstances the plaintiff would not meet the burden that rests upon it (Willcox v. Consolidated Gas Co., 212 U. S. 19).

In Knoxville v. Knoxville Water Company, (212 U. S. 1, 17,

18) the court, per Mr. Justice Moody, said: "We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests, as it does here, not upon observation of the actual
2083 operation under the ordinance, but upon speculation as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate, and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put into operation."

In Willcox v. Consolidated Gas Company (212 U. S. 19, 42) Mr. Justice Peckham, speaking for the court, said: "Of course, there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature, and in that event there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate. But where the rate complained of shows in any event a very narrow division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to the value which differ considerably among the witnesses and also upon the results in the future of operating under the rate objected to so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as possible, the doubt arising from opinions, as opposed to facts."

The Knoxville and Willcox cases have been cited with approval in Des Moines Gas Company v. Des Moines (238 U. S. 153) and in Municipal Gas Company v. Public Service Commission (225 N. Y. 89, 97). In the latter case the Court of Appeals, per Judge Cardozo, said: "* * * through repeated decisions there runs the consistent thought that in controversies of this order experience is the final test, that the courts must abide their time, and let the workings of the law decide. * * * Bills to annul rates have been dismissed 'without prejudice' while the outcome remained uncertain. Bills to annul the same rates have afterwards been sustained when the vision of results was clarified by the wisdom that follows the event."

In Lincoln Gas Company, &c., v. Lincoln et al. (decided June 2, 1919), the United States Supreme Court emphatically reiterated its views as to the importance of a test under the law as follows: "As early as the month of January, 1909, this court in two notable rate cases indicated its view of the importance, in any but a clear case, of subjecting the prescribed rates to the test of practical experience before attacking them in the courts" (citing the Knoxville and Willcox cases, 212 U. S.).

It thus becomes important carefully to scrutinize the proofs touch-

ing the costs of operation for the years 1916 to 1918, inclusive. The annual sales of gas during these years at a 95-cent rate to the public and the 75-cent rate fixed for municipal lighting were as follows:

1914	$ 874,213,86
1915	890,213,86
1916	950,653,13
1917	1,104,034,75
1918	1,160,552,00

2084 It thus appears that even at a 95-cent rate there has been a steady increase in business from year to year since the plaintiff began its operations. The 80-cent rate went into effect on July 1, 1916.

The operating revenues, based upon the amount of gas sold during 1916, calculated at the statutory rate of 80 cents for the latter half of the year, shows a total revenue of $884,721.06, or a decrease in the revenues for that year at a 95-cent rate by the amount of $65,642.07.

The operating expenses for that year, according to plaintiff, were $730,843.05, which if correct would have produced an income to plaintiff at an 80-cent rate of $153,878.01, or a little over 5 per cent upon the rate base of $3,041,259.

Included in these operating expenses, however, are legal expenses amounting to $16,653.24 incurred in prosecuting this action and the increased taxes upon the increased revenues at the 95-cent rate collected during the pendency of this action. The reduction in taxes upon an 80-cent rate would have amounted to $1,129.12. It is conceded by the plaintiff that these two items are properly deductible from the operating expenses. Embraced in the operating expenses is an item of "amortization" for depreciation for 1916, calculated on the basis of 8 cents per thousand feet of gas sold from January to June and on the basis of 11½ cents per thousand feet sold from June to December. The increased figure of 11½ cents for depreciation is wholly unwarranted in view of the company's experience in that regard in the past and in view of the fact that only 8 cents was charged off for depreciation for the first half of the year. The excess amortization calculated at 11½ cents over what it would have been at 8 cents for 1916 amounts to $19,410.13. The three items just mentioned aggregate $37,192.49. There is also included in operating expenses the sum of $7,500 paid to one Byrne, a retired superintendent of the plaintiff company, since deceased, who rendered no services during 1916. The impropriety of including that item in a rate case seems to be clear. It was not shown that this payment was justified by any prior agreement made with Mr. Byrne. Upon the evidence the payment of that sum was a mere gratuity.

It is commendable to recognize the faithful services of an old employee. Had it been shown that the plaintiff had adopted a policy years before to encourage faithful and efficient service by providing a pension fund for old age or other disability from which employees would be paid, the moneys set apart for that purpose could have been

spread over many previous years and not charged against the years when disability existed.

There is also another item, the propriety of which is challenged by the defendants.[5] It has reference to the price paid for gas oil during the year 1916. As previously stated, the plaintiff's plant is known as a water-gas plant as distinguished from a coal-gas plant. By far the largest single item which enters into the production of water-gas is water-gas oil. In order to form an idea of the extent to which this ingredient enters into the plaintiff's manufacture of gas it will be instructive to refer to the total production expenses of the plaintiff (exclusive of overhead charges, transmission and distribution expenses) for the years 1909 to 1918 and the cost of gas oil for each of these years.

985 Year.	Production expenses limited as above.	Cost of gas oil.
1909	$157,255.67	$67,283.49
1910	162,084.55	70,136.82
1911	177,670.49	75,637.98
1912	215,238.79	98,191.45
1913	273,226.92	147,258.52
1914	396,179.89	159,352.01
1915	335,811.90	191,171.95
1916	389,223.27	222,047.12
1917	464,891.66	242,530.46
1918	687,652.98	332,187.50

In other words, the cost of gas oil in 1916 was nearly 60 per cent of the total expense of production, and in 1917 it was somewhat less than 50 per cent.

It may also be instructive to set forth the number of gallons of oil used; the number of gallons per M cubic feet of gas manufactured; the average cost per gallon and the cost per 1,000 cubic feet manufactured during the years 1909 to 1918.

Year.	Gallons.	Gallons per M cubic feet manufactured.	Cost per gal. (cents) average.	Cost per M cubic ft. manufactured (cents).
1909	2,317,309	3.80	2.09	11.03
1910	2,700,091	3.93	2.60	10.21
1911	3,054,858	4.08	2.48	10.10
1912	3,372,346	4.04	2.91	11.76
1913	3,521,912	3.95	4.18	16.51
1914	3,793,171	3.97	4.20	16.68
1915	4,179,926	4.13	4.58	18.92
1916	4,520,811	4.22	4.91	20.72
1917	5,018,086	4.07	4.83	19.67
1918	4,906,611	3.35	6.78	22.73

It is insisted on behalf of the defendants that plaintiff's expenditures for gas oil in the year 1916 were excessive because of an im-

provident contract which it made with the Standard Oil Company of New York on January 19, 1914, for 7,000,000 gallons of oil at 4.575 cents per gallon. At the time when the contract was made the plaintiff's supply of oil for the year 1914 was provided for by a previous contract for 3,521,403 gallons at 4.48 cents per gallon. The amount used in 1914 according to plaintiff's figures was a little upwards of 3,700,000 gallons. It appears that of the oil covered by the January, 1914, contract, only 240,803 gallons were used in that year and that the remaining portion was sufficient to provide for all the oil required for 1915 and for 1916 up to August of that year.

In about June, 1914, the price of gas oil dropped to about 2½ cents. It appears that the Brooklyn Gas Company, the Central Union Gas Company and the Astoria Company had also made contracts with the Standard Oil Company in 1914 at the rate of 5 cents per gallon, but as a result of negotiations with that company and in consideration of agreeing to contract for an increased supply of gas oil, they succeeded in obtaining a reduction in the price of the oil contracted for in 1914 to an average price of 3.03 cents per gallon.

The plaintiff also applied for a reduction of the price, but owing to the fact that plaintiff was not prepared to agree to take an additional supply, no modification in the price such as was made with other gas companies was secured.

The defendants argue that not only was the contract improvidently entered into, but that plaintiff used bad judgment in not procuring a modification of the agreement. The plaintiff did not attempt to show why a contract for such a large quantity of oil was made in January, 1914, for deliveries which extended to August, 1916, that is to say, a period of two years and seven months from the date of the contract. Moreover, it appeared that a price
2086 contract was then in force which covered practically all the oil that would be required for 1914. The practice in buying gas oil seems to have been to enter into a contract some months before the expiration of the final delivery under an existing contract and for deliveries to commence upon the expiration of that contract. Such a practice must commend itself as prudent. But the length of time for entering into a new contract before the expiration of the existing contract must be a reasonable one. And where it appears that the supply for 1914 had been provided for under a prior contract and where the amount purchased under the new contract was for 7,000,000 gallons, a quantity far in excess of the reasonable requirements for 1915, and where in fact it filled the needs for nearly eight months of 1916, it can scarcely be claimed that the contract was a prudent one. The imprudence or lack of ordinary judgment is emphasized by the fact that the price contracted for was not a low one, but was at a considerably higher figure than in previous years. No reason was given for making a contract for such a figure in January, 1914. Besides, it appears from the testimony of the manager of the Standard Oil Company, with whom the contract was negotiated, and who was called as a witness by the plaintiff, that there was no market price for oil so far as he knew, excepting

that he stated that he regarded the market price as the price at which his company from time to time sold the product. The witness also stated that oil was sold in small quantities at what he termed current prices and that contracts for future delivery, which he considered as a proper procedure, were usually negotiated and that the price resulting from such negotiations, according to his understanding, constituted the market price at that time.

The witness testified that he made contracts in 1915 for deliveries in 1916 and from the memorandum produced by the witness of such contracts made by him and marked in evidence, it appears that in a contract dated February 10, 1915, for 85,000 gallons, the price was 3.40 cents per gallon, in one made on March 17, 1915, for 2,750,000 gallons the price was 3.75 cents per gallon; in another, made on October 1, 1915, for 2,000,000 gallons, the price was 3.875 cents per gallon.

It is thus evident that if the plaintiff had adopted the ordinary, prudent course of making contracts, say from year to year, so that oil to be used in 1916 would have been contracted for in 1915, the price of oil for 1916 would have been somewhere from 3.75 to 3.875 cents per gallon instead of the average price actually paid of 4.91 cents per gallon.

In 1916 the plaintiff used upwards of 4,500,000 gallons of oil which at a saving of even one cent per gallon would have meant a saving in that year in production expenses of upwards of $45,000.

It may be assumed that the contract of 1914 was made in good faith. But the true test in a rate case for determining the cost of the oil for 1916 should be the price at the time when in the usual course a gas manufacturing concern would be expected to purchase the commodity for that year and not at high prices prevailing in 1914. If the company chooses to speculate or take its chance in making such a contract, the loss should fall upon it and not the public (Ames v. Union Pacific R. R., 64 Fed. Rep., 165, 177; Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S., 201; Cedar Rapids Gas Light Co. v. Cedar Rapids, 144 Iowa, 428, 451).

There is another matter which merits serious consideration and which applies not only to 1916, but also to 1917 and 1918, 2087 The gas manufactured in 1916 amounted to 1,079,266 M cubic feet. The gas sold during the year was 934,406 M cubic feet. It thus appears that at least 135,860 M cubic feet of gas is unaccounted for. At the rate of 36 cents per M cubic feet, which plaintiff itself assumes was the cost of gas to it during that year, this loss would represent nearly $50,000. The lost or unaccounted-for gas in 1917 was about 185,322 M cubic feet, which according to plaintiff's figure of 37 cents a cubic feet during that year would amount to $68,569.14. The gas unaccounted for in 1918, about 230,240 M cubic feet for that year, would represent $108,212.80. The ratio of loss for 1916 was 12.69 per cent for 1917, 15.03 per cent, and for 1918, upwards of 18 per cent.

The only explanation for this unaccounted-for gas was given by plaintiff's expert, who merely stated generally that a loss of gas is found in all gas plants, and that it was due to various causes, such

as errors in the station meter, defects in consumers' meters which average low, loss due to the contraction of the gas between the temperature of the station meter and the temperature where it is normally measured, stealing of gas, breaks in mains and leakages at connections. It may be assumed that a certain percentage of this unaccounted for gas is likely to exist in every gas factory, however efficiently managed, but that does not explain whether such a large percentage of unaccounted for gas as is here shown is usual in well managed gas factories. It was incumbent upon the plaintiff to establish that its business was conducted efficiently and with due regard to proper economies. The expert witness, however, refrained from giving testimony as to what the percentage of unaccounted for gas was found to be in other gas-making concerns or whether there is a well-recognized average percentage of loss of gas which is unavoidable, nor was he questioned on these points. The plaintiff has therefore failed to meet the burden of showing that its percentage of unaccounted for gas is not excessive.

The circumstance, too, that in 1916 the ratio of lost gas was 12.69 per cent of the entire output, and 1918 the ratio had increased to 18 per cent, is an added fact in indicating the importance of showing with some reasonable degree of certainty whether such an increased loss could not have been avoided by the exercise of care and efficient management. The failure to furnish proof as to the specific causes to which the losses were attributable is a circumstance strongly pointing to the fact that the loss is excessive and could have been largely reduced by careful supervision.

It should also be noted that plaintiff made no attempt to segregate the results of the first half of 1916 from those of the remainder of the year. The result of the foregoing analysis is that the operating expenses for 1916, as they appear on the plaintiff's books, should at least be reduced by $89,692.49, even if no account be taken of the unaccounted for loss of gas. If that sum be added to $154,878.80, the net income calculated from plaintiff's books reduced to an 80-cent rate basis, the minimum actual net income which the plaintiff could have enjoyed in 1916 would be the sum of $243,570.3 the rate base of $3,041,259, there would have been a return of approximately 8 per cent for the year 1916.

It is a matter of common knowledge that in 1917 and 1918 the labor wage was greatly enhanced and the price of materials largely increased.

2088 In the case at bar, despite the higher wages of labor and the higher cost of materials, the court finds that the year 1917 shows substantial earnings at an 80-cent rate. It is conceded by the plaintiff that the net income for that year, with commercial sales reduced to an 80-cent basis, would have been $133,265.86, reached as follows: Total revenue, $868,510.77; adjusted operating expenses, $735,244.91.

The adjustment recognized the propriety of excluding rate case expenses for 1917 amounting to $32,860.12, and reduction in taxes owing to reduced revenue to the amount of $6,713.15. These adjusted operating expenses should be further adjusted by the deduction

of $11,827.77 paid to one Mr. Behr, of Chicago, for alleged services, of which $3,590.56 were for services stated to have been performed during December, 1916, and as to the balance, the nature, extent, necessity and reasonableness of those services were not explained.

An item of $1,530, paid as a recording mortgage tax, should be deducted, since it is not chargeable as an operating expense. It should be charged to capital account. An item of $5,000 to Messrs. O'Brien, Boardman & Platt for legal services, said to have begun in July, 1916, which, for aught the court knows, may have been rendered in this case, must also be deducted for lack of explanation as to the nature of these services, their necessity or reasonableness.

The item of $1,000 paid to one W. E. Freeman as "general auditor" should be disallowed for failure to give proof of the necessity and nature of this work, although plaintiff was asked to do so.

There were other legal expenses, principally to Messrs. Whitney, Ricks & Sullivan, aggregating $4,812, as to which no proof was submitted either as to their reasonableness or necessity.

The criticism heretofore made to the payment of $7,293.30 to the retired superintendent, Mr. Byrnes, is also applicable to 1917. There were further legal expenses amounting to $10,594.06, charged as expenses, the necessity for which was not made evident.

There were items such as "promotion management," amounting to $2,862.50, as to which no explanation was given. The amount spent in 1914 under the same title was $600.

Fees for appraisal and commissions paid to David Porter, the real estate expert called to testify as to land values and amounting to $1,710 do not appear to be proper charges. So far as the bill relates to this rate case, it may not be classed as an operating expense. A balance of $2,000 paid to Mr. Porter seems to be for commissions in leasing the land to the Morse Company, a matter wholly unrelated to gas operations.

There are various other items of expenditures criticised by the defendants, which were not satisfactorily explained, not to speak of the large amount of leakage of gas.

Sufficient has already been shown to indicate that the admitted revenue for 1917 of $133,056.91 would be increased by the above mentioned items which should be disallowed, aggregating at least $75,000, which would bring the net income for 1917 to upwards of $185,000. Taking the rate base as $3,100,000 for 1917, such a revenue would indicate a return of about 6 per cent. If the plaintiff is charged with a substantial sum for unaccounted leakage, the revenue for that year would have been correspondingly increased.

Coming now to the proofs affecting plaintiff's operations during the year 1918, we find that according to plaintiff's books there was a deficit of upwards of $336,000 for the year. The plaintiff has, however, conceded the propriety of eliminating certain objectionable items, which results in changing the apparent deficit to a net profit of somewhat above $3,000. A comparison of expenses for the years 1917 and 1918 shows that the net production expenses for 1917 amounted to $464,891 and for 1918 to $687,652.96, an increase of $222,761.96.

The "production expenses" according to the method of accounting in vogue in plaintiff's business is made up of the cost of labor, including superintendence of works and cost of boiler fuel, generator fuel, water-gas oil, various supplies and repairs upon the works.

The cost of the three items of boiler fuel, generator fuel and gas oil for those years was as follows:

	Boiler fuel	Generator fuel	Gas oil
1917	$51,139	$109,112	$242,320
1918	116,996	168,955	332,487
Increase	$65,857	$59,843	$90,167

The increase of cost in 1918 in these three items over 1917 according to the plaintiff's books was $215,027.

In this connection it is to be noted that in 1916 the plaintiff's accounts show that in the manufacture of 1,070,266,000 cubic feet of gas there were 23,468 tons of coal used, whereas in 1917 29,495 tons of coal were consumed in manufacturing 1,232,741,000 cubic feet of gas and in 1918 39,922 tons of coal were used in the manufacture of 1,463,688,000 cubic feet of gas. Stating it differently, in 1916 there were used 43.8 pounds of coal per 1,000 cubic feet of gas, in 1917 47.8 pounds, and in 1918 54.3 pounds. This large increase in 1918 is unexplained. It was not claimed that the coal in 1918 was inferior to that of 1916. Besides, it should be stated that the system employed for determining the amount of coal used per year was very unreliable and unsatisfactory. It would seem that approximately 10,000 tons should be deducted from the amount claimed to have been used in 1918.

The number of employees in the "commercial department" also in 1916 was 48; in 1917 the number was 57, and in 1918 it was 88, that is to say, an increase of 40 employees in 1918 over 1916. The salaries and wages of these employees were $41,144.84 for 1916, $49,625.45 for 1917, and $85,481.76 for 1918. One might expect an increase in salaries during that year, but why there should have been so large an increase in the number of employees was not satisfactorily shown.

There are various other items of expense for 1918, particularly in what are generally known as overhead charges, which appear to be excessive. Instead of finding rigid economy in a year of high prices one is impressed with the idea that a policy of extravagance or recklessness had been established.

The net profits of about $3,000 for 1918 might doubtless have been largely increased by strict economy. The court is of opinion that the items, some of which will appear in the findings of fact, already passed upon and including the excessive use of coal above referred to and which should be eliminated from the cost account, will amount to approximately $100,000. But it seems to the court to be an unnecessary task to dissect the various items in that year's expenses, since it is quite evident that the excessively high cost of coal and

gas oil would point to an inadequate return for that year even if it be assumed that by greater efficiency and economy there would have been a considerable saving in expense.

Oil is by far the largest single item of expense in a water-gas plant and coal the next largest item. The price of oil paid by the
2090 company increased from 4.83 cents per gallon in 1917 to as much as 6.78 cents in 1918, an increase of nearly 2 cents. The fluctuation of 1 cent per gallon is the equivalent of about $50,000 in the annual production expenses of the plaintiff company. There was thus an increase in cost of production in one year of $100,000.

With respect to the items of boiler and generator fuel no one familiar with the prevailing prices of coal was called. Whether the plaintiff contracted for coal and oil at the lowest prices obtainable has not been satisfactorily shown. For example, during 1917 we find that oil was sold in some instances as low as 3.24 cents per gallon and at prices ranging in various figures from 5.85 cents to 8.90 cents. In like manner we find that in 1918 the prices ranged from 5.875 cents to upwards of 10 cents.

As stated by the manager of the Standard Oil Company, there is no market price excepting as it is made upon negotiation. Why this should be so was not shown. The increased cost of labor in the manufacture of the gas is quite negligible so far as the rate of return to the plaintiff is affected.

There was no explanation proffered as to the causes for spasmodic increases in the price of oil or coal. Considering the sharp fluctuations in price of oil during the years of 1917 and 1918, and in the absence of any explanation as to the reasons therefor, it becomes idle speculation to forecast the price of that commodity, and indeed of coal, for succeeding years. The price may suddenly drop to a point where a substantial return may result to plaintiff.

It is clear that confiscation may not be predicated upon the operations of the plaintiff for 1916 and 1917. As to the years 1917 and 1918 it must at the outset be said that those years were abnormal, owing to the war conditions then existing. Notwithstanding this abnormality, the year 1917 showed a fair return at an 80-cent rate. It would be safe to assume too that had the 80-cent rate been charged to customers during that year the increase of the sale of gas would have been considerably increased.

In Railroad Commn. v. Cumberland Tel. & Tel. Co. (212 U. S., 414, 426, 427, opinion of Mr. Justice Peckham), it is said: "In furnishing gas at reduced rates, the reduction in the rate would very probably result in increased consumption, not only in increased demands from more consumers, but also in increased consumption by consumers already existing and the increased cost of furnishing the gas would be nothing like in proportion to the increase in consumption."

As to the year 1918 the question that confronts one is whether confiscation should be based upon such a year, even if it be established with reasonable certainty that the plaintiff's income was

thereby reduced to a point which concededly would not be ordinar
deemed an adequate return upon the capital invested.

In the case of a private business the owner may meet the rising c
of labor and material by a corresponding increase in the price
merchandise which he sells. A public service corporation is limi
by the rates imposed by law. The merchant, however, is frequen
confronted by conditions, such as change of styles or fluctuation
prices of materials, by reason of which the result of the year's bu
ness is a loss. Should not a public service corporation also expect
be confronted by the risks of loss arising now and then as incide
of business enterprises? The government in granting a franchise
a public service corporation does not guarantee a profit
249 every moment of the corporation's activities. All that sh
a corporation is entitled to is protection against inadequa
returns upon its investment which are likely to continue for so
a length of time as would result in the impairment of a very s
stantial portion thereof, or a deprivation of an adequate return u
the capital.

The operations of a fiscal year which was as abnormal as was t
year 1918 lack the value of a normal year in determining the futu

In this connection it will be instructive to study the opinions
the courts as to what is meant by a fair return and what period of ti
should be taken into account in determining the fair return and
what extent abnormal conditions may affect the question of inad
quacy of return.

In Knoxville v. Knoxville Water Company (212 U. S., 1, 15) t
court, per Mr. Justice Moody, said: "We think it was error to co
fine the investigation to and base the judgment upon that year alon
The precise subject of inquiry was what would be the effect of th
ordinance in the future. The operations of the preceding fiscal yea
or of any other past fiscal year, were valueless if the year was ab
normal."

In Steenerson v. Great Northern R. R. (72 N. W., 713, 721) th
court said: "It is not necessary here to determine just what rate
annual income on the cost of reproducing all of the road except th
terminals is the least which the court would uphold before declarin
the rates fixed by the commission confiscatory, but we are of th
opinion that in such times as existed in 1894 an income of 5 per cen
per annum on such cost is certainly not unreasonably low or con
fiscatory, and that is as far as it is necessary to go in this case. Mo
especially is this true since it appears from the evidence that in year
prior to 1894 this system of roads had produced some very larg
amounts of income sufficient to make extraordinary improvement
and betterments in the road, as well as ordinary repairs, to pay larg
dividends, and accumulate a cash surplus which in 1894 amounted t
about $3,500,000. * * * The managers of railroads have n
right to play with the public the game of 'heads we win, tails yo
lose.'"

In Darnell v. Edwards (244 U. S. 564) the court affirmed a decre
dismissing the bill on the ground that the "evidence for complainan

tending to show they were non-remunerative, while based upon actual experience in the operation of the road, yet relates to only a brief period when conditions were abnormal."

In Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co. (191 N. Y. 123, at p. 149) Chief Justice Cullen, speaking for the court, said: "We have no difficulty in upholding the provision that the rate shall remain as established for the term of three years. It is urged that circumstances might so alter that before the expiration of three years a rate which was reasonable at the time it was established would become unreasonable. This is possible, nevertheless, we think the legislature was justified in enacting some period of repose during which the rate should remain stable. In answer to this objection we cannot do better than quote the reply made by Chief Justice Holmes to a similar objection in the Massachusetts case (Matter of Lauvrin). He said: 'But supposing a party aggrieved should obtain an injunction, obviously the decree would be drawn so as to bind the defendant for a reasonable time, or if it were drawn in the common form, subject to review on a change of circumstances, the court would not be likely to grant leave to file a bill of review until a reasonable time had elapsed, and if the legislature should say that in these cases five years was a reasonable time, we could not say that it was wrong.'" The opinion of Mr. Justice Holmes above quoted is reported in 174 Mass. 514, 519.

In Municipal Gas Co. v. Public Service Commission (225 N. Y. 99, 98) Judge Cardozo aptly and tersely said: "For more than nine years the statutory rate was adequate. Abnormal conditions brought about a change, and now, when the return is figured upon the value of the property, the outcome is said to be a deficit. * * * It will seldom be important that rates have been inadequate for a day or a week or a month. Fleeting losses may be suffered, and yet the balance sheet may show a profit. Prolong the loss, however, for a year, and you may reach and cross the danger line. It is by the average of the year that business commonly reckons its losses and its gains. On the other hand, there may be times when the average must be distributed over periods still longer." Are these not such times?

It is also necessary to consider the cases which have treated of the necessity of experimentation under the rate as fixed by the legislature.

In Knoxville v. Knoxville Water Co. (supra) the court, per Mr. Justice Moody, said: "We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculations as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate and is clearly disputed. The expense ac-

count was not agreed upon. The ordinance had not actually been put into operation. * * *"

In Willcox v. Cons. Co. (212 U. S. 19, 42, 51) Mr. Justice Peckham, speaking for the court, said: "Of course, there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature, and in that event there should be no hesitation in so deciding and enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate. But where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as possible, the doubt arising from opinions as opposed to facts. * * * The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are from the evidence so uncertain, and where the margin between possible confiscation and valid regulation is so narrow we cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient." The Knoxville and Willcox cases have been cited with approval in Des Moines Gas Co. v. Des Moines (238 U. S. 153, 173) and in Municipal Gas Co. v. Public Service Commission (225 N. Y. 89, 97). In the latter case the Court of Appeals, per Judge Cardozo, said: "Through repeated decisions, there runs the consistent thought that, in controversies of this order, experience is the final test, that the courts must bide their time, and let the workings of the law decide. * * * Bills to annul rates, have been dismissed without prejudice while the outcome remained uncertain. Bills to annul the same rates have afterwards been sustained when the vision of results was clarified by the wisdom that follows the event."

It has also been held that a reduced legislative rate has the effect of largely increasing the income of a public utility company. In the instant case that consideration has a most important bearing, as will presently be shown by the fact that the quality of gas manufactured during 1918 was far below the candle power prescribed by law (Laws of 1906, chap. 125, approved April 3, 1906).

The undisputed evidence of the average candle power per month furnished by the plaintiff to its customers during the year 1918 was as follows:

January	15.55
February	14.11
March	11.71
April	16.94
May	16.62
June	12.15
July	13.34
August	11.18
September	12.71
October	12.21
November	12.17
December	14.17

During the entire year plaintiff continuously furnished gas of a candle power below the legal standard of 22 candles and varying from a maximum monthly average 16.94 candles to a minimum average of 11.18 candles. There was not a single day during the year 1918 when the plaintiff furnished gas up to the standard prescribed by law. There were many occasions when the gas was found to be below 10 candles. It was not denied that the plaintiff regularly received copies of the daily reports of the official inspections, and, moreover, the records of previous years show a substantial compliance with the requirements of law in respect of the candle power of the gas sold by plaintiff. In view of these facts and in the absence of any explanation of this seemingly flagrant violation of law, the conclusion seems to be inevitable that the plaintiff's violation of law was deliberate.

The daily tests of gas made by the legal inspectors established that the average quality of the gas supplied by the plaintiff during 1918 was an average of 13.57 candles instead of 22 candles, which is the minimum by law. It follows that the consumer was either compelled to consume a greater quantity of gas measured by the ratio of 22 to 13.57 at a correspondingly increased price to him or that he suffered from the loss of light in the ratio of 13.57 to 22 for which he paid the price charged for gas of a 22-candle power standard.

How can one foretell how much increased business the plaintiff would have had if it had furnished the legal 22-candle power instead of the very considerably diminished candle power that it furnished in 1918? The use of gas has been largely extended during the past few years for cooking, heating water, house heating and other purposes. A standard quality of gas would insure a more extensive use of gas. At any rate a fair test under the law cannot be made except by compliance with the law which fixes the standard of quality.

Moreover it may well be urged that if the plaintiff has knowingly violated the law by selling gas of a standard lower than that fixed by law, it is not entitled to equitable relief. Observance of the law is a cardinal principle, which is obligatory upon him who seeks judgment in equity.

The plaintiff has failed to establish confiscation and the complaint must be dismissed, with costs, without prejudice, however, to reopen the case by appropriate proceedings if, after an adequate experimentation under an 80-cent rate, it believes that it can prove that this rate is confiscatory as to it.

Submit proposed decision upon notice in conformity with the findings outlined in this opinion and with the findings made upon the requests heretofore submitted to the court.

Endorsed on cover: File No. 28,224. S. New York, D. C. U. S. Term No. 295. Charles D. Newton, as Attorney General of the State of New York, and Alfred M. Barrett, constituting the Public Service Commission of the State of New York for the First District, appellants, vs. The Kings County Lighting Company. Filed April 11th, 1921. File No. 28,224.

No. 8[redacted]295

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The Supreme Court of the United States

CHARLES D. NEWTON, as Attorney General of the State of New York, ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District and HARRY E. LEWIS, as District Attorney for the County of Kings,

Defendant-Appellants.

against

KINGS COUNTY LIGHTING COMPANY,

Complainant-Respondent.

Motion to Advance

WILBER W. CHAMBERS,
Solicitor for Defendant, Charles D. Newton,
Attorney General of the State of New York,
51 Chambers St., New York City.

JOHN P. O'BRIEN,
Corporation Counsel,
Solicitor for Defendant, Harry E. Lewis,
Municipal Building, New York City.

TERENCE FARLEY,
Solicitor for Defendant,
Alfred M. Barrett,
49 Lafayette St., New York City.

WILBER W. CHAMBERS,
JAMES P. HILL,
WILLIAM S. JACKSON,
Of counsel.

M. B. Brown Printing & Binding Co., New York

The Supreme Court of the United States.

CHARLES D. NEWTON, as Attorney General of the State of New York, ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District and HARRY E. LEWIS, as District Attorney for the County of Kings,

Defendant-Appellants.

against

KINGS COUNTY LIGHTING COMPANY,

Complainant-Respondent.

Sirs,

PLEASE TAKE NOTICE that we will move the Supreme Court of the United States at Washington, District of Columbia, pursuant to Rule 26 of the Rules of the Supreme Court of the United States, on Tuesday, the 12th day of April, 1921, at 12 o'clock noon, at the opening of said Court for motions, or as soon thereafter as counsel can be heard, for an order advancing the above-entitled appeal on the docket of said Court for argument at the

earliest particular date during the October Term, 1921, convenient to the Court.

Dated, New York, April 2, 1921.

Yours, etc.,

WILBER W. CHAMBERS,
Solicitor for Defendant
Charles D. Newton,
Attorney-General of the State of New York,
51 Chambers St., New York City.

JOHN P. O'BRIEN,
Corporation Counsel,
Municipal Building, New York City,
Solicitor for Defendant
Harry E. Lewis.

TERENCE FARLEY,
Solicitor for Defendant
Alfred M. Barrett,
49 Lafayette St.,
New York City.

To: Sherman Sherman & Sterling
~~SHEARMAN & STERLING~~,
Solicitors for Respondent,
55 Wall St., New York City.

THE SUPREME COURT OF THE UNITED STATES.

CHARLES D. NEWTON, as Attorney General of the State of New York, ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District and HARRY E. LEWIS, as District Attorney for the County of Kings,

Defendant-Appellants.

against

KINGS COUNTY LIGHTING COMPANY,

Complainant-Respondent.

To the Honorable The Supreme Court of the United States:

1. The appellants above named respectfully move to advance this cause on the docket of this Honorable Court pursuant to Rule 26 of the rules of the Supreme Court of the United States.

2. The above-entitled appeal was brought by the appellants to review the Final Decree of the District Court of the United States for the Southern District of New York, dated the 19th day of October, 1920, adjudging Chapter 125 of the Laws of 1906 and Chapter 604 of the Laws of 1916 of the State of New York, confiscatory and unconstitutional, and depriving the complainant-respondent of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. The Laws of the State of New York herein referred to provided among other things that the complainant company shall not

charge or receive for gas manufactured, furnished or sold by it, a sum in excess of eighty cents per one thousand cubic feet.

3. The final decree appealed from contains the following provisions:

> "(1) ORDERED, ADJUDGED AND DECREED that Chapter 125 of the Laws of 1906 and Chapter 604 of the Laws of 1916 of the State of New York, in so far as such statutes, or either of them, limit the rate to be charged for gas supplied by plaintiff in the territory served by it, are, and each of them is, confiscatory and deprives plaintiff of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States; and it is
>
> "(2) FURTHER ORDERED, ADJUDGED AND DECREED that the enforcement of said statutes, and each of them, in so far as they, or either of them, prescribe a rate or price to be charged for gas supplied by plaintiff, be, and the same hereby is in all respects suspended and restrained; and it is
>
> "(3) FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, Charles D. Newton, as Attorney-General of the State of New York, and Harry E. Lewis, as District Attorney of the County of Kings, and each of them, their, and each of their, successors, attorneys, agents, assistants, deputies, servants and employees, be, and each of them hereby is restrained and enjoined from enforcing the provisions of said Chapter 125 of the Laws of 1906 and said Chapter 604 of the Laws of 1916 with respect to the rates or price to be charged by plaintiff for gas supplied by it, and from instituting, or causing to be instituted, any suit, action or proceeding to enforce

the said statutes, or either of them, or any provision thereof, or from taking any action under the Public Service Commissions Law of the State of New York, or any other statute or law of said State, to compel or enforce obedience to the said statutes in so far as they, or either of them, fix or prescribe a rate or price for gas supplied by plaintiff, and from interfering with plaintiff, forthwith, and while this decree is in force, charging, billing and collecting a rate or charge in excess of that fixed by said statutes or either of them for gas supplied to its consumers other than the City of New York; and it is

"(4) FURTHER ORDERED, ADJUDGED AND DECREED that any of the parties defendant to this cause, or their successors in office, may apply, upon notice, at the foot hereof, to vacate or modify the foregoing injunction, if it can be shown that by change in conditions the statutory rate is no longer confiscatory in its effect under such new conditions."

4. The complainant Company is now charging and collecting the sum of $1.50 per one thousand cubic feet and has been charging and collecting this rate from its consumers since shortly after the entry of the final decree hereinbefore set forth.

5. The complainant Company is now charging and collecting a rate without any restraint, regulation or limitation by a State authority or judicial injunction or limitation.

6. The complainant Company has chosen to fix its rate at $1.50 per 1,000 cubic feet, an increase of 87½% over the statutory rate. The difference between the statutory rate and the rate charged by the company is not being impounded with a Special Master pending the final determination of the appeal to this Honorable Court. The failure to

impound makes a speedy hearing of this appeal most necessary for the protection of the consumers.

7. The complainant Company serves approximately 39,000 individual consumers in the Borough of Brooklyn, City of New York, and furnishes gas for street lighting to about 3,600 street lamps maintained by the City of New York. The territory served by the Company has a present population of about 250,000. There is no adequate remedy for the individual consumer who must pay $1.50 rate or submit to having his gas supply cut off. Litigation by an individual consumer with the complainant company can be prosecuted only at so great an expense as to become prohibitive. The number of citizens interested in this litigation as well as the amount involved is unusually large. If this cause is not advanced upon the docket of this Honorable Court a very large number of citizens may be irreparably injured and subjected to the loss of large sums of money.

8. The defendant-appellants contend that the final decree should be reversed, for the following reasons, among others:

(a) The complainant Company was allowed to support its case entirely upon incompetent evidence, to wit., its own general books of account.

(b) The period used upon which to base any finding as to the confiscatory nature of the law was unusual, abnormal and too short, being from January 1, 1919, to June 30, 1920.

(c) The complainant Company persistently and deliberately violated a statutory provision which placed upon it the duty of supplying "twenty-two candle power gas." It therefore, as appellants contend, came into equity with "unclean hands."

(d) The complainant Company was barred by a judgment of the Supreme Court of the State of New York entered March 29, 1920, in which similar relief was denied.

(e) The amount allowed for "unaccounted for gas" was excessive.

(f) Excessive sums were allowed for coal, oil, repairs, uncollectibles, etc.

(g) Prices of coal, oil and labor have fallen precipitately in the past six months.

9. This Honorable Court granted a motion made on behalf of the same appellants to advance the Consolidated Gas case, and set the said case for argument on the 10th of October, 1921.

10. Similar questions of law arise in other cases involving the following gas companies operating within The City of New York.

1. East River Gas Company of Long Island City.
2. The New York Mutual Gas Light Company.
3. Northern Union Gas Company.
4. Central Union Gas Company.
5. Woodhaven Gas Company.
6. Newtown Gas Company.
7. Flatbush Gas Company.
8. Richmond Hill Gas Company.
9. Jamaica Gas Company.
10. The Standard Gas Light Company of The City of New York.
11. New Amsterdam Gas Company.
12. Brooklyn Union Gas Company.
13. New York and Queens Gas Company.
14. Consolidated Gas Company.

In most of these cases preliminary injunctions have been granted and deposits made with the

Special Master which amount to a very large sum. The cause involves questions of the very greatest importance which have never yet been passed upon by this Court.

WHEREFORE your petitioners ask this Honorable Court for an order or direction advancing the above entitled appeal on the docket of the said Court for argument at some date convenient to this Court during its October Term and after the 10th day of October, 1921, the day set for the argument of the case of Charles D. Newton and others *vs.* Consolidated Gas Company.

Dated April 2, 1921.

Yours, etc.,

WILBER W. CHAMBERS,
Solicitor for Defendant,
Charles D. Newton,
Attorney-General of the State of
New York,
51 Chambers St., New York City.

JOHN P. O'BRIEN,
Corporation Counsel,
Municipal Building,
New York City,
Solicitor for Defendant,
Harry E. Lewis.

TERENCE FARLEY,
Solicitor for Defendant
Alfred M. Barrett,
49 Lafayette St.,
New York City.

WILBER W. CHAMBERS,
JAMES P. HILL,
WILLIAM S. JACKSON,
Of Counsel.

Office Supreme Court, U. S.
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JAMES D. MAHER
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Supreme Court of the United States

October Term, 1921.

No. 295.

CHARLES D. NEWTON, as Attorney General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District,

Appellants,

against

KINGS COUNTY LIGHTING COMPANY,

Appellee.

Motion for Reassignment and Affidavit.

GEORGE L. INGRAHAM,
SAMUEL F. MORAN,
Solicitors for Appellee,
14 Wall Street,
New York City.

Supreme Court of the United States

OCTOBER TERM, 1921.

CHARLES D. NEWTON, as Attorney General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District,
Appellants,

against

KINGS COUNTY LIGHTING COMPANY,
Appellee.

No. 295.

SIRS:

PLEASE TAKE NOTICE, that on October 4th, 1921, at the opening of court on that day, in the Supreme Court Room, Washington, D. C., the appellee will move this court, on the records in the above entitled cause, the annexed affidavit of Samuel F. Moran, and on all the proceedings had herein, for an order reassigning this case for argument on November 14th, 1921 or such other date as may suit the convenience of the court, for the reason that appellant has failed to serve his brief upon appellee, as required by Rule 22 of the rules of this court.

New York, September 24th, 1921.

Yours, etc.,
GEORGE L. INGRAHAM,
SAMUEL F. MORAN,
Counsel for Appellee,
14 Wall Street,
New York City.

To:

Hon. Charles D. Newton,
as Attorney General of the State of New York,
Appellant.

Wilber W. Chambers, Esq.,
Counsel for appellant Newton.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

CHARLES D. NEWTON, as Attorney General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District,

Appellants,

against

KINGS COUNTY LIGHTING COMPANY,

Appellee.

No. 295.

STATE OF NEW YORK, }
County of New York. } ss.:

SAMUEL F. MORAN, being duly sworn, deposes and says:

1. I am an attorney-at-law and one of the solicitors for the appellee in the above entitled cause, and am familiar with all the proceedings which have been had in this suit.

2. The appeal in this cause was taken by two of the defendants below from a decree of the District Court of the United States for the Southern District of New York dated October 19th, 1920, adjudging confiscatory and void as to the plaintiff the provisions of chapter 125 of the Laws of 1906, as amended by chapter 604 of the Laws of 1916 limiting the rate to be charged for gas in the 30th and 31st Wards of the Borough of Brooklyn, City of New York, the territory served by the appellee, to 80 cents per thousand cubic feet.

3. The case was advanced for argument and set for October 10th, 1921, by order of this court made April 18th, 1921, upon the motion of the appellants. The case is No. 15 on the call of this court for that day.

4. The record in this case is contained in two volumes, consisting of 1178 printed pages. The appellants have filed 57 assignments of error.

5. By chapter 134 of the Laws of 1921 of the State of New York, which became a law March 30th, 1921, the Public Service Commission of the State of New York for the First District, of which Alfred M. Barrett was sole commissioner, was abolished and the jurisdiction thereof conferred upon the Public Service Commission of the State of New York created by said chapter 134 of the Laws of 1921. Said Public Service Commission of the State of New York, which succeeded to the jurisdiction theretofore exercised by said Alfred M. Barrett, constituting the Public Service Commission of the State of New York for the First District, has not appeared herein or been substituted for said Alfred M. Barrett. Charles D. Newton, as Attorney General of the State of New York is now the only appellant prosecuting the appeal.

6. The appellant Newton, as Attorney General, has not served his brief herein and I am advised it will not be served for a week or more. It is impossible for the solicitors for the appellee to determine in advance of the receipt of appellant's brief what assignments of error appellant intends to rely upon, or to prepare a brief on behalf of the appellee. In view of the size of the record and the probably numerous questions appellant will present and argue in his brief, and the magnitude and importance of the questions involved, counsel for the appellee will require the full time allowed by the rules of this court in which to prepare and serve their brief in answer to the points which will be made by the appellant.

7. Many of the issues involved in this cause are similar to those involved in Case No. 257, *Newton, Attorney General, et al. v. Consolidated Gas Company*, and Case No. 296, *Newton, Attorney General, et al., v. New York and Queens Gas Company*, both of which have been advanced for argument and set for October 10th, 1921. I am advised that a motion is to be made to reassign and set said cases for argument on November 14th, 1921, for the reason that the appellants therein have not served their briefs, and counsel for the appellees likewise require the full time allowed by the rules of this court to prepare and file their respective briefs.

This affidavit is made in support of appellee's motion to reassign this case for argument on November 14th, 1921, or on such day as the court shall set for the argument of Nos. 257 and 296.

SAMUEL F. MORAN.

Sworn to before me this
23rd day of September, 1921.

JAMES A. BYRNE,
Notary Public.

OCT 4 1921

No. 295.

Supreme Court of the United States

OCTOBER TERM, 1921.

CHARLES D. NEWTON, as Attorney-General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York, for the First District, *et al.*,

Appellants,

vs.

KINGS COUNTY LIGHTING COMPANY,

Respondent.

AFFIDAVITS IN OPPOSITION TO MOTION FOR REASSIGNMENT

CHARLES D. NEWTON,
Attorney-General of the State of New York,
Capitol,
Albany, N. Y.

WILBER W. CHAMBERS,
Solicitor for Appellant Newton,
Capitol,
Albany, N. Y.

JOHN P. O'BRIEN,
Solicitor for Appellant Lewis,
District Attorney of Kings County,
Municipal Bldg., New York City.

Supreme Court of the United States,

OCTOBER TERM, 1921.

CHARLES D. NEWTON, as Attorney General of the State of New York; and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York, for the First District, *et al.*, Appellants, *vs.* KINGS COUNTY LIGHTING COMPANY, Respondent.	No. 295.

State of New York, }
Southern District of New York, } *ss.:*

Wilber W. Chambers, being duly sworn, says: I am solicitor for Charles D. Newton, as Attorney-General of the State of New York, one of the appellants in the above entitled cause and have had throughout the care and charge of this case, both before the trial court and upon this appeal.

This case was advanced for argument and set down for October 10th, 1921, by order of this court made on or about April 18th, 1921.

As soon as I discovered that the printer would not be able to complete the brief of Attorney-General Newton upon this appeal in time to serve it on the 19th of September, 1921, owing to labor

disturbances which had theretofore taken place in the printing establishment of the J. B. Lyon Company who do the printing for the Attorney-General of the State of New York, I caused to be taken up with Messrs. Ingraham, Sheehan & Moran, solicitors for respondent, the question of giving the Attorney-General more time in which to deliver to them his printed brief. Accordingly, said solicitors entered into a stipulation with me, a copy of which is hereto annexed and marked Exhibit "A," extending the time of the Attorney-General to file and serve his brief in this action on the appeal to this court until the 1st day of October, 1921.

In accordance with this stipulation I caused to be served on said solicitors for respondent part of the page proof of the Attorney-General's brief on the 27th day of September, 1921, and the balance of the brief on the 28th day of September, 1921.

I expect to serve the completed bound brief on said solicitors on the 30th day of September, 1921.

The above named respondent, Kings County Lighting Company is now, so I am informed, charging its consumers $1.50 per M cubic feet and has been charging that amount since the entry of the decree herein, or at least shortly after the entry of the decree appealed from. This is 70 cents in excess of the statutory rate of 80 cents.

The court below made no order impounding the excess collected by the company over the statutory rate and did not require it to give any bonds to insure the repayment during the pendency of this appeal of any such excess collected from its consumers.

The consumers are, therefore, paying 70 cents in excess of the statutory rate without any pro-

tection insuring the repayment of the excess in the event the decree is reversed by this court. There should be no delay in the argument of this appeal and I oppose the reassignment of the argument, and ask that it be heard on the 10th of October, 1921, the day assigned.

WILBER W. CHAMBERS.

Sworn to before me this 30th
day of September, 1921.

HARRY HERTZOFF,
Commissioner of Deeds,
New York City.

EXHIBIT "A."

SUPREME COURT OF THE UNITED STATES.

CHARLES D. NEWTON, as Attorney-General of the State of New York, *et al.*,
Appellants,
vs.
KINGS COUNTY LIGHTING COMPANY,
Respondent.

IT IS HEREBY STIPULATED AND AGREED, by and between the solicitors for the respective parties that the appellants may file and serve their briefs in the above entitled matter on or before the first day of October, 1921, the court consenting thereto. It is furthermore understood and agreed that the appellants will send to the respondent such parts

of their briefs from time to time in galley proof prior to the aforesaid first day of October, 1921, and beginning on or about the 20th day of September, 1921.

Dated, September 8, 1921.

INGRAHAM, SHEEHAN & MORAN,
Solicitors for Respondent.

WILBER W. CHAMBERS,
Solicitor for Appellant Newton,
as Attorney-General of the State
of New York.

UNITED STATES SUPREME COURT

CHARLES D. NEWTON, as Attorney-General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District, *et al.*, Appellants, *against* KINGS COUNTY LIGHTING COMPANY, Appellee.	No. 295

The United States of America,
Southern District of New York,
City, County and State of New York. } ss.:

JAMES A. DONNELLY, being duly sworn says: That he is an Assistant Corporation Counsel of The City of New York, and as such appears herein

as counsel to Hon. JOHN P. O'BRIEN, Corporation Counsel, solicitor for the appellant of record, Harry E. Lewis, District Attorney of Kings County.

That he has read the affidavit of Samuel F. Moran, solicitor for the appellee in support of the motion for reassignment of the argument of the within appeal.

A motion was made to advance the argument of the appeal herein on April 12, 1921, and this court set the case for argument on October 10, 1921.

The brief on behalf of the appellant Harry E. Lewis, District Attorney of Kings County, was served on the solicitor for the respondent on September 19, 1921, and filed in the office of the clerk of this court immediately thereafter. I am informed and believe that the solicitor for the appellant Newton as Attorney-General, and the solicitor for the respondent signed a stipulation extending the time of the appellant Newton to serve and file his brief until October 1, 1921, and I am further informed that proofs of said brief are being furnished to the solicitor for the respondent, and the completed brief will be served on or before October 1, 1921, the date agreed upon.

The respondents have had almost six months to prepare their briefs and were in no way prejudiced by the conduct of the appellants as above set forth.

The respondent is now collecting the sum of $1.50 per 1,000 cubic feet of gas, the rate fixed by itself without impounding the difference between this amount and the rate of 80c. per 1,000 cubic feet of gas fixed by the statute. It is, therefore, necessary that this case be disposed of as soon as possible.

It is respectfully submitted that the appellee should be compelled to go on with the argument on October 10, 1921, the date assigned by this court.

JAMES A. DONNELLY.

Sworn to before me this 30th
day of September, 1921.

HARRY HERTZOFF,
Commissioner of Deeds,
The City of New York.

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IN THE

Supreme Court of the United States

October Term—1921

Calendar No. 295

CHARLES D. NEWTON, as Attorney General of the State of New York, ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District and HARRY E. LEWIS, as District Attorney of the County of Kings,

Appellants,

against

KINGS COUNTY LIGHTING COMPANY,

Appellee.

BRIEF ON BEHALF OF APPELLANT HARRY E. LEWIS AS DISTRICT ATTORNEY OF THE COUNTY OF KINGS.

JOHN P. O'BRIEN,
Corporation Counsel,
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Supreme Court of the United States

October Term—1921

Calendar No. 295

CHARLES D. NEWTON, as Attorney General of the State of New York, ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District and HARRY E. LEWIS, as District Attorney of the County of Kings,

Appellants,

against

KINGS COUNTY LIGHTING COMPANY, *Appellee.*

BRIEF ON BEHALF OF APPELLANT, HARRY E. LEWIS, AS DISTRICT ATTORNEY OF THE COUNTY OF KINGS.

Appeal from the Southern District of New York.

Statement.

This is a suit in equity instituted by the above-named appellee against the appellants herein to have declared unconstitutional and void, as to it, Chapter 125 of the Laws of 1906, as amended by Chapter 604 of the Laws of 1916, upon the ground that the statute is in contravention of Section 10, Article I of the Constitution of the United States and the Fourteenth Amendment thereof.

The constitutionality of Chapter 125 of the Laws of 1906 was upheld by this Court, in *Willcox* v. *Consolidated Gas Company of New York*, 212 U. S., 19. The issues in this case were referred to GORDON AUCHINCLOSS, Esq., as Special Master, whose report was confirmed on October 13, 1920, by Hon. CHARLES M. HOUGH, sitting as a District Judge.

Appellant's appeal was taken and a motion was made to advance the argument of the same. This Court advanced the case for hearing at the October, 1921, Term.

Many of the questions have been thoroughly treated in the brief filed by us in the *Consolidated Gas Company* case, and what we have said with reference to the questions of burden of proof, abnormal period, earnings of prior years, admissibility of the books of account in evidence and the schedules drawn therefrom, applies also to this case and we will not attempt to again cover those points herein. It will be necessary, however, to add something to what we have said, by reason of different facts which are presented by this case.

POINT I.

The judgment should be reversed and the complaint dismissed by reason of the judgment entered in the State Court.

The complainant herein commenced an action in the Supreme Court of the State of New York on July 1, 1916, the date when Chapter 604 of the Laws of 1916 took effect, and sought the same relief and judgment which it now seeks in this action. The defendants were the same except that The City of New York was made a party defendant in the said action, and the District Attorney was not included as one of the defendants. The case was tried before Mr. Justice GREENBAUM and a judgment was entered on March 29, 1920, dismissing the complaint (110 Misc., 204). The plaintiff has appealed from this judgment and the appeal is now pending. The findings, amongst others, were as follows:

> "The substantial observance of the requirements of the statute as to candlepower should have been shown by the plaintiff, and its failure to do so does not entitle it to favorable consideration of a court of equity."

The State Court had similar jurisdiction to this Court over the parties and subject-matter in litigation.

The complainant admits that it has made no attempt to comply with the Law since January 1, 1918, in spite of the decision of the Court condemning its practice. Instead of mending its ways, as pointed out in that judgment, it commenced a second action in this Court.

This record is full of instances showing that no effort has been made to remedy any of the conditions that were condemned in the prior suit.

It is a well-settled rule that a question which was raised in a prior suit and passed upon conclusively settles the question and is not the subject of litigation in a subsequent action in the same Court or in any other Court upon the same or a different cause of action (23 Cyc, p. 1216).

POINT II.

The complainant has never experimented with the statute fixing the rate, for 22 candlepower gas, at 80 cents per thousand cubic feet.

The decision of Justice GREENBAUM (110 Misc., 204) in the Supreme Court of the State of New York in which the complainant in the case at bar was plaintiff, shows (at p. 248) first, that during the year 1918

> *"plaintiff continuously furnished gas of a candlepower below the legal standard of 22 candles and varying from a maximum monthly average of 16.94 candles to a minimum average of 11.18 candles. There was not a single day during the year 1918 when the plaintiff furnished gas up to the standard prescribed by law. There were many occasions when the gas was found to be below ten candles."*

The Special Master in the case at bar has found that for this kind of gas complainant received 95 cents per thousand cubic feet.

Secondly, Justice GREENBAUM required experimentation with the rate as a condition to re-opening the case for the purpose of showing that the statute was confiscatory (see page 250). The complainant could not make any experimentation with the statutory rate for the years that the Court had under consideration at the trial, but only for years of the future, which were the years 1919 and 1920. The Special Master in the case at bar has found (Finding No. 39) that the "taking of testimony in said case [meaning the case in the Supreme Court] was concluded in April, 1919. The opinion of the Court was handed down January 27th, 1920" (Rec., p. 38).

This discloses that the complainant was required to experiment with a period of operation subsequent to "January, 1920." The learned judge of the Court below has therefore ignored the condition imposed by this decision and granted equitable relief, notwithstanding that the question was *stare decisis*. This is tantamount to a reversal of the decree of the Supreme Court of the State of New York, a court of complete jurisdiction in the premises, by a court having no authority to reverse decrees of the State courts.

The practice of the complainant, continuously since January 1, 1918, of furnishing to its consumers illuminating gas approximately 35 per cent. deficient in the standard of quality required by law, and selling it for 95 cents per thousand cubic feet, is obviously not experimenting with the statutory rate.

We urge upon the Court the necessity of requiring complainant to now begin a course of adequate experimentation with the statutory rate, and herewith submit authorities in support of our position in the premises.

In *Louisiana R. R. Com.* v. *Cumberland Tel. Co.*, 212 U. S., 426, this Court said:

> "We say this because the evidence shows that in the case of telephone companies the general result of a reduction of rates in some other kinds of business does not always follow, namely, that there would be an increased demand, which could be supplied at a proportionately less cost than the original business. Such, it is admitted, would be the case generally in regard to water companies, and perhaps some others where the rate is a reasonable one. For example, it is said that it would cost no more, or certainly scarcely an appreciable amount more to haul a train of two cars both filled than it would to haul the same train with both cars half filled, and if the reduction in rates should result in filling the cars where previously they had not been half filled there might be an increased

carriage at a cost very little more than before and probably an increased profit. So in the case of a water company the reduced rate might result in furnishing more water to consumers already existing and the increased cost of furnishing the same would be infinitesimal where there was a supply sufficiently large to fill the demand. *So, also, in furnishing gas at reduced rates, the reduction in the rate would very probably result in increased consumption*, not only in increased demands from more consumers, but also an increased consumption by consumers already existing and the increased cost of furnishing the gas would be nothing like in proportion to the increase in consumption. In these cases increased profits might be result of decreased rates."

The rule laid down by this Court is especially applicable to the appellee because it is doing business in the same city, under practically the same local conditions, and under the same statute that was attacked in *Willcox* v. *Consolidated Gas Co.* (212 U. S., 19). Chapter 604 of the Laws of 1916, which is herein assailed, is an amendment of Chapter 125 of the Laws of 1906, which was passed upon in the Consolidated case. It might fairly be urged that the decision in the latter case is an adjudication which positively must be followed in the instant case.

In the former case the Court required that an actual experiment be had with the new rate, and it may be observed that ten years elapsed before the Consolidated Gas Company undertook to assail again in Court the statute which it sought previously to have declared confiscatory. The Court said:

"The value of real estate and plant is to a considerable extent matter of opinion, and the same may be said of personal estate, when not based upon the actual cost of material and con-

struction. Deterioration of the value of the plant, mains and pipe, is also, to some extent, based upon opinion. All these matters make questions of value somewhat uncertain, while added to this is *an alleged prospective loss of income from a reduced rate, a matter also of much uncertainty, depending upon the extent of the reduction of the probable increased consumption, and we have a problem as to the character of a rate which is difficult to answer without a practical test from actual operation of the rate* * * * but where the rate complained of shows, in any event, a very narrow line of division between possible confiscation and proper regulation and based upon the value of the property found by the Court below, and that the division depends upon divisions as to value which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is kept very much in doubt, a Court of equity ought not to interfere by injunction *before a fair trial* has been made of continuing the business under that rate, and thus eliminating, as far as possible, the doubt arising from opinions as opposed to facts" (212 U. S., 42).

And later, in the same decision, the Court said:

"The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost *can be answered only* by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are from the evidence so uncertain, and where the margin between possible confiscation and valid regulation is so narrow, we cannot say that there is no fair or just doubt about the truth of the allegation that the rates are insufficient" (212 U. S., 51).

And in conclusion the Court said:

> "Upon a careful consideration of the case before us, we are of the opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or reasonable doubt that the acts of the Legislature of the State of New York are, in fact, confiscatory" (212 U. S., 54).

How closely this Court adheres to this rule requiring actual experiment is shown in Knoxville Water Company v. Knoxville (212 U. S., 14). The Court said:

> "The case is peculiar. The company has never observed the ordinance. The suit was begun nine months after its enactment, and tried considerably later * * *. In this case there could be no *absolute certainty* because the ordinance had never been put in operation, but evidence of the years succeeding to the ordinance is relevant and of great importance, and by a consideration of such evidence a much greater degree of certainty be obtained * * *. The jurisdiction thus invoked here, and as has been said to be exercised only, in the clearest cases. *If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into Court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the Court that the ordinance would necessarily be so confiscatory* in its effect as to violate the Constitution of the United States."
>
> (Citing *ex parte Young*, 209 U. S., 123; *San Diego Land & Town Co.* v. *National City*, 174 U. S., 729, 754;
> *San Diego L. & T. Co.* v. *Jasper*, 189 U. S., 439).

"If hereafter it shall appear that the actual operation of the ordinance that the returns made

by it operate as a confiscation of property; nothing in this judgment will prevent another application to the courts of the United States or the courts of the State of Tennessee" (212 U. S., 19).

To meet the assertion that this rule was laid down only in exceptional cases, we call the attention of the Court to the following cases:

"While we agree with the Court below that it was right * * * we think, in view of the fact that the attack upon the rate was made before the advance went into effect, and before actual application of the rates could be demonstrated whether they were remunerative or not * * * the Court should have dismissed the bill without prejudice."

(*Des Moines Gas Co.* v. *City of Des Moines*, 238 U. S., 153).

"The evidence for complainant tending to show they were non-remunerative, while based upon actual experience in the operation of the rate, yet relates to only a brief period when these were abnormal * * * but it is sufficient for the present to show that the *experimental period was too brief*, and the decree under review should be so modified that the dismissal of the bills shall be without prejudice to another suit * * * if after a *full and fair test* they shall be found to be confiscatory."

(*Darnell* v. *Edwards*, 244 U. S., 569, 570, *citing Knoxville Water Co.* v. *Knoxville*, and *Willcox* v. *Consolidated Gas Co.*, *supra.*)

"We are far from saying that the argument for doing so does not seem to us to have considerable probability on its side. We do not say that experiment may not establish a case in the future that would require a decision upon the question of con-

stitutional law. But we can express no opinion upon it now * * *. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

Nor. Pacific Ry. v. *Nor. Dakota*, 236 U. S., 581.

In this case the test was made under the rates in question and the case reopened after a year and finally passed upon by this Court (236 U. S., 585):

"If thereafter it shall appear that under actual operations of the plant, under these rates, the return allowed by such corporation commission operates as a confiscation of the property of complainant * * * she may at the expiration of one year again present her evidence to the Court and obtain appropriate relief on the facts then presented."

Van Dyke v. *Geary*, 218 Fed., 111, aff'd in 244 U. S., 49, citing *Knoxville Water Co.* v. *Knoxville* (212 U. S., 1).

"When it is remembered what clear evidence the court requires before it declares legislation otherwise valid, void on this ground (confiscation) and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of the opinion the result is too near the dividing line not to make *actual experiment necessary.*"

City of Louisville v. *Cumberland Telephone & Telegraph Co.*, 225 U. S., 430.

In *Penn. R. R. Co.* v. *Towers*, 245 U. S., 6, this Court affirmed 126 Md., 59, which refused an injunction and held:

> "and that although the order involved fixed rates for ten years, there should be reserved to the company the right to apply to P. S. C. after reasonable time for the right to rescission or modification of the order, if *experience* demonstrated that the revenue derived under the tariff as established was not properly compensatory for the services rendered."

Following the same rule the Court, in *Montana W. & S. R. Co.* v. *Morley*, 198 Fed. Rep., 991, held that where a freight rate had been made for the future and a *reasonable time had passed during which it had been applicable*, the revenue derived therefrom would be regarded in determining whether it is remunerative or confiscatory.

> "We recognize fully the authority and wisdom of the views of the Supreme Court * * * 'that a case ought to be a clear one before the Court ought to be asked to interfere with state legislation upon the subject of rates in advance of *an actual experience of the practical* results of said rates'"

Boubright v. *Geary*, 210 Fed., 44.

> "Where a fair trial for a year of rates of intrastate business established by a state has demonstrated that they are not compensatory to a railroad it is entitled to an injunction to restrain their further enforcement without reference to what might be their effect if continued."

In re Arkansas Rate Cases, 187 Fed., 290.

> "The ordinance was never put in force. Within a few days after it went into effect, this bill was filed and an injunction *pendente lite* granted," etc. * * * "The inquiry in cases of this character is not alone what has complainant theretofore

earned but it is what will be the effect of the ordinance reducing the rate upon the future net earnings of the company and it devolves upon complainant to show not that the past rates have not produced a reasonable return but that the rate prescribed by the ordinance will not in future produce a reasonable return."

Lincoln Gas Co. v. *Lincoln*, 223 U. S., 361.

"As the ordinance was passed in 1906 and had not yet been enforced, the Supreme Court of the State dismissed the bill without prejudice to a rate suit after it should have been given a fair test (144 Iowa, 426). The plaintiff, having specially set up that the ordinance violated the contract clause of the Constitution (Art. 1, Sec. 10) and the Fourteenth Amendment, bring the case here * * *.

But there is nothing of which we can take notice in the case that could warrant us in changing the result or in saying that the plaintiff did not get as much as it could expect when leave was reserved for it to try again."

Cedar Rapids Gas Co. v. *Cedar Rapids*, 223 U. S., 666, 670.

"May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business and therefore the earnings? At any rate, must the Court assume that it has no such effect; and ignoring all other considerations, hold as a matter of law, that a reduction of rates necessarily diminishes the earnings."

Chicago, etc., Railway Co. v. *Wellman*, 143 U. S., 344.

In this case it was shown that, on the very day the act went into force, the application for a ticket was made, a suit begun and within two months a judgment obtained in the Trial Court.

While we are discussing this point, we may appropriately refer to *Commonwealth* v. *Interstate Consolidated Railway Company*, 187 Mass., 436, in which the Court said:

> "Nothing less than a certainty that the provision (half rate fare to children) would cause loss to the railway companies or some of them, would enable us to hold that the Legislature was powerless to make the requirement * * *.
>
> * * * Was it not possible that the Legislature to decide * * * that the number who would ride at the half rate would be nearly, if not twice as many as at the regular rate and that for these and other companies would suffer no loss from carrying children at half the regular fare?"

This case was appealed to this Court and in 207 U. S., 79, Mr. Justice HOLMES wrote as follows:

> "I am not prepared to overrule the decision of the Legislature and of the highest Court of the State of Massachusetts, that the requirement (half fare rate) is reasonable under the circumstances existing there; upon evidence that goes no higher than this (which was to the effect that a considerable percentage of the passengers carried by the railroad consisted of school children).
>
> * * * * * * *
>
> It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power."

The New York Court of Appeals has recently followed the same doctrine, and in expressive language declared (*Municipal Gas Co.* v. *City of Albany*, 225 N. Y., 98):

> "On the contrary, through repeated decisions, there runs the consistent thought, in controversies of this order, experience is the final test, that the

Court must bide their time, and let the working of the law decide." (Citing *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19; *Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1; *North. Pacific Ry. Co.* v. *North Dakota*, 216 U. S., 579; *Cedar Rapids Gas Light Company* v. *City of Cedar Rapids*, 223 U. S., 655, 670; *Missouri* v. *C. B. & Q. Ry. Co.*, 241 U. S., 533, 540; *Darnell* v. *Edwards*, 244 U. S., 564-570; *Van Dyke* v. *Geary*, 244 U. S., 39.) "Bills to annul rates have been dismissed *without prejudice*, 'while the outcome remained uncertain. Bills to annul the same rates have afterwards been sustained when the vision of results was clarified by the wisdom that follows the event'" (*Northern Pacific R. R. Co.* v. *North Dakota*, 236 U. S., 585; *Missouri* v. *C. B. & Q. Ry. Co.*, 241 U. S., 540).

It is not improbable that the effect of the amended statutory rate would be to somewhat reduce the earnings of the company during the first year, but all experience shows and this Court has recognized it in many cases that the probable effect of a reduced rate on such a commodity as gas would be to greatly increase the consumption without a corresponding increase of expense, and that in time the increased consumption of gas, resulting from the reduced rate, would be sufficient to more than overcome the amount of the reduction.

It is notable that, in spite of the competition of the electric light, the consumption of gas is steadily increasing and the number of new customers may be counted by thousands.

If it be argued by the complainant that the conditions under which the company operated since the enactment of the statute assailed have been such that manifestly there would have been no difference in the result so far as the returns upon the value of the property were concerned, had the company actually obeyed the statute and

put into effect the 80-cent rate, then we respectfully submit to the Court that there is no evidence in this case to show such a conclusion, and that such a deduction from what has been put in evidence in this case would be purely conjecture.

The suggestion was made during the trial that the complainant could show evidence from which it might be deduced that in all likelihood the results so far as the percentage of return upon the fair value of the property of the complainant was concerned, would not have been changed had the 80-cent rate actually been followed. But the complainant has brought forward no such evidence from which a fair conclusion in this matter may be drawn.

A recent decision was handed down by this Court in the case of *Lincoln Gas & Electric Light Company* against the *City of Lincoln* (250 U. S., 266). It will be recalled that this case had formerly been up on appeal to this Court. In the first instance it had not been referred to a Master and the Court hearing the case made no specific findings.

The decree of this Court reversed the decision of the Court below with directions to refer to a Master with leave to both parties to take additional evidence. The Court below followed these instructions and appointed a Master who reported his findings, both of fact and law. The Master's report was confirmed by the District Court, from which an appeal was again taken to the United States Supreme Court.

This decision positively confirms the proposition which we have above asserted that an actual test must be made of the statutory rate before it may be assailed in Court. This Court said as follows:

> "Pending the hearing upon the Master's report, and on or about May 1, 1915, complainant, notwithstanding the injunction *pendente lite,* put into

effect a net rate of $1 per thousand feet for gas, and has maintained it since.

Upon the strength of this test, and before the argument of this the second appeal, complainant presented to us a petition for leave to file a bill of review in the court below upon the ground that, according to the Master's findings, complainant, in the year 1907, earned so small a return that the rate ordinance would have been confiscatory upon the valuation as found by him, but for this additional finding: 'All human experience has shown that increased consumption follows quickly a reduction in the price of commodities, and the evidence in this case satisfactorily shows that gas is no exception to the rule.'

The petition averred that the experience of complainant in an actual test of the reduced rate during a considerable period since May 1, 1915, showed that the view of the Master was erroneous, and in fact under actual operating conditions there was no increase of consumption.

The application for leave to file a bill of review will be denied, for the following reasons:

First because the $1 rate was put into effect pursuant to a written stipulation made between the parties in the cause to the effect that the action of the company in so doing should not be construed as an acceptance of or compliance with the ordinance in controversy, and *should not be 'shown in evidence or presented to the court in the above-entitled cause, or used* in any way by either party to influence the action of the court in the disposition of the case.' *Hence defendant was not called upon to observe the effect of the reduced rate or prepare to meet inferences drawn therefrom.*

Secondly, because complainant might have made a practical test of the ordinance rate before bringing this suit for an injunction, and certainly ought to have resorted to the test long before it did so. As early as the month of January, 1909, this court, in two notable rate cases, indicated its view of the importance, in any but a very clear case of

subjecting prescribed rates to the test of practical experience before attacking them in the courts. Knoxville v. *Knoxville Water Co., 212 U. S., 1, 16, 18. Willcox v. Consolidated Gas Co., 212 U. S., 19, 54. When those decisions were announced this case was pending in the Circuit Court, and shortly thereafter it was decided adversely to complainant upon the question of the validity of the rate, the Knoxville and Willcox cases being cited. 182 Fed. Rep., 926, 929. Then, if not before, complainant might have made a practical test of the sufficiency of the rate, instead of waiting six yearss longer before doing so. The litigation has been extremely tedious and burdensome to both sides and it ought now to be brought to a conclusion upon the record as it stands.*

* * * * * * *

Without going into details, we content ourselves with announcing our *general conclusion that having regard to the entire period under investigation, we are unable to say that the Master erred in holding that the ordinance was not shown to have been confiscatory in its effect. It is probable that in the years 1907 and 1912, the net return was close to the line, if not below it; but that in the other years examined it was at least 7 per cent.; and there are too many doubtful items for us to adjudge the ordinance void, in the absence of an actual and timely test.*

The decree dismissed the bill, however, so far as it related to the rate ordinance, without reservation or qualification. Perhaps it would go without saying, but in our opinion the decree ought *to be modified so as to permit complainant to make another application to the courts for relief against the operation of the ordinance hereafter, if it can show, as a result of its practical test of the dollar rate since May 1, 1915, or upon evidence respecting values, costs of operation and the current rates of return upon capital as they stand at the time of bringing suit and are likely to continue thereafter, that the rate ordinance is confiscatory in its effect under the new conditions."*

Mr. Justice GREENBAUM, in the trial in the State Court (110 Misc., 204) said:

> "This action was commenced before the legislative act here assailed went into effect and was not brought on for trial until the latter part of 1918. If the court had before it only the experiences of the plaintiff during 1916 and a few years prior thereto, showing as they do substantial incomes annually, it would have been justified in dismissing the bill upon the evidence, for the reason that the plaintiff had made no practical test by actual operation under the 80 cent rate (*Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1, 14, 15; *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 42; *Municipal Gas Co. of City of Albany* v. *Public Service Comm'n*, 225 N. Y., 89). As matter of fact the plaintiff has been collecting from its customers since the commencement of this action at the rate of 95 cents per thousand cubic feet of gas, pursuant to an order of the court, the excess of 15 cents above the legal rate having been deposited with a trust company pursuant to such order.
>
> The court, however, took proof as to expense of operations, subsequent to July 1, 1916, and down to December 31, 1918, to afford the plaintiff an opportunity to establish that at an 80-cent rate, confiscation would ensue, despite an economical and efficient operation of the works and a largely increased income because of a lower rate (*Willcox* v. *Consolidated Gas Co., supra*, at p. 42).
>
> It is obvious, unless the evidence is conclusive that confiscation is inevitable under the present law, that it would be mere speculation in the absence of an actual experimentation to find whether the increased business would or would not sufficiently overcome the reduction in price. Under such circumstances the plaintiff would not meet the burden that rests upon it (*Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19)."

It is clear, therefore, that the complainant's suit must fail for the reason that it has failed to make a practical test of the 80c. rate.

POINT III.

Candle Power.

The defendants assert that complainant is not entitled to equitable relief, because it has persistently violated the statute requiring it to furnish gas of twenty-two candle power.

In the recent case of

Carmen v. *Fox Film Corporation*, 269 Fed., 928,

the Court refused to interfere on behalf of an infant who sought to have certain contracts declared void, which she alleged had been made during her minority. The Court said at page 932:

> "The maxim that one who comes into equity must come with clean hands expresses rather a principle of inaction than one of action. It means that equity will refuse its aid in any manner to one seeking its active interposition if he has been guilty either of unlawful or inequitable conduct respecting the subject matter of the litigation."

The opinion of Judge LEARNED HAND, in the *Consolidated Gas* case (267 Fed. Rep., 243), stated that the requirement

> "must of course be regarded as a duty imposed upon the plaintiff while it remains upon the statute book. A persistent and deliberate disregard of it might, I should think, bring this case within that somewhat indefinite rule which turns out of a court of equity a suitor who has himself been unjust in the very matter of which he complains."

The complainant, according to the Court, did not dispute that it has not furnished its consumers with gas of the quality required by the statute.

It is furnishing a counterfeit gas.

In *Kings County Lighting Company* v. *Lewis et al.* (*ante*), the case tried recently in the New York Supreme Court, Mr. Justice GREENBAUM said:

> "* * * Moreover, it may well be urged that if the plaintiff has knowingly violated the law by selling gas of a standard lower than that fixed by law, it is not entitled to equitable relief. Observance of the law is a cardinal principle which is obligatory upon him who seeks judgment in equity."

The officials of this company "knowingly violated the law by selling gas of a standard lower than that fixed by law."

The quality of the gas manufactured by complainant is a necessary factor to be considered in connection with the income of the company. It has not attempted to prove or estimate how much the income would have been increased if it had provided the consumers with candle power gas. It necessarily follows that because of the increased purchase of gas, the income would have been greater than it is alleged to have been, if the company had sold 22-candle power gas.

In *Kings County Lighting Co.* (*ante*), Judge GREENBAUM said:

> "* * * The daily tests of gas made by the legal inspectors established that the average quality of the gas supplied by the plaintiff during 1918 was an average of 13.57 candles instead of 22 candles, which is the minimum by law. It follows that the consumer was either compelled to consume a greater quantity of gas measured by the

ratio of 22 to 13.57 at a correspondingly increased price to him or that he suffered from the loss of light in the ratio of 13.57 to 22 for which he paid the price charged for gas of a 22-candle power standard.

"How can one foretell how much increased business the plaintiff would have had if it had furnished the legal 22-candle power instead of the very considerably diminished candle power that it furnished in 1918? The use of gas has been largely extended during the past few years for cooking, heating water, house heating and other purposes. A standard quality of gas should insure a more extensive use of gas. At any rate a fair test under the law cannot be made except by compliance with the law which fixes the standard of quality." * * *

The Master has found that the complainant has been charging for gas at the rate of 95 cents per thousand cubic feet since July 1, 1916 (Rec., p. 38). Since January 1, 1919, the monthly average of candle power furnished by complainant has been 15. The company is required by statute to furnish 22-candle power gas at 80 cents per thousand cubic feet. It has restrained public officials from enforcing the statute for almost four years, and ignored the statute after the restraint was off. Without the sovereign authority of the State, it adopted its own method of fixing gas quality, of which the Master approves, and sold the product it manufactured, not at 80 cents per thousand cubic feet, nor even at 95 cents, which the Master finds, but at $1.38 per thousand cubic feet. Selling fifteen candle power gas for 95 cents is equivalent to selling 22-candle power gas for $1.38. The Court below finds, however, that the company is not compensated and is entitled to equitable relief. *Moreover, he finds that there has been a sufficient experimentation*

with the statute it has assailed as non-compensatory, notwithstanding that there has been no effort on the part of the company to comply with the requirements of the statute.

In actual results the discrepancy is even greater than shown above, because efficient use cannot be made of a gas that varies in quality from day to day.

The Master, however, disregards the obvious inequity and excuses the complainant's default, and its consequent defiance of the regulating power of the State, by giving full credence to the company's alleged inability to get sufficient gas oil.

If Congress passed a law permitting the fixing of prices per pound of food commodities, and created a special board to enforce such an act, we feel sure that the courts would punish those who arbitrarily decided to sell and did sell 12 ounces of sugar and call it a pound. There would be no defense available to the dealer that sugar was scarce. The analogy herewith presented is complete with the facts in the case at bar—15-candle power gas is not 22-candle power gas any more than 8 or 12 ounces is a pound.

We urge upon the Court to consider the illegality, and the obvious unfairness of complainant to its consumers, in selling extremely low and variable candle power gas at a price in excess of that fixed by statute. The Legislature determined that complainant must give the consumer 22-candle power gas at 80 cents per thousand cubic feet. The complainant not only failed to meet the standard but furnished gas of exceedingly inferior quality.

The City reported the result of its tests to the company each day (Rec., pp. 202-3), and no complaint was ever made to the City by complainant that said tests were

not accurate. In addition, the City deducted from the complainant's bills a proportionate amount to cover the deficiency in the candle power of the gas furnished.

The tests made by the City of New York are made by gas testers employed by the Department of Water Supply, Gas & Electricity of the City of New York. These men are experts in their line and made daily reports under oath as required by Chapter 735 of the Laws of 1905.

The situation presented in this case bears no resemblance to the state of facts passed upon in the *Consolidated* case hereinbefore referred to. There is no question in the instant proceeding about the accuracy of the readings taken or methods used by the official City gas testers. Their results are uncontroverted.

The testimony shows many violations of the statute, and the undisputed evidence is that these continued over a long period (Comp. Ex. 15-17, Rec., p. 1037). The complainant furnished no proof that it had complied with the statute. It admitted the violations repeatedly complained of and merely offered lame and insufficient excuses, such as its alleged inability to obtain oil in sufficient quantities to thoroughly enrich the gas.

The Illinois Commission, *in re Central Illinois Public Service Co.*, Case No. 7617, reported in P. U. R., 1918, E., pages 357-358, said:

> "The petitioner has displayed a lack of effort and interest in its gas business, and the quality of the service has been sufficiently bad to discourage the use of gas, and for these and other reasons, more fully set forth in this opinion, the company need not expect consumers to pay a return for poor service equal to that allowed heretofore in the order issued in connection with gas utilities that have been ably managed and developed."

The Wisconsin R. R. Commission recently decided a case reported in P. U. R., January, 1921, said:

> "We find:
>
> 1. That the gas service furnished by this Company to these communities is inadequate and unsatisfactory.
>
> 2. That no increase in rates for gas should be given consideration until the service rendered in the gas department shall conform in a reasonable manner to the standards laid down by this Commission."

Similar findings have been made by other commissions.

Complainant has at all times been in a position to furnish the gas prescribed by the statute but has refused to do so. It might have made application to the Public Service Commission for authority to change the standard from Candle Power to B. T. U. under certain conditions; but there is nothing in the record to show that it ever made any such effort.

While we maintain that the heating value is not an issue in this case, because not mentioned in the statute, we say that the heating value of the gas as measured at the plant of the complainant is not evidence of the heating value at the consumers' premises.

In finding number 11 (Rec., pp. 31-2), the Master gives a table showing the alleged heating value of the gas manufactured. He does not state how much *more than 620 British Thermal Units* there is normally and unavoidably contained in gas of 22-candle power. He altogether fails to show that the law requires complainant to deliver gas of 22-candle power measured at least one mile from the plant. He has not been informed that there is a very great difference between a gas of 524.07 B. T. U.

value tested at the plant and one with 22-candle power (or say 650 B. T. U.) tested one mile from the plant. He seemingly does not understand that a manufactured gas having only 3.08 candle power can have only an exceedingly small heating value. He is not aware that a monthly average heating value does not mean anything in itself so far as concerns uniformity of heating value, but it is demonstrated beyond all question that the gas during June, 1920, varied at least as much as 100 per cent. above the low point in heating value because the candle power value was around 4 on June 2nd to 7th inclusive, while the monthly average was 8.04. Whereas we might admit that a 22-candle power gas may vary considerably from day to day in its heat value, although not over 10 per cent., we know of no gas engineer who would not swear that as between a 3 or 4-candle power gas and an 8-candle power gas the difference in the heating value would be in almost direct proportion to the candle power. We thus see that the complainant has demonstrated, by its evidence, the fallacy of the opinions loosely expressed by its experts that heating value gas is more uniform than a gas measured by its candle power. We positively dispute the finding of the Master, number 14 (Rec., p. 33), "the heating value standard tends to increase efficiency in consumption, by insuring uniformity of quality." We deny that the record shows any basis for the conclusion that up to May 1, 1920, the gas furnished was of uniform heating quality. He has no means of knowing what heating value was furnished. *No regulatory body has ever prescribed a test of gas based upon its heating quality measured at or near the relief holder.*

The testimony clearly shows that since 1918 the complainant has abandoned all efforts to comply with the statute. The wisdom of this statute is solely within the province of the Legislature. The constitutionality of

that part of the statute which prescribes the candle power to be furnished is not attacked by complainant. Other large companies in this vicinity have attempted substantially to comply with said statute, and there is no testimony to controvert the fact that it is possible to make gas and comply with the requirement that the Legislature prescribed after due deliberation and consideration of voluminous evidence relating to this important part of the service.

In *Willcox* v. *Consolidated Gas Company*, 212 U. S., 19, the penalties for violation of the candle power statute were held to be unconstitutional, due to their being cumulative, and accordingly it would have been futile to prosecute this company. The complainant has taken advantage of this decision, on the assumption that it could not be punished by the imposition of fines. It can, however, feel the weight of the law at this time by having this Court decide that it has taken advantage of its position as a monopoly deliberately to impose upon its customers. Having come into a court of equity it should be required to do equity before any relief is granted.

POINT IV.

Unaccounted-for Gas.

An unreasonable amount of the unnecessarily expensive gas made by complainant is subsequently lost or unaccounted for.

The complainant loses almost one-fifth of its product in the distribution process, and, moreover, does not improve its methods notwithstanding one serious judicial attack made upon this loss over a year ago. Suppose that any industrial or mercantile plant lost 17½ per cent. of its product before it reached the consumer. Suppose, further, it lost 15 per cent. which the Court fixes as a reasonable amount to lose. What would be the result to the manufacturer? Seventeen or fifteen per cent. would have to be added to the price to the consumer in order to save the concern from bankruptcy. Good business practice does not increase prices to this extent to cover loss, but seeks to eliminate the loss. Where did the Court below obtain the basis of fact to make the findings? This cannot be ascertained from the record, except from two loose statements of engineers. These statements explain nothing. Shall the consumer stand an increase in price to cover this loss in order to justify the slipshod management of the complainant?

The practice of this company was condemned in the opinion of Mr. Justice GREENBAUM, in the prior suit (110 Misc., 204). He said:

> "It may be assumed that a certain percentage of this unaccounted-for gas is likely to exist in every gas factory, however efficiently managed, but that does not explain whether such a large percentage of unaccounted-for gas as is here shown is usual in well-managed gas factories. It was in-

cumbent upon the plaintiff to establish that its business was conducted efficiently and with due regard to proper economies. The expert witness, however, refrained from giving testimony as to what the percentage of unaccounted-for gas was found to be in other gas-making concerns or whether there is a well-recognized average percentage of loss of gas which is unavoidable, nor was he questioned on these points. The plaintiff has therefore failed to meet the burden of showing that its percentage of unaccounted-for gas is not excessive.

The circumstances, too, that in 1916 the ratio of lost gas was 12.69 per cent. of the entire output, and 1918 the ratio had increased to 18 per cent., is an added fact indicating the importance of showing with some reasonable degree of certainty whether such an increased loss could not have been avoided by the exercise of care and efficient management. The failure to furnish proof as to the specific causes to which the losses were attributable is a circumstance strongly pointing to the fact that the loss is excessive and could have been largely reduced by careful supervision."

After its defeat in the State Court, complainant made no effort to reduce the amount of its unaccounted-for gas, so far as the evidence shows.

The loss of gas is a matter of importance, but the danger to health and to life and limb is of even greater concern and needs to be particularly considered in a rate case from the standpoint of losses from claims and damages. A company that admits over 10 per cent. of the gas it sends out is unaccounted for, condemns itself as negligent and wasteful. The burden is upon it to prove why such excessive losses should be charged against the public. Defendants could not in this case be charged with the duty of digging thousands of test holes, making hundreds of thousands of tests on meters, or examining a large number of dead service ends. These

matters are given careful attention by a well-managed gas company. No reasonably operated gas utility can be found, other than complainant, with nearly 18 per cent. leakage in similar territory to that of the complainant at least so far as our experience goes.

All of the witnesses agreed that this was an excessive amount and the Master allowed 11 per cent. which was increased to 15 per cent. by the District Judge.

The evidence shows how inefficient the management was.

Chief among the important elements in the costs as indicated there will be found, by deduction, the cost of making *gas that is lost*. The only way to find the cost to the consumers of this item of expense is by taking the cost of gas made as shown on page 1 of Exhibit 6 (Rec., p. 1033) (.4835) from the cost of gas sold as shown on page 2 (.5920) and thus reach the result (.1085). This 10.85c. per M. applied to 279,274,156 cubic feet, amounts to a loss of $32,254 for the year 1919. We do not say that all of this loss should be eliminated. We do say, however, that the 15 per cent. loss allowed by the Court cannot be substantiated, by the evidence, as the reasonable allowance. In the *Consolidated Gas Company* case the learned judge allowed only 4.1 per cent. for leakage losses. The Master in the present case allows 11 per cent., which the Court increases to 15 per cent. It is impossible to determine how this conclusion was reached. If the Court below believed complainant's territory is different from that of others, this Court should know how much weight was given by Judge Hough to that assumption. It should also know how much of this allowed loss was figured from the testimony of Elsman, who swore that gas was made and blown into the air (after it had been metered) because there was no place to store it (Rec., p. 309). Information should be available to the Court to show the

amount figured for leakage losses because of the fact that the company allowed the gas holder seals to freeze, unbalanced the holder, and thus allowed a lot of gas to be lost.

The witness Klumpp, when testifying for appellee on the matter of leakage, said that some of this might be attributed to "non-register" meters. That means a meter has not registered the amount of gas a consumer has used. It is not due to "sticking valves," as when valves cease to operate the meter will not pass gas. He seems to be unaware of the general practice, covered by Commissions' rules, that where a meter does not register the company is allowed to send an estimated bill, and this excuse that he used for part of the leakage does not hold good (Rec., p. 362).

He figured the greater proportion of gas unaccounted for was due to an underestimate of the amount of gas used for street lighting and paid for by the City of New York. If that is the case then the gas consumers are being indirectly taxed for an expense that should be borne by the people as a whole and not by the gas consumers as a class (Rec., p. 362).

In making comparisons with other territories the witness Miller said that the leakage varies in proportion to the number of services (Rec., p. 385), and we ask the Court to note the testimony of other witnesses to the effect that this particular district has few services as compared with the number of customers, due to one service giving connection to several meters in a large number of apartment buildings. Can you compare Gloversville, N. Y., with Brooklyn? Even Klumpp testified that over ten per cent. unaccounted-for gas would be excessive, and yet the Master found 11 per cent. was reasonable (Rec., p. 365). Klumpp had been testifying considerably about the Minneapolis plant

in comparison with that of complainant; and it is therefore interesting to note that on cross examination *he admitted that the unaccounted-for gas in Minneapolis was practically nil* (Rec., p. 366).

The witness Miller testified that in New York City a lot of the gas goes directly from the holders to the consumers, and that in the territory of the complainant it goes through a long transmission main. He well knew, having been an expert called in the *Consolidated Gas Company* case, and it is in fact very clearly in that record and decision, that gas made for use in the Consolidated system goes into a high-pressure transmission main that is common to all gas companies on the system. His lame explanation on page 390 of the Record impeaches his testimony. The Master thought he saw some very valuable information in the testimony, but it is altogether inaccurate and misleading (Rec., pp. 390-1). This witness, Miller, has long been connected with this company as an "expert," and yet his testimony regarding the places where consumers' meters are set in the apartment houses was entirely broken down by some questions directed to him by Counsel Jackson for the defendants (Rec., p. 391). *His testimony about the "gummy" substance depositing in the meters and making them "tend to go slowly" is not convincing.* The slowing down of the *speed* of the valves would have absolutely nothing to do with the registration of the gas but would merely result in less gas going through per hour (Rec., pp. 394-5).

Judge HAND in the case of *Consolidated Gas Company* v. *Newton* (*ante*) said:

> "The average for the whole system over a period of 13 years during which statistics were given

to the authorities was 5.31 per cent., and unless there are some disturbing factors, this is a valid starting point, which the company must accept. The only disturbing features suggested here are the poorer quality of coal and oil, and I take against the plaintiff any doubt which those factors may raise. I accept the average of 5.31 as a proper allowance for the system as a whole, at least in a rate case * * * I shall therefore take 4.1 per cent. as the proper figure for gas unaccounted for."

The testimony shows (Defts.' Ex. D-1, Rec., p. 1088) that five companies, located in territory similar to that of complainant, reported to the Public Service Commission for each of the years, 1917, 1918 and 1919, a yearly percentage of 8 per cent.

The amount allowed by the Court should therefore be reduced to 8 per cent.

POINT V.

The record in this case discloses a substantial lack of proof on important facts and gross inefficiency in the management of complainant's plant.

Complainant has failed to prove that its business has been run efficiently, honestly, economically and prudently.

The question resolves itself into whether or not the complainant, during the period 1919 to June 30, 1920, on which it relies to prove the statute is confiscatory, possessed reasonably adequate, modern and efficient plant equipment. The testimony shows that complainant's plant is, and has been for many years, poorly designed and inadequately equipped to produce gas economically. It is furthermore shown that this deplorable condition is due to complainant's wilful or fatuous neglect to provide for inevitable expansion of those obvious and ordinary improvements in the art of gas manufacture which substantially decrease the cost of labor and materials used in the production of gas. It has not looked ahead in preparing to meet the demands of the public for good gas at the reasonable price fixed by statute.

The alleged confiscatory nature of a gas rate cannot be established by a mere survey of the operating expenses of the plant for a short period of time; details are required.

In view of the fact that the management and operating policy of complainant's plant is beyond the control of the public—purely a function of the executives of the company—the following questions may be asked:

Can a public utility corporation select any kind of a plant that it has in mind, operate it according to a system that has never been sanctioned in the gas industry, and then come into Court and demand that the public pay the bill?

Can a utility serve only a selected number of customers and refuse service to others, thereby increasing the cost of operating its property?

Can it in equity defy the laws under which it operates and charge more than is allowed for a service less than is prescribed?

All these questions should have been adequately investigated by the Master before the Acts of the Legislature are set aside and before appellee is permitted to collect more than the service is reasonably worth.

Complainant's Exhibit "6" (Rec., p. 1033) purports to show the cost of producing and distributing gas for the year ending December 31, 1919.

The attention of the Court is respectfully directed to the following comments upon said Exhibit:

Complainant reports using *gas oil* for raising steam $.073 per gallon. It reports use of *gas oil* to produce gas in the carburetted water gas system at a cost of $.0646 per gallon. *Gas oil* is used for both purposes and yet the cost per gallon of gas oil is different. Why? Which price is correct?

Complainant reports that it used 22,594.80 tons of generator coal. For purposes of study this should have been narrowed down to the number of pounds used per thousand cubic feet of gas sold. Did the complainant use any coke for generator fuel? The record is silent on the point. The recent decision of Judge HAND in the case of *Consolidated Gas Company* v. *Newton, et al.* (*ante*) is illuminative.

He said at page 248:

> "In 1919 the Seaboard Company was selling it continuously to the plaintiff at six dollars and fifty cents long ton, delivered alongside."

and later at page 249:

> "Mr. Doane had been for many years concerned with the coke market in New York and its environs

and up to 1915 had made more or less continued efforts to obtain a market for so much as the company did not use."

Here we find one New York gas company with coke on its hands that it had produced in its coal gas plants, and which it claimed was going begging at one time; and in 1919 said gas company was able to secure by-product coke from the Seaboard Company at six dollars and fifty cents a long ton alongside its plant. Almost within hailing distance of said gas company appellee was paying eight dollars and forty cents a ton for generator fuel that is admittedly no better than that which the Consolidated Gas Co. alleged it could not sell. The generator fuel used by appellee was worse for this purpose than the by-product coke that the Seaboard Company sold during 1919 at one dollar and eighty-five cents a ton less than the complainant paid for its generator fuel. In 1919, 22,594.80 tons were used. The complainant could have saved about $41,800, on this transaction alone, if the complainant's engineering department had been concerned in economizing, rather than being concerned, which it is, in making the statutory rate at which it sells gas appear to be confiscatory. Was the Master justified in reporting that the prices and amounts paid for and quantities used of generator fuel were reasonable and necessary?

Boiler Fuel. The testimony shows (Rec., pp. 301, 879) that two of the five machines were taken down for repairs in September, 1919, and were not put into use until January, 1920, thus leaving only three machines to take care of the maximum demand, and these remaining three machines had not been cleaned or repaired since June, 1919, although the usual practice is to have them cleaned and repaired after being run for 1,000 gas-making hours.

The allowance for boiler fuel is excessive. Complain-

ant's own witness Klumpp admitted that 18.8 pounds was high (Rec., p. 353). The testimony of Mr. Merrifield shows that the reason for the excessive use of coal was due to the foul condition of the water-gas machines (Rec., pp. 875-6) and that this condition could have been remedied between July and November of 1919; some of the machines could have been re-checkered, as there was no necessity of keeping all five machines in use during that time (Rec., p. 879).

The usual practice in all well-regulated gas plants is to make all repairs during the off season, so as to be prepared for the winter demand.

Residuals. In the manufacture of water gas there is produced a residual oil to the extent of 15 per cent. of gas oil used. This complainant used, according to Exhibit "6," 5,375,887 gallons of gas oil and should therefore have had at its disposal 806,383 gallons of tar oil. It used 749,369 gallons under the boilers and charged production cost at the rate of .064 per gallon. The average selling price of water gas tar in 1919 was not more than 4 cents per gallon. To balance this cost of production, there was a credit for said residual tar, 765,312 gallons at .064 per gallon. *How can the loss of 57,016 gallons of tar be explained?*

Before leaving this matter of residuals, it is pertinent to inquire what became of the products of gas condensation, in the form of light oil recovered at the plant or drip oil collected from the mains? The complainant sets up very boldly, on Exhibit "6" (Rec., p. 1033), the matter of "condensation," possibly thinking it a good round-sounding word to explain away some of the enormous loss of 279,274,156 cubic feet of gas in 1919. There should be available drip oil from condensation to the extent of 78,330 gallons, and at only 5 cents per gallon the revenue to the company would be $3,916.50 for the year 1919. *It appears nowhere on Exhibit "6," as a credit to operations*

or addition to revenues. It is also natural to inquire *where on Exhibit "6" is there shown the rent received from the Morse Company that leased a large amount of waterfront property from the complainant.* As shown by the opinion of Mr. Justice GREENBAUM in this case heard in the Supreme Court of the State (*ante*), this land is leased to the Morse Company and it must be of considerable value because it was shown that a certain real estate man got a commission of $2,000 for negotiating the lease. The complainant in fact valued it at $268,137. In that case the Court included the leased land in the rate base so the rentals received are a revenue chargeable into the gas operations.

Gas Oil. Returning to the recorded operating costs, the complainant reported for 1919 the use of 3.43 gallons of gas oil per thousand cubic feet of gas made. The witness Merrifield, who was put on by defendants at the insistence of counsel for plaintiff (Rec., p. 855), testified that in his opinion the company had used close to one gallon of oil per M. ft. in excess of what should have been required for the lamentably low quality gas that was produced (Rec., p. 866). If we assume, to be on the safe side, that .75 of a gallon was used in excess, the saving at .0646 per gallon would have been .04845 per M. cubic feet of gas made, or the amazing sum of $75,903.12 for the year 1919. One can well imagine where that 150,000 gallons of "sludge" came from that the company reported as being such a nuisance when it clogged the machines and the mains at the plant. This was undoubtedly caused by the foul machines in use as testified by Mr. Merrifield.

As to the quantity of oil reported used in making water gas, we propose to show that the records kept by the complainant are not conclusive. Reference should be made to the testimony of Albert J. Gounnod, auditor and assistant secretary to the complainant, who had never

worked directly or indirectly on gas accounts until June, 1918, and at that time he was employed by a public accountant (Rec., p. 116). He testified that:

> "Well, for the quantity for the year the engineer at the works takes an inventory of the oil on hand, he examines these tanks, reads the gauges, takes the inventory at the begininng of the year; and we receive the bills showing the amount that was purchased. This amount purchased is delivered at our works, and receipt is sent up showing that that amount was received. To the inventory at the beginning of the year we add the purchases during the year and from that we subtract the amount of oil as shown by the inventory on the last day of the year or for the beginning of the first day of the succeeding year, *and that will give us the amount of oil that was actually* used in the manufacture of gas" (Rec., p. 123.)

Even the witness himself refuted this method later, as he showed that all the oil purported to have been received is not charged to the gas oil account. Some of the oil is used under the boiler (Rec., p. 126). In criticizing the method explained above, it may first be said that the witness knew only in a general way that a referee certified that the oil delivered was according to the amount shown on the bill. He had no knowledge of how the engineer measured the oil in the tanks and in fact did not know, even approximately, how large the tanks were. We submit that the mere certificate of some third party to the effect that certain quantities of oil had been received does not prove that it was used in the manufacture of gas. This company reports the loss of very large quantities of gas. May it not be that it also loses a great deal of oil? If that is so, should the consumers be made to stand the expense? The record shows that the reported use of gas oil in the year 1919 was away over what it should have been in a reasonably well-managed company, and we re-

spectfully suggest that the company must prove to the satisfaction of the Court that it not only bought the oil but that it used it legitimately in the production of gas.

Labor. The witness Gounnod testified that he determines to what account labor is to be charged. He issues instructions to the men who are to do the work (Rec., p. 145). The witness admitted that it is absolutely important to distribute the labor as between operating expense and capital account, and in view of his statement that he determines what account the labor is to be charged to we assert that the system used by complainant is incorrect, because the auditor cannot possibly tell just what kind of work every man has done each day. There is no proof in the record that all labor capital costs are charged to the proper account and not to operating expenses.

Materials. The plan in use of taking material out of stores and showing this has been done by a receipt given by the man who gets the material is no proof that the material was actually used on the particular job that said laborer assigns it to. We claim there should be a check made of the material taken out of stores, with the amount estimated to be required when the "extension and improvement requisition" is made out (Rec., p. 147). There is no proof that any kind of check is made. All the company does is to inventory the stores and supplies each year to see what difference there is between the perpetual inventory and the inspectional inventory, but this in no way proves that all material charged out of stores went correctly to operating expenses or capital account (Rec., p. 149).

Books of Account. So far as concerns the books themselves, the witness admitted that the complainant does not include therein certain accounts prescribed by the "Uniform System of Accounts," as, for instance, "Store and Stable Expense" and "General Amortization."

The latter is one of the most important items to be

considered by the Court, because the Commission has laid out this particular amortization account in such a way that it ties in with the repair costs which are charged directly into operating expenses. The Court has been given absolutely no information about the justice of the repair accounts and cannot positively tell if they have been charged with renewals and replacements. If they have, then the additional sum of one cent per thousand that the company claims in its operating expense is entirely unnecessary.

The Master appeared to believe this point was not material, but it was brought to his attention very plainly by Mr. Chambers, for the defendant Newton (Rec., pp. 151, 152). The charge for "plant withdrawn from service" is arbitrarily made at one cent per thousand feet, although there is no such account presented (Rec., p. 152) and no proof that any plant retired from service has not been charged into repairs and maintenance accounts (Rec., p. 152). *The witness put that charge of $12,872.46 on the books of the company for the year 1919 because he was told to do so by the executives of the company* (Rec., p. 153). *There is evidence from the complainant that indicates very clearly the extent to which renewals and replacements are charged directly to operating expenses, Gounnod* testifying regarding repairs to boilers, in connection with the expense of $14,329.05 in 1919 as against $3,895.08 in 1918 and $3,375.27 in 1917 (Rec., p. 220), that "the expense of that is borne within the period where the replacements of boiler tubes was made necessary" (Rec., p. 221).

Referring further to Gounnod's testimony, it is perfectly evident that there is *no real record kept of the amount of tar produced in making the gas* (Rec., p. 158). It is furthermore shown by this witness that extensions and betterments to the water gas machines in 1919 were charged to operating expenses, at least in part (Rec., p.

221). Complainant claims that it actually measures everything that goes into the production of gas, making check inventories every month. *We find, however, that it estimates the amount of tar* made at so much per thousand cubic feet. The Master drew attention to the smaller percentage of tar made in 1920 than in 1919, and the witness Gounnod explained that they found in 1920 this tar was unusable to the extent of 150,000 gallons (Rec., p. 228). That being the case, and it being evident that the 150,000 gallons of "sludge" was not in the tanks at all but was forcibly extracted from the yard piping, how is it that the monthly inventory did not reveal this fact long before the company had it brought to its attention through the choking of the piping system?

General Economy of Plant Operation. Reflecting further on the cost of operations is the admitted fact that the company is operating hand-fired boilers for which it has to purchase a special kind of coal (Rec., p. 289). It was admitted by Gounnod that when the automatic stokers on certain other boilers broke down, the company had to increase its boiler room force by 18 men (Rec., p. 229). It naturally follows that by continuing in use obsolete boilers that do not have stokers attached, this complainant is incurring a greater labor expense than is necessary. In regard to the quality of the gas, we wish to call the attention of the Court to the testimony of Elsman for complainant, particularly at page 303. He shows a great increase in the consumption of gas although there was practically no increase in the number of consumers. This could be caused by two very important delinquencies on the part of the complainant, one being the low quality of the gas and the other being the deficiency of pressure at the consumers' appliances. In 1915, there were 28,925 consumers who used 765,691,400 feet of gas, or an average of about 26,470 feet, whereas in 1919 there were 37,884 consumers who used 1,226,312,-

600 feet, or an average of about 32,370 feet (Rec., p. 304). *The evidence is conclusive that the complainant overtaxed its production plant during the year 1919. It did not have enough gas to go around, so it refused to take on new consumers and at the same time it diluted the gas it sent to those customers it deigned to serve* (Rec., p. 305). *It is also apparent from this that the cost of operation was abnormal.* You cannot work a plant in the way indicated and get normal results. It follows that the negligence of the complainant in keeping up its plant facilities is not to be charged to the consumers.

It will also be noticed from the testimony that it was not until the year 1918 that the company condescended to try and save some money in its boiler house operations by putting in a limited number of automatic stokers. It now has 4 hand-fired boilers and 2 with automatic stokers (Rec., p. 306). *Further light is thrown upon the excessive cost of repairs in 1920 by the testimony of Elsman, who shows that they practically rebuilt three water gas machines and charged all costs to repair account* (Rec., p. 307).

As to further negligence in operation the testimony of Elsman is convincing. *He allowed the water in the holder cups to freeze, which caused an accident to the gas holder, and a lot of gas was lost* (Rec., p. 308). *It is also reasonable to suppose that this occasioned excessive repairs.* Further reasons for the exceedingly bad service given to the consumers are revealed by Elsman's testimony as to the neglect of the company to provide sufficient gas storage (Rec., p. 308). *The lack of holders also caused unnecessary production expense as shown by his statements.* In addition to extra cost to make the gas they blew into the air a lot of gas that had been made (Rec., p. 309).

Gas Making Labor. Having given some examples of the testimony in this case we will again refer to Exhibit

6 and discuss further the reported expenses. On the first page we see the item of "Gas Making Labor." The testimony shows that it is not really all gas making labor but includes boiler labor and a lot of other miscellaneous labor around the plant. There is also testimony that labor of another sort is included with some of the materials. We submit that the Court can form no reasonable judgment from the evidence as to whether or not the amount of gas making or other labor is reasonable. It is very evident from the testimony, as already abstracted, that the operation of the water gas machines was exceedingly bad. Gas machines that should be cleaned every 1,000 hours of operation were allowed to run for *away over 5,000 hours* without being let down. One might just as well expect an automobile to run 5 years without having the carbon removed from the cylinders. Efficiency could not possibly exist in a plant operated as this one was. *Repairs. The evidence all points to the fact that repairs account has been inflated away beyond all reason by more than one cause.* In the first place, a good deal of that undertaken in this plant is known to the industry as *deferred maintenance. Some of it is in the nature of depreciation which should be spread over a number of years. Other parts of it relate solely to improvements and betterments that should be charged to capital account.*

Concerning the inefficiency of this plant we have the evidence of J. B. Klumpp, a witness called for complainant, who swore *that the plant was running at over capacity and was very dirty and inefficient. In the next few words he shows the capacity of the plant had been reduced 25 per cent. because it was in such a dirty condition.* (Rec., p. 336). This witness also testified that although the capacity of the gas manufacturing apparatus was 9,600,000 feet per day and the company had been making as high as 7,000,000 feet per day, the purifying capacity

and condenser area was only sufficient for 5,000,000 feet per day. He also said the transmission main was too small and required more steam for operation than should have been used. He further asserted the gas was going out on the system at too high a temperature and caused deposits in the mains (Rec., p. 341). Can it be wondered at that this complainant reports it is not able to make gas and sell it at the reasonable price fixed by the Legislature.

Klumpp is the man who testified at another time that the complainant could not carry through last winter, and he seemed to be quite anxious to show why his prognostication had not been fulfilled (Rec., p. 339). It is to be remembered that the company has been crying "*Wolf*" for several years and is still doing business.

The witness Klumpp, claiming to be an expert, was asked concerning the boiler fuel shown on Exhibit 6, and stated in reply that 18.8 pounds of "boiler fuel is high compared to what I would consider good, efficient operations" (Rec., p. 353). He evidently did not know what he was talking about because the boiler fuel is away over 18.8 pounds when the tar is taken into consideration, being in fact over 21 pounds per 1,000 feet of gas made. This omission by the witness was apparent to the Master (Rec., pp. 355-6).

The basis for determining whether or not the rate prescribed by statute is confiscatory must include consideration of the management of the property.

In the Master's finding, number 4 (Rec., p. 29), he refers to the capacity of the production plant as it relates to the water gas machines and says that "It is customary in efficiently operated companies manufacturing the same kind of gas as that manufactured by the complainant to estimate actual working capacity as the rated capacity less the capacity of the largest machines. *This is done because efficient management requires* the constant

repairing of machines * * *." It is on record in this case that the management failed to let down the machines once each 600 hours of working effort, but that it allowed the machines to operate continuously for periods longer than 5,000 hours without cleaning the checker bricks, repairing the hot valves, or relining the generator at the clinkering zone. Under the circumstances it is beyond all dispute that the plant has not been efficiently operated or even reasonably well managed.

Under finding 7 (Rec., p. 29) the Master reports that "there has been a steady increase from 1915 to 1920 in the consumption of gas furnished by the complainant requiring complainant to increase its manufacturing and distributing facilities * * *."

We submit that there is not one word in the record to show that the complainant has since 1915 increased the manufacturing facilities. Even if there were evidence to show that additional production units have been installed, we claim that the testimony of complainant's own witnesses is that the production plant is away beyond the capacity of the cleaning machinery and the yard connections. We further assert there has been no increase in such cleaning and handling facilities, and it stands to reason that this manufacturing plant is of no greater capacity and has no facilities in excess of the minimum equipment in its production plant. Does it do any good if you can make 7 million feet of crude gas per day but can only treat it at the rate of 5 million feet per day. If a plant cannot condense the gas that is produced, so as to remove the unstable elements before they get out into the distribution system, will it not result in a stoppage of the gas piping and connections between the machines? The record shows that very thing happened.

Complainant has sufficient production capacity, but the yard connections, condensers, scrubbers, boilers and other auxiliary equipment is away below the production capacity. If complainant had exercised foresight in the design and selection of its plant equipment, making it balance one apart with the other, the present situation would not have been reached. One might just as well say to a man with an obsolete automobile "I will fix you up with a new and more powerful engine, but you must endeavor to run along during the balance of the year on three wheels, because I cannot get you a new wheel in less than 18 months."

The testimony shows that in 1919 the water gas generator produced more gas than the rest of the equipment could handle, and some of the gas had, therefore, to be blown into the air.

The complainant alone is responsible for this condition. The Courts have invariably ruled that the selection of plant is solely within the control of the company, it being unheard of that a regulatory body should substitute its judgment, on the matter of plant design and capacity, for that of the trained executives of the company.

But the courts have never held that gas consumers must bear the burden of excessive costs due to incompetent or inefficient management.

The complainant repeatedly asserts that it has been unable to secure money for extensions. How did it get, and for what useful end did it dispose of $225,000 that was made available to it "after August, 1919," as related by witness Gounnod (Rec., p. 675)? See *Findings of the Master*, No. 39 (Rec., p. 38), in which it is established that the complainant has had 15c. per thousand cubic foot sold since July 1, 1916. Further, the Master in his opinion refers to

an order of August 7, 1918, permitting plaintiff to withdraw funds and to further cease from impounding the 15c. per M. cubic feet. This sum has been expended for improvements and the total amount had by the company in excess of the statutory rate is now approximately $650,000.00. We are confident that if the stockholders' property is in jeopardy, they will take adequate steps to protect it, because they are aware an enormous amount of new business had been ruthlessly turned away and that the company refused to sell any additional quantities of gas, or of appliances on which large profits can be made. Conditions for the consumers cannot be any worse than they now are. The Master reports that since 1915 the sales of gas have increased 100 per cent. (Rec., p. 30). He also reports that the company reduced the price of gas to 95c. per thousand feet on July 1, 1914 (Rec., p. 31). At that time, presumably, it was making huge profits, because it could afford to cut the rate for the gas. It should then have secured new capital. It ought to have laid its plans to build new plant to take care of the greatly increasing demands. It did not do so. It has only itself to blame if it is now in a precarious position.

The testimony of Mr. Merrifield (Rec., pp. 872-3) shows that the Public Service Commission ordered the complainant to make additions to its plant in order that it be in a position to take care of its consumers.

Plant Capacity. Finally in reference to the matter of plant capacity and reasonable production costs we refer to Miller's testimony that the whole plant needs extending and changing, except the water gas generators (Rec., p. 410). Also, other witnesses testified that they needed two new water gas generators. Miller also admitted that all the connections between the gas machines are

too small to take care of even the present capacity of the water gas machines (Rec., p. 405). He then contradicted himself by saying that the plant was all right if they had available some extra holder capacity (Rec., pp. 407-8). He afterwards further contradicted his testimony by saying the boilers are not nearly sufficient for the purpose (Rec., p. 409).

We cannot see how anyone reading the testimony can arrive at any other conclusion than that since this statute was enacted there has been a deliberate attempt upon the part of the management of the company to abnormally and unnecessarily increase its expenses so as to assist it in striking down the statute.

The Public Service Commission, 2nd District of New York, said as follows in Breen *v.* Northern New York Utilities, Inc., P. U. R., 1921, B. 463:

> "The Commission realizes that to a very large extent the policy of the utility as to whether or not salaries shall be liberal or otherwise, and the proportion of the earnings which shall be devoted to various departments of the business, must be left to the judgment of the directors of the company, and that such judgment may not be supplanted by that of the Commission. But unless there is some limit to the application of this doctrine, and it is to be held that the Commission can not criticise expenditure on the ground that it is excessive, the *power to regulate rates is greatly circumscribed.*"

This reasonable limitation of expenditures must, in cases of this kind, be imposed by the courts, or else the power to invalidate legislation, including rates, passes inevitably from the public authorities into the hands of the owners of public utilities.

The operation of a public utility is a business within the scope of government. The company's plant is affected by a public use; the company has, in a qualified sense, taken upon itself a governmental function, and is, therefore, bound in the conduct of its business to scrupulously regard the rights of the public equally with its own.

We earnestly ask the Court to consider these facts. No reward should be bestowed upon negligence. Are the consumers, with hands tied by the monopolistic character of this business, to be bled financially after being inconvenienced and imposed upon by the foisting on them of a spurious article? We have too much faith in our courts to believe so.

POINT VI.

The record shows that the case was disposed of with "undue haste"; the appellants having no opportunity to prepare their defense.

The complainant had its experts ready to testify after many months of preparation.

The witnesses who testified for it were interested witnesses; either employees like Elsman and Gounnod, or men like Miller, of the Bartlett-Hayward Company, and Klumpp, of the United Gas Improvement Company, who are affiliated with it in a business way; while those called by the defendant were disinterested.

The Master would not accept testimony tending to show that it was impossible for the Public Service Commission to make an examination of the complainant's records and give testimony to protect the gas consumers and the public (Rec., p. 901).

The Commission had under its jurisdiction about 100 public utility corporations, and it is manifestly impossible for it to keep in close touch with each one of them, due to its limited staff of engineers and accountants.

The record discloses inordinate celerity in disposing of the case before the Master; it supports a charge that there was undue haste—more than "convenient speed" —in the examination of witnesses, in failure to obtain exhaustive information of the company's financial history and the real facts behind its alleged financial plight. The result is unfair to the public;

We quote in detail from the testimony of Robert H. Mitchell, a witness for the defense (Rec., p. 923) to show lack of opportunity to offer proof in behalf of the defense and further, the Master's misunderstanding of

the scope of the issues in the case at bar (we begin at page 925):

"Q. And you are acquainted with the plaintiff's plant there and the business in a general way, are you not? A. Yes, I have resided in that same ward for over twenty years.

Q. And can you state, in reference to this litigation, how long it would take for you, with say two assistants, to make a complete investigation of the company's accounts for the purpose of informing yourself properly upon litigation of this kind?

Mr. Moran: I object to that.

The Master: Objection sustained.

Mr. Jackson: Exception.

Q. Now, what did you ascertain? Did you ascertain anything in regard to the repairs of the plaintiff?

The Master: He has just stated personally that he has only spent a little part, a small part of a day, as I understand it, considering this question, and gave it up. So I don't suppose that his testimony could possibly be of any assistance to the Court in this case.

* * * * * * *

Q. What steps do you consider necessary and proper in analyzing and ascertaining the reasonableness or unreasonableness of expenditures, and in addition what factors do you take into account in carrying on any such investigation?

The Master: Do you object, Mr. Moran?

Mr. Moran: Oh, I don't see what it has got to do in the record.

The Master: Objection sustained.

Mr. Jackson: Exception.

* * * * * * *

Q. Have you made a detailed examination of the charges to repairs made by the company dur-

ing the years 1918 to 1919 and the first six months of 1920?

The Master: You can answer that.

A. I have not. It is impossible, as I have stated before, to undertake a thorough analysis along the lines of proper procedure, which requires not only analyzing operating expenses, but analyzing the fixed capital accounts to find out that the items included in operating expenses are properly chargeable to operating expense, that they are reasonable and necessary.

Mr. Moran: Just a moment, Mr. Mitchell. I move to strike out the answer, and I object to the question.

The Master: I will let him state that he has not, and that it is impossible to do it within the day's time that he spent on the case.

* * * * * * *

Mr. Jackson: Now, of course, that is limited—your Honor limits it to the time that he has spent on the case (at page 926).

Q. Was it possible to do that within the time that has been available to prepare this case? A. Absolutely impossible.

Mr. Moran: I object to that.

The Master: Objection sustained. There is no evidence before the Court as to how much time there was available to prepare for this case.

Q. May I ask you, how long it would take to make such examination?

Mr. Moran: Objected to on all the grounds, and I ask the Court to admonish the counsel to cease to take any time of the Court and counsel in this matter.

The Master: Oh, I will let him state that, from such an examination as he has made.

A. To properly conduct an examination of the operating expenses, and correspondingly and concurrently to carry on investigation of the fixed capital expenditures for the years 1918 and 1919, and the six months of 1920, would take three engineers approximately four months working continuously.

The Master: You have had just about that time since this case was brought (at page 927).

* * * * * * *

The Witness: Well, your Honor, if I may be permitted to state that we have been under undue pressure, with the limited appropriation and with fifteen cases pending in the courts involving gas rate litigations, and in addition before the Commission—Long Island Railroad rate case, the Manhattan & Queens Traction Corporation——

The Master: Well, I do not think you need to go.

The Witness: And several other railway and lighting matters within the city.

* * * * * * *

The Witness: I am not discussing the question of the rate base. These are elements involving the question of whether operating expenses——

Mr. Jackson: I think, if the Master please——

The Master: Just a minute. I insist upon being allowed to ask any question I please.

Mr. Jackson: I object to the witness being stopped, either by counsel or the Master, before he can answer the question.

The Master: Your statement then, when you said you have to analyze capital account, would be unnecessary in this case, wouldn't it?

The Witness: Except to the extent to find out and ascertain whether there had been an inflation in operating expenses and a corre-

sponding deflation in fixed capital, due to the company charging into operating expenses items of cost of physical property which were properly allocatable to the other class (at page 928).

The Master: Well, you could examine that by looking into your operating expense, you don't have to go into capital expense. You would not object if they charged into capital expenses operating expenses, would you?

The Witness: Well, your Honor, you do not find right on the face of the records of the company. A value is given showing repairs to an account. In order to properly analyze that money value, it is necessary to identify the property represented by that expenditure, which requires——

The Master: Well, I am not going into that.

The Witness: Which requires going back through this system of records. This is just a general line, following the records right back to the original source, consulting the men that were on the ground when the construction work was performed, and ascertaining if that particular work was done and whether it is put under a name that it should not be put under, like repairing mains when it is constructing new mains.

The Master: I am not going into the question of whether there has been adequate time to prepare this case any further (at page 928).

* * * * * * *

Mr. Jackson: Is your Honor going to exclude all other considerations than the fact that he said it should take four months? Did your Honor also consider that it would take two engineers with him, and that there are 18 rate cases pending, and that there is not any such force at the command of the Public Service Commission? Now, that is what I offer.

The Master: I also considered the fact that he included 1918, which is not pertinent to this inquiry.

Q. Then I will limit you, I will ask you a question within, and limit your considerations to the years 1919 and 1920.

The Master: I won't take any further evidence from this witness on this point (at pages 928-929).

* * * * * * *

Mr. Jackson: You have made an investigation regarding this plaintiff in regard to its repairs per cubic foot, as stated upon its schedules in evidence.

A. I have examined the schedules.

Q. And what is the result of that, please?

Mr. Moran: Oh, just a moment now.

Q. What do you find in regard to it?

Mr. Moran: The exhibits speak for themselves.

Mr. Jackson: Oh, they speak part way and part way they are silent. Now I would like to give another opportunity for them to speak through this witness (at page 930).

* * * * * * *

The Witness: I would like to save the time, if there is a question in your mind, and counsel then could proceed with questions along the line, to give you what I thought would enlighten the record on some of these questions. My testimony naturally would be as an engineer who has been identified through all the phases of examination of capital and operating expenditures for the Commission, to find out whether they are properly includable, to find out whether they are deferred repairs or excessive repairs due to the abnormal conditions that prevailed, such as occurred in the gas companies in the

last winter—frozen mains and subway construction requiring relocation of mains, and several other exceptional items that come up. Now, as the result of that, in all this extensive work of many hundreds of million dollars worth of expenditures handled by this Commission, we have collected data showing the repairs per thousand. Some of these companies' expenditures have been closely analyzed, others are not. Official records filed with the Commission show certain costs per thousand cubic feet.

Now, differences in those costs have naturally led us to analyze to see what a figure really means, when you say repairs per thousand, and likewise investment per thousand cubic feet. It has led to conclusions which show that it is unsound to rely on any such data which does not exactly represent a condition than can be used as a basis and taken judicial notice of and subsequently used in a late proceeding. Now, if——

Mr. Moran: Well, just a moment, now, I object (at pages 930-931).

* * * * * * *

Now, Mr. Mitchell, your study of this matter as to the rate per thousand cubic feet, applied to any item that you have in mind—repairs, say, of the plaintiff—showing for the expenses of either 1919 or 1920, which ever one you have in mind, and tell us what the result will be?

The Master: Answer the question.

A. Well, for example, repairs to meters of this company as shown in the annual reports of the Commission for the year 1919, were $22,900.98. In the year 1918 the repairs were $11,595.55, or an increase of approximately 91.5 per cent. in actual dollars. Now, in examining to find out what is a fair amount for repairs for meters, when you eleminate it to a specified period

of time, necessarily calls for an inquiry into the fact. 'Were these meters, meters which were necessarily repaired in that year, or did they include a great number of meters which the company had deferred repairing due to the peculiar economic conditions existing?' If such a fact exists, it produced an abnormal figure in this particular year.

Likewise, the same might be said of any other item. Now, if repairs in this particular year had increased 15 per cent, the corresponding increase in sales might be entirely out of proportion. The year does not represent a normal year unless it is examined and found to be. The cents per thousand cubic feet for repairs is dependent upon the condition of equipment at the beginning of the particular year—whether there has been deferred repairs, whether there has been exceptional repairs which can be explained away due to the two factors, which is increase in labor and material, and also another factor which is the personal efficiency of the working force at the present time.

Briefly, I mean to say simply this: You may find in a particular year, considering the plant operating normally and in a good operating condition and with the company having looked forward with every adequate equipment such as reserve generating equipment, with capacity of mains, capable of carrying ten times the amount of gas, and in good repair—that the sales may increase 30 per cent, and the repairs over the whole system might not increase 10 per cent. And that would be dependent on studying and seeing what the actual conditions are. Likewise, I believe, to draw an analogous case, on the question of fixed capital in the same way—and plant (at page 933).

* * * * * * *

The Witness: Simply as an example. If we found this particular company at this time with per cent. excess generating capacity and with equipment maintained in the best operating condition, and correspondingly the rest of the investment in underground system, mains, services,

meters—with the mains laid out so that they are adequate to take care of the growth for years to come—which is always the effort of a company, to try to anticipate future growth—if a condition like that exists, that there is an investment there which will be able to take care of the company's gas consumers for a number of years with a slight increase in the investment.

So that, whereas today you may find as a matter of fact that the investment is $5 per thousand cubic feet sold, we will say, inside of the next year the sales may increase 25 per cent., but due to the adequacy of the generator equipment and the adequacy and capacity of the mains for carrying a given volume of gas within distribution pressures permitted by this Commission, that for the increase of 25 per cent. in sales there may be 5 per cent. or 10 per cent. or even smaller a corresponding increase in the investment. So, as the ratio is a fluctuating ratio and at one time may mean nothing, and further taking this company right under the present conditions that exist today, any figure predicated upon an investment per thousand cubic feet at this time—and I do not happen to know offhand what was the sales last year, or the generator—but you are, as I understand, from the testimony of previous witnesses, which has been fairly well substantiated all through the record—that you are up to the limit of your rated capacity and almost reaching the point where it is difficult to maintain the adequacy of your service and reliability of your service. Now, you are about to—and if conditions permit you would like to make a big additional investment in generating plant equipment in the next year. What would happen with a growth expenditure of many thousands of dollars to increase your generating capacity, perhaps increase your holder capacity, restrengthen your distribution network of mains, by making extensions, and increasing sizes perhaps in certain sections? A big expenditure like that amounting to a great

> deal of money, incurred in a particular year and with a very slight increase in sales, would be working an injustice to the company if predicated at the present time on an investment per thousand * * *" (at page 934).

Considering the inability of the Public Service Commission to put in serviceable information by reason of lack of available time to examine into the operations of the company now or for any other period, the absence of any direct evidence from the Attorney General's department, and the exclusion by the Master of all evidence relating to operating results prior to 1919, it is respectfully submitted that the record is incomplete.

VII.

For the purpose of making a fair test of the statute, the period found is altogether too brief.

The statute should not be declared confiscatory upon the results obtained in a year and a half of abnormal times, when prices had reached their highest level.

The Period to Which the Master Erroneously Confined the Testimony.

The Master declined to take any testimony as to the operating expenses, etc., for the years prior to 1919 (Defts. Ex. D23b and D24 for Iden., Rec., pp. 1102-1103).

He was undoubtedly influenced by the opinion of Judge HAND in *Consolidated Gas Co.* v. *Newton*, 267 Fed., 231, who predicted that high prices would remain for at least five years.

The Master took evidence over a period of eighteen months, from January 1, 1919, to June 30, 1920.

He said (Finding 28, Rec., p. 36):

> "Present prices are so far as can be judged abnormal and are results of the World War."

The Period Decided by Judge Hough to be the Proper Test.

There are several aspects of Judge HOUGH's decision of what is the proper period for a test, which make it impossible to agree with his conclusions.

The Master said (Finding No. 38, Rec., pp. 37-38):

> "The evidence adduced before me affords no reasonable grounds for expecting that the price of materials or the wages paid to labor in connec-

tion with the production of gas will be reduced during the last few months of 1920 or during the year 1921."

His report was filed on September 22, 1920, and soon thereafter a reversal in trade conditions took place which was unparalleled in history and beyond the wildest dreams of business men in the summer of 1920, when the peak of prices had been reached.

Since the entry of the decree in the instant case, steel plants, textile mills, railroads, express companies and other industries have been readjusting war inflation wages, cutting war inflation production costs, and lowering war inflation prices. These events are of common knowledge; and they are, therefore, matters of which this Court will take judicial notice.

The rights of gas consumers are as sacred as the rights of gas producers. Relief is in sight for all producers. The peak of high prices has been passed. The coal used in the manufacture of gas which a few months ago was sold for ten and twelve dollars a ton has recently been offered at five dollars a ton and as low as two dollars a ton. Prices of food and clothing are coming down. This means that the rate of wages will be reduced, as the purchasing power of the dollar is restored to something like its pre-war state. Yet, in spite of the general tendency downward of all the materials used in the production and distribution of gas, the company is asking for higher rates. Claim is made that it is losing money daily and that no company however strong can sustain such a loss for a considerable period. No one is inclined to dispute this proposition.

In the past it was possible to manufacture and distribute gas for about 45c. per 1000 cu. feet, this left 35c.

to 50 cents to the company to pay overhead expenses and dividends. In the last few years the earnings are claimed to have fallen short of funds enough to pay dividends. A reduction in the dividends would affect the profits of the shareholders; their trustees and directors would prefer that the people should pay a higher price for gas rather than that the profits should be reduced. The defendants who are the trustees of the people should be as solicitous of the interests of the people as the directors are of the interests of their shareholders. When the gas corporation's profits are threatened, the officers of that corporation have no hesitation in commencing suits to declare the statute confiscatory.

This company has suffered no loss by reason of the drop in value of its materials on hand and has not been subject to any of the troubles which confronted the business men of the country in this period of transition back to the pre-war days.

A survey in the interests of fairness should be made of the profits made since the law went into effect and should not be confined to the business of the company during the past year or so of abnormal times. It should go back to the time of the enactment of the statute and should disclose the profits made in the early years when it cost only 45c. per thousand cu. feet to produce gas in order that the earnings of the company may be ascertained for every year from the beginning and so that the probable profits in the future may be computed. Then facts will be available from which an opinion may be drawn concerning the propriety of going to the relief of the company in the present temporary and disappearing crisis. The mere fact that the company claims to be losing money is not sufficient to justify the demand for an

increased rate. If it should appear after investigation that the average profits are reasonable then the demand for the increase will not have a leg to stand on. The statute should not be declared confiscatory so that the extra money should go to the shareholders as dividends to increase the value of their shares and to make profits for speculators in those shares.

As this question has been covered at some length in the briefs submitted by the appellants in the *Consolidated Gas* case we shall not endeavor to burden the Court with a repetition of the argument advanced.

VIII.

The statute is presumed to be constitutional. The burden of proof is on the complainant to prove the contrary beyond a reasonable doubt.

The higher Courts, both State and Federal, have laid the greatest emphasis upon the quality of proof which must be adduced by those who assail a statute as unconstitutional. These decisions have a peculiar aptness when considered in the light of the meagre minimum of testimony presented by complainant.

In *Willcox* v. *Consolidated Gas Co.*, 212, U. S., 19, this Court said at page 41:

> "The rates *must be plainly unreasonable* to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just, both to the owner and the public (citing *San Diego Land and Town Co.* v. *National City*, 174 U. S., 739, 757; *Same* v. *Jasper*, 189 U. S., 439, 442).
>
> *The case must be a clear one* before the Courts ought to be asked to interfere with State legislation upon the subject of rates, especially before there has been any experience of the practical result of such rates. In this case, the rates have not been enforced as yet, because the bill herein was filed and an injunction obtained restraining their enforcement before they came into actual operation.
>
> Upon a careful consideration of the case before us, we are of opinion that the complainant has failed to sustain the burden cast upon it of *showing beyond any just or fair doubt* that the acts of the Legislature of the State of New York are in fact confiscatory." (Italics ours.)

Without making extended quotations from the authorities, we may state they uphold the following propositions:

1. The burden of proving that the statute is unconstitutional is upon him who asserts it.

2. This burden must be sustained by evidence which establishes the complainant's case beyond a fair, clear, just, rational or reasonable doubt.

3. The judicial power of declaring laws unconstitutional will not be exercised by this Court except in the clearest cases.

> *Detroit United Railway* v. *Detroit*, 248 U. S., 442;
> *Knoxville* v. *Knoxville Water Co.*, 212 U. S., 8;
> *Minnesota Rate Cases*, 230 U. S., 352, 499;
> *In re Young*, 209 U. S., 123, 165;
> *Atkinson Ry. Co.* v. *U. S.*, 232 U. S., 199, 221;
> *Lincoln Gas Co.* v. *Lincoln*, 223 U. S., 357;
> *Des Moines Gas Co.* v. *Des Moines*, 238 U. S., 153, 163;
> *Railroad Commissioners of Louisiana* v. *Cumberland Tel. & Tel. Co.*, 212 U. S., 423;
> *Shepard* v. *Northern Pacific R. R. Co.*, 184 Fed. Rep., 165;
> *Palatka Water Works Co.* v. *Palatka*, 127 Fed. Rep., 161;
> *Sinking Fund Cases*, 99 U. S., 700, 718;
> *Fletcher* v. *Peck*, 6 Cranch (star page), 128;
> *Montana W. & S. R. Co.* v. *Morley*, 198 Fed. Rep., 991.

In the decision in the case tried in the New York Supreme Court, *Kings County Lighting Co.* v. *Lewis*, *ante*, Mr. Justice GREENBAUM said:

> "It must, however, always be borne in mind that in rate cases the burden is on the plaintiff to establish confiscation beyond doubt."

IX.

Complainant's books of account, erroneously admitted in evidence over defendants' objections and exceptions, are not *prima facie* proof of their contents.

In admitting the books in evidence the Master felt he was bound by the decision of Judge HAND in the *Consolidated Gas* case (*ante*), which was based on the idea that the books had been kept in accordance with the Uniform System of Accounts.

He said (p. 35), "the books * * * have been kept in conformity with said rules and regulations with one exception." * * *.

The appellants pointed out many other respects in which the accounts differed with those prescribed by the Public Service Commission.

The books admitted are transcripts of other books, records and papers, many of which were not proven or even produced.

The witness for complainant admitted that complainant does not keep an account required by the Uniform System of Accounts, and the Master said(Rec., p. 35):

> "Complainant company does not keep an account entitled 'General Amortization—Gas' which is an account required by the Public Service Commission * * *."

Even if all the figures and computations that are on the books of the complainant are correct and exact, the distribution of these figures from the vouchers still remains a matter open to discussion between experts who are sincere in their views as to the proper distribution of them.

The fact that accountants have found the computations, meaning by that the additions, subtractions, divi-

sions, and multiplications entered on the various accounts, to be correct, is no proof that the accounts themselves have not been sophisticated by a wrong distribution of the amounts of the vouchers, or that the cost of gas has not been sophisticated by a subsequent incorrect distribution of these accounts.

It is not possible for a mere accountant, familiar only with figures, and unfamiliar with the practical processes of gas making, to authoritatively determine the distribution of vouchers to accounts, nor, assuming these vouchers to have been properly distributed, to determine the proper accounts, which should go to operating cost, and which should go to capital or investment account.

As this question has been discussed fully in the briefs filed by the appellants in the *Consolidated* case we will not attempt to do so once more.

X.

Rate of Return.

The Court erred in its finding that 8 per cent. was a proper rate of return.

It is well recognized both by the companies in rate regulation cases and by the financial community in ordinary commercial transactions, that what is a fair return upon an investment is not a fixed rule. It depends in great part upon the character of the enterprise. Thus, business men consider a railroad stock earning a certain rate is worth par, while they would demand a much higher return upon the par value of the so-called industries. The risk assumed and the likelihood that the property would continue to earn an adequate profit are always controlling factors of such valuation. This fact is important in the present case.

Utility corporations of all kinds are not subject to the same risk as is the average business for the reason that they are, practically speaking, free from competition and under proper regulation are in fact guaranteed a reasonable return.

It is no reply to assert that a person could not organize a new gas company on a 6 per cent. basis. We are not dealing with new companies just starting out in a small city or endeavoring to compete in a large city.

We are dealing with a company whose rates cannot be arbitrarily reduced below a minimum of profit, and the property has and always will have a value which it would not possess if thrown on a scrap heap.

Although the Court may consider that the company is entitled to earn some return on even that portion of its plant which has been built up out of profits, yet surely the Court would not consider so high a return just upon capi-

tal thus accumulated as upon capital directly contributed by stockholders. This is more likely to be the opinion of the Court if it find, as it surely will, first, that the company has paid good dividends for over twenty years; and, second, that if the gas companies had undertaken to divide much larger profits than they did they probably would have attracted so much public attention as long ago as to have precipitated urgent demands for a reduction in the price of gas.

Section 72 of the Public Service Commissions Law of the State of New York reads in part as follows:

> "* * * with due regard, among other things, to a *reasonable average return* upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies."

A gas company does not usually exhibit to the public too exorbitant profits on its actual investment by its stockholders. Can it then conceal from the public these profits by putting them in the plant and yet expect the Court to allow it as high a return on the investment as if the cost of the property had been paid for directly by the stockholders?

In general it will be acknowledged by business men that any addition to 6 per cent. interest or profit on moneys invested is because of more than ordinary risks in business. When the percentage on interest or dividend on any given investment drops below 6 per cent. the reduction of interest rates is due to the unusual safety of the investment.

The question of the risks of the business is the controlling factor in the determination of the percentage of divisible profit which may be expected from gas works.

Notwithstanding the fact that accidents and explosions have occurred in other large cities there was pro-

duced no evidence showing any extraordinary danger or any relatively heavy loss on the part of the complainant, which goes to show that gas making on the average when properly conducted is one of the safest and most stable of businesses.

The monopolistic feature of public service corporations, especially in the present case, where a duplication of gas piping would result in an intolerably increased burden upon the City streets, is another important feature to be considered as tending to increase the security of the investment of the complainant company.

This Court has held that public service corporations, as a matter of law, are not entitled to any fixed rate of return. What is a reasonable rate must depend upon the circumstances of each case.

The complainant has paid good dividends since its start, and in addition it has built a considerable portion of its plant out of its earnings. These facts will naturally lead the Court to recognize as reasonable a lower rate of return than if the plant had been entirely constructed out of stock and bond issues.

CONCLUSION.

The judgment should be reversed, the bill of complaint dismissed, and judgment rendered in favor of the appellants, with costs.

Respectfully submitted,
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FILED
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Supreme Court of the United States

October Term, 1921

No. 295

HARLES D. NEWTON, as Attorney-General of the State of New York; LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District; and HARRY E. LEWIS, as District Attorney of Kings County,

Appellants.

against

NGS COUNTY LIGHTING COMPANY,

Respondent.

IEF ON BEHALF OF APPELLANT NEWTON, AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK

CHARLES D. NEWTON,
Attorney-General
of the State of New York
Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
Solicitor for
Appellant Attorney-General,
Capitol, Albany, N. Y.

BER W. CHAMBERS,
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SUPREME COURT OF THE UNITED STATES

CHARLES D. NEWTON, as Attorney-General of the State of New York; LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District; and HARRY E. LEWIS, District Attorney of Kings County,

Appellants,

vs.

KINGS COUNTY LIGHTING COMPANY,

Respondent.

October Term, 1921. No. 295. Brief on behalf of Charles D. Newton, as Attorney-General of the State of New York.

Brief on Behalf of Appellant, Newton.

This is an appeal by the above named appellants from a decree of the United States District Court, for the Southern District of New York (Hon. Charles M. Hough, sitting as District Judge presiding), entered in the office of the clerk of said court on the 19th day of October, 1920, adjudging chapter 125 of the Laws of 1906 and chapter 604 of the Laws of 1916 of the State of New York, confiscatory and unconstitutional, and depriving the respondent of its property, without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States; and furthermore, restraining and enjoining the appellants, public officials of the State of New York, from enforcing the provisions of the aforesaid laws of the State of New York.

The laws herein referred to provided, among other things, that the respondent company shall not charge or receive for gas manufactured, furnished or sold by it in certain portions of the City of New York to private consumers, a sum in excess of 80 cents per thousand cubic feet.

ISSUES IN THE CASE

The issues in this case were, by order dated July 31, 1920, made by Hon. John C. Knox, District Judge of the United States District Court, Southern District of New York, referred to Gordon Auchincloss, Esq., to take proof respecting the issues and to find and report the facts with his conclusions and recommendations. (Pp. 24, 25.)

This being a suit to enjoin the enforcement of a State law as unconstitutional, the findings of the master are not entitled to the weight and consideration usually accorded to them in equity suits, since the validity of the action of a sovereign legislative body is involved. It is the duty of the court in cases of this character to give its own full consideration to the facts as well as the law, regardless of what took place in the courts below.

> *City of Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1.

In the case of the *Consolidated Gas Co.* v. *Newton et al.*, 267 Fed. Rep. 231, the court recognized that this rule obtained. Judge Learned Hand said (p. 259):

> "In these cases the conclusiveness of the master's report does not obtain (*Knoxville Water Co.* v. *Knoxville*, *supra*)."

And again in a supplemental opinion said (p. 274):

> "In the case at bar the reference was not on consent — though without objection — and it was only advisory in any case. In such cases 'the report has no legal sanction, and no further weight than such as attaches to it by reason of the fact that it may embody the researches and conclusions of an intelligent master.'"

The order referring the issues to a special master in the instant case was similar to the order of reference in the case of the *Consolidated Gas Co.* v. *Newton et al.*

The trial of the case before the special master began on the 3rd day of August, 1920, and was completed on the 3rd day of September, 1920. The master filed his report and opinion on the 22nd day of September, 1920. The said report and opinion was moved for confirmation before Hon. Charles M. Hough, sitting as United States District Judge, Southern District of New York. Thereafter and on or about the 13th day of October, 1920, Judge Hough filed an opinion confirming the report of the special master herein (pp. 67-75) and thereafter a decree was filed in the office of the clerk of the United States District Court, for the Southern District of New York, as aforesaid, from which this appeal is taken (pp. 75-77).

PRELIMINARY STATEMENT

This action was begun by the service of a subpoena on the appellants on the first day of June, 1920, and the filing of a bill of complaint

to have declared unconstitutional and void as to the respondent, chapter 604 of the laws of 1916, upon the ground that the rate of 80 cents per thousand cubic feet at which gas shall be supplied to private consumers in the City of New York in the 30th and 31st wards thereof in the Borough of Brooklyn, is confiscatory, and that the appellants, public officials should be restrained from in any way enforcing or attempting to enforce the said statute.

There was no allegation that the requirement in the statute as to quality and candle-power of gas served was unconstitutional (p. 1-11).

The answers of the appellants denied all the material allegations of the complaint, and alleged that the respondent has not furnished to its consumers gas of a candle power having the standard of illumination provided by the statute (chapter 125 of the laws of 1906) known as 22 candle-power (pp. 14-23).

The respondent serves about 40,000 individual consumers in the Borough of Brooklyn, City of New York, and furnishes gas for street lighting to about 3,600 street lamps maintained by the City of New York.

The territory served by the respondent company has a present population of about 250,000.

The statute which the respondent seeks to have declared unconstitutional and void (chapter 604 of the laws of 1916) went into effect on July 1, 1916.

Just prior to the time when the statute went into effect and on or about June 22, 1916, respondent started an action in the Supreme Court of the State of New York to have the said statute

declared unconstitutional and restraining the public officials from enforcing the provisions of the said statute. The defendants in that action were the Attorney-General of the State of New York, the Public Service Commission of the State of New York for the First District, and the City of New York. All filed answers denying the material allegations of the complaint. On August 2, 1916, an order was made and filed in that action in the county clerk's office of the City of New York granting the company a temporary injunction and allowing it to charge 95 cents per thousand cubic feet for gas supplied to private consumers from the time the act went into effect, July 1, 1916. This injunction order required respondent to deposit with a trust company the difference between the statutory rate of 80 cents and 95 cents thus allowed. Approximately $610,000 has thus been deposited and no part of this money has been returned to the consumers.

The issues in that case were tried before Mr. Justice Greenbaum at a Special Term of the Supreme Court and an exhaustive and painstaking trial was had. The trial was begun in October, 1918, and concluded in April, 1919. The court handed down an opinion on January 27, 1920 (110 Misc. 204, Record, pp. 1151-1178) and thereafter a motion was made on February 6, 1920, by the plaintiff to reopen the case. This motion was denied by an order of March 29, 1920. The decision of the court contained 111 findings of fact and 20 conclusions of law (pp. 1130-1149).

In the State court action the court found upon competent evidence that in the year 1916, at an

80-cent rate, plaintiff had an income of $153,878.01, or a little over 5 per cent upon the rate base found by the Court of $3,041,259; that in the year 1917 plaintiff had a net income of upward of $152,953.91, which upon the rate base as found by the Court of $3,100,000 would give a return of between 5 per cent and 6 per cent, and that if plaintiff were charged with a substantial sum for unaccounted for leakage, this revenue would be correspondingly increased; and that in the year 1918 the plaintiff had some profit, and with the elimination of objectionable items the income would have been approximately $100,000.

The court further found, that so far as the year 1918 was concerned, the operations of plaintiff show improvidence; that there was no satisfactory proof offered as to the actual amount of coal used; that plaintiff failed to explain the increase in wages of its employees for that year, and the increase in the number of its employees and the hiring of extra help; that its stable expenses were excessive; that the promotion expenses were excessive; that the items for office supplies and expenses were excessive; that a great many items were not satisfactorily explained as necessary and reasonable operating expenses; that the loss in unaccounted for gas was not properly proven; that the gas furnished by plaintiff to its consumers was of a very low candle power and below the standard required by law; that plaintiff has not proven beyond a rational doubt that the 80 cent rate would or could not give a fair return during the year 1918; that plaintiff came into court of equity with unclean hands by furnishing to its consumers in the year 1918 gas of a candle

power of 13.57 instead of 22 candle power, and that the portion of the fiscal year which was as abnormal as was the year 1918 lacked the value of a normal year, in determining the future (pp. 1130-1178).

Judgment was entered in the office of the clerk of the county of New York dismissing the complaint upon the merits, and denying the motion made by the plaintiff to reopen the case. Plaintiff appealed from this order but said appeal has not been heard by the Appellate Division, First Department (pp. 1149-1150).

The appellants in the instant case excepted to substantially all of the findings of the master, and filed assignments of errors covering substantially all of the conclusions and findings in Judge Hough's opinion confirming the report and opinion of the special master and in the final decree from which this appeal is taken (pp. 54-65, 80-92).

The respondent has never operated under the statutory rate complained of. The preliminary injunction in the State court action allowed it to charge 95 per cent per thousand cubic feet from the date when the statute was to have taken effect.

POINT I

Prior adjudication requires a dismissal of the bill of complaint.

The action begun by the respondent in the Supreme Court of the State of New York to have declared unconstitutional chapter 604 of the laws of 1916, sought the same relief as the action in this court.

The defendants were the predecessor in office

of the present appellant Attorney-General of the State of New York, the predecessor in office of the present appellant Lewis Nixon, constituting the Public Service Commission of the State of New York, for the First District; the City of New York was made a party defendant in said action in the State court while in this action the District Attorney of Kings County was made a party defendant. The Corporation Counsel of the City of New York represented the District Attorney of Kings County in this action.

The issues raised by the pleadings are substantially the same. The decision of Mr. Justice Greenbaum contained the following findings, among others:

> "The plaintiff has come into equity with unclean hands in that it has conceded that the candle power of gas furnished to its consumers in 1918 was 13.57 candle power instead of 22 candle power as prescribed by chapter 125 of the laws of 1906, as amended by chapter 604 of the laws of 1916." (6th Conclusion of Law, p. 1148.)

Again:

> "The substantial observance of the requirements of the statute as to the candle power should have been shown by the plaintiff, and *its failure to do so does not entitle it to the favorable consideration of a court of equity*" (p. 1177).

Does this decision of the State courts have any effect? That court had co-ordinate jurisdiction with the United States Courts over the parties and subject-matter here litigated. Since July 1, 1916, the respondent has at all times violated the

statute in question. The pleadings in this case allege a continuance of the violation. (Complaint, paragraphs XV and XXI, pp. 6, 7, 9.) Its general manager says no attempt has been made to comply with the regulations contained in the law since January 1, 1918 (pp. 315-323).

The master during the examination of this witness said:

> "The plaintiff has admitted it never has during this period — I think it has admitted that during this period *it has not produced gas of a candle power required by the statute*" (p. 316).

Can respondent have and entertain a complete disregard for all statutes and laws, and when its conduct has been judicially condemned by a court of competent jurisdiction, is such judgment a nullity and entirely invalid and inoperative, made so by its own determination and decision? It was decided that the respondent was not entitled to equitable relief because of its failure to observe the conditions of the statute, and to conduct itself in that reasonably blameless manner which the rules of equity have prescribed as a condition precedent to the coming in by a suitor. Having been defeated in one court of equity it has prepared a new bill, alleging that at all times it *has continued the same course of conduct, which, the previous judgment declared, prevented relief being given it.* May a corporation be so obdurate as to turn defeat into victory? And shall it, by pleading and proof of *its continuing obstinacy*, lay a foundation for a second action in another court of equity, giving no heed to the decision of a court having full jurisdiction?

The rule that a prior adjudication is conclusive is so well settled that citation of authority is almost unnecessary. It is to the effect that a fact or question which was in issue in a former suit and was there judicially passed upon and determined by a court of competent jurisdiction, is conclusively settled by the judgment therein so far as concerns the party to that action, and persons in privity with them, and cannot be litigated in any future action between such parties or privies in the same court or in any other court of concurrent jurisdiction upon the same or a different cause of action.

Missouri v. *Chicago B. & Q. R. Co.*, 241 U. S. 533 (Rate Case) and cases cited by Mr. Chief Justice White in the opinion of the Court.

Williamsburg Saving Bank v. *Solon*, 136 N. Y., 465;

Southern Pacific R. R. Co. v. *U. S.*, 168 U. S. 1.

In the case last cited, Judge Harlan at p. 48, said:

> "Is this position consistent with the settled rule of law as to the conclusiveness, between parties and their privies, of the final determination by a court of competent jurisdiction of matters put in issue by the pleadings?
>
> "The importance of this question, independently of the magnitude of the interests to be affected by our decision, and of the earnest contention of learned counsel, justifies a reference to some of the adjudged cases, showing the grounds upon which this salutary rule rests.
>
> "The general principle announced in

> numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and *even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established*, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

It was judicially determined that the respondent was not entitled to equitable relief because it had flagrantly violated the very law which it sought to have declared unconstitutional and void. After such a judicial determination squarely denying it relief in a court of equity, can the respondent seek the equitable aid of a court of concurrent jurisdiction, admitting its continued disregard of the law it seeks to have declared void as it did in its complaint? (pp. 6, 7, 8) Can it hope to have this second court override and disregard the adjudication of the Su-

preme Court of the State of New York, and furthermore, overlook the time-honored equity maxim of "clean hands," all for the purpose of granting relief to a deliberate and flagrant violator of the law of a sovereign State? We do not believe that this court will countenance such practice. The right to equity relief was directly "put in issue and directly determined by a court of competent jurisdiction." The very conditions which led the first court to deny relief were admitted to exist in the complaint to the second judicial tribunal. Paraphrasing the language of the court in *Washington, etc., Packet Co.* v. *Sickles*, 24 How., 333, limits must be imposed upon the faculties for litigation.

A right adjudged by a court of competent jurisdiction under definite conditions such as prevailed in the action in the Supreme Court of the State of New York should be received in evidence "as irrefragable truth" and should be a guarantee of the future efficiency and binding operation of a judgment.

It is true that the judgment of the Supreme Court of the State of New York passed upon the confiscatory nature of the statute for the years 1916, 1917 and 1918 as set forth in the opinion of Judge Hough. But the learned Judge failed to take into consideration that the judgment also provided that the respondent had violated the law assailed, in that, for the year 1918, it furnished to its consumers a gas of 13.57 candle power instead of 22 candle power as provided by statute and that a substantial observance of the statute should have been shown by the respondent, and having failed to do so it was not entitled

to equitable relief. That the same failure to observe the law prevailed in the instant case. The record shows that the average candle power for the six months of 1920 was 13.99, and for the year 1919 was 16.10 (respondent's exhibits 15, 17, p. 1037).

We respectfully submit that the respondent's right to equitable relief, so long as the conditions which moved the State court to deny relief, remained the same, was *res adjudicata*.

In other words, it is the law between the parties here that failure by respondent to furnish gas to its consumers of the statutory quality, prevents it from obtaining relief upon a claim that the rate of return is inadequate.

The fact was established in this action that if did not furnish such gas to its consumers, hence the court below erred in not holding the State court judgment was a bar.

The prior determination required a dismissal of the bill of complaint.

POINT II

The burden of proof is on the respondent to establish beyond a reasonable doubt the unconstitutionality of the statute in question.

It is now settled by an abundance of authority that the burden of proof in suits brought to have a rate statute declared confiscatory, is on the party assailing the statute to establish its contentions beyond a just or fair doubt.

In the case of *Willcox* v. *Consolidated Gas Company*, 212 U. S. 19, the court said (p. 41):

> " * * * The rates must be plainly unreasonable to the extent that their enforce-

ment would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and to the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public." *San Diego Land & Town Company* v. *National City*, 174 U. S., 739, 757; *Same* v. *Jasper*, 189 U. S., 439, 442.

" * * * *The case must be a clear one* before the courts ought to be asked to interfere with state legislation upon the subject of rates. * * *

" Upon a careful consideration of the case before us, we are of the opinion that the complainant has failed to sustain the burden cast upon it of *showing beyond any just or fair doubt* that the acts of the legislature of the state of New York are in fact confiscatory" (p. 54).

Chief Justice Waite declared in *Sinking Fund Cases*, 99 U. S. 700, p. 718:

" Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach upon the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

In the case of *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, the court says (p. 163):

" We may premise that the public authority is presumed to have acted fairly, and that the burden of proof is upon the gas company to show that the regulating ordinance has the effect to deprive it of an in-

come equivalent to a fair return upon its property dedicated to public use (*Knoxville* v. *Water Co.*, 212 U. S. 1)."

Trustees of Saratoga Springs v. *Saratoga Gas Co.*, 122 App. Div. 203 (N. Y.)

Ex Parte Young, 209 U. S. 123, 165.

Chicago, Milwaukee & St. Paul R. R. Co. v. *Tompkins*, 176 U. S. 167.

Respondent must establish "*beyond any just or fair doubt*," that the act of the legislature of the State of New York is in fact confiscatory. But as we shall see this rule was not fulfilled. The proof offered by respondent fell short of satisfying the requirement set forth in the cases cited.

Not only did the respondent fail to meet the requirements of the statute in these cases but it was affirmatively established that it never even gave the statutory rate a trial. It started an action to declare the rate confiscatory one week before it was to have gone into effect and obtained a temporary injunction dating back to the day the statute went into effect, and it has never, to the present day, experimented with the rate fixed by the statute.

POINT III

Respondent should experiment with the rate fixed by the statute before it is assailed as confiscatory.

The rate fixed by the statute assailed was 80 cents per thousand cubic feet. It became effective July 1, 1916 (chap. 604, Laws of 1916).

Respondent has not operated under the statutory rate of 80 cents per thousand cubic feet for

gas, but has been charging its consumers 95 cents a thousand cubic feet since the statute went into effect on July 1, 1916. Thus far it has entirely escaped complying with the statute.

The increased use of gas by its present consumers as well as the enormous new business which would result from a lower gas rate is entirely lost sight of by respondent in its various contentions.

In the case of *Railroad Commission* v. *Cumberland Tel. Co.*, 212 U. S. 414, Mr. Justice Peckham said (p. 426):

> "So, also, in furnishing gas at reduced rates, the reduction in the rate would very probably result in increased consumption, not only in increased demands from more consumers, but also an increased consumption by consumers already existing, and the increased cost of furnishing the gas would be nothing like in proportion to the increase in consumption. In these cases increased profits might be the result of decreased rates."

The respondent, however, asks this court to assume that no more gas will be used and no more consumers will result from an 80-cent than from a 95-cent rate. This is contrary to human experience in all lines of business. Just now drastic reductions in every line of business are being made the world over to stimulate buying by the public. To ask this court to assume, and base confiscation on the assumption, that such will not be the result, and to further ask this court to speculate upon the results of operation at a reduced price without such facts being devel-

oped as the result of experience or even opinion evidence, is extreme and without precedent.

Respondent offered no proof to show what the prospective earnings would be under the 80-cent rate, with the increased consumption resulting from it, so the court was without clear proof as to earnings under the rate, either by an actual test or by opinion evidence.

It is a well-known fact that a gas plant with a large consumption manufactures gas at a lower cost and increased net profits than one with a smaller consumption working only a portion of the day.

The necessity of a practical test under the rate has been pointed out in the case of *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, where it is said (p. 17):

> "Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculation as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt."

The same question arose in the case of *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, where this court remarks (p. 41)

> "The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates, *especially before there has been any actual experience of the practical result of such rates.* In this case the rates have not been

enforced as yet, because the bill herein was filed and an injunction obtained restraining their enforcement before they came into actual operation."

And again at p. 42:

> " * * * a court of equity ought not to interfere by injunction *before a fair trial has been made of continuing the business under that rate*, and thus eliminating as far as is possible, the doubt arising from opinions as opposed to facts."

And again at p. 54:

> It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice.

Thus the *Willcox* case was reversed to permit the company to experiment with the rate.

In the case of *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, the court adhered to the same doctrine. In dismissing the bill the court said:

> " While we agree with the court below that it was right to confirm the master's report and dismiss the bill, we think, in view of the fact that the attack upon the rates was made, before the ordinance went into effect, and *before actual application of the rates could demonstrate whether they were remunerative or not*, that the court should have followed the recommendation of the master and dismissed the bill without prejudice. We think that this is particularly so, in view of

> the fact that ordinarily time alone can satisfactorily demonstrate in a case like this whether or not the rates established will prove so unremunerative as to be confiscatory in the sense in which that term has been defined in rate-making cases. The master's suggestion has the support of the judgment of this court in *Knoxville* v. *Water Co.*, and *Willcox* v. *Consoldated Gas Co.*"

This rule was also recognized in the case of *Lincoln Gas & Electric Co.* v. *City of Lincoln*, 250 U. S. 256. In the course of the opinion of Mr. Justice Pitney in that case it was:

> "The application for leave to file a bill of review will be denied, for the following reasons * * * because complainant might have made a practical test of the ordinance rate before bringing this suit for an injunction, and certainly ought to have resorted to the test long before it did so. As early as the month of January, 1909, this court, in two notable rate cases, indicated its view of the importance, in any but a very clear case, of subjecting prescribed rates to the test of practical experience before attacking them in the courts" (p. 261).

The rule for which we are contending seems finally settled in these late cases.

The rule is recognized also by the Court of Appeals, for Judge Cardoza said, in the case of *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 89, 97:

> "* * * through repeated decisions, there runs the consistent thought that, in controversies of this order, *experience is the final test*, that the courts must abide their time and let the workings of the law decide * * * * Bills to annul rates have been dis-

> missed 'without prejudice' while the outcome remained uncertain. Bills to annul the same rates have afterwards been sustained when the vision of results was clarified by the wisdom that follows the event."

The same thought is expressed in the case of *Bronx Gas and Electric Co.* v. *City of New York*, 195 App. Div. 554; 187 N. Y. Supp. 2, where the court had before it the question as to whether it was proper to order a reference in a gas confiscatory case, and Mr. Justice Page said (p. 556):

> "The acts which it is sought to have declared unconstitutional were passed fifteen and sixteen years ago. *The practical experience of the company under these acts up to January 1st, 1917, taking into consideration the changes that would be occasioned by the increase in the cost of materials and labor will be the determining factors in the case.*"

When a respondent, operating under a rate, alleges confiscation, it must prove such fact "beyond a just and fair doubt." The degree of proof required from a plaintiff not operating under the rate complained of must be conclusive and free from every doubt, or the rate so low and unreasonable that it shocks the conscience of the court.

Mr. Justice Greenbaum correctly states the degree of proof necessary in this case by saying:

> "It is obvious, unless the evidence is conclusive, that confiscation is inevitable under the present law, that it would be mere speculation in the absence of an actual experimentation to find whether the increased business would or would not sufficiently overcome the reduction in price" (p. 1164).

The respondent charged 95 cents per M cubic feet from the date the statute went into effect until March 29, 1920, the date of the final judgment in the State court action. Despite the fact that respondent was unsuccessful in this litigation and its complaint was dismissed, it continued to charge the 95-cent rate without the slightest color of right and in wilful and deliberate disregard of the laws of the State of New York (p. 38).

From the date of final judgment in the State court action March 29, 1920, until the respondent obtained a temporary injunction in the Federal Court in July, 1920, it was charging its private consumers a rate in excess of that provided for by statute in open defiance of law. We respectfully submit that such lawlessness, such a deliberate and persistent course of impudently flaunting the mandates of the State from whom its privilege to operate were derived, hardly entitles a public utility to consideration at the hands of a court of equity. The complaint should have been dismissed on this ground alone.

POINT IV

Respondent came into this court of equity admitting that it had violated the law assailed and with the fact established that it had persistently, flagrantly and deliberately violated the said law in that it had not supplied to its consumers the quality of gas specified in the act in question. For that reason alone the bill of complaint should have been dismissed.

Mr. Justice Greenbaum dismissed the complaint in the action of the State court, correctly stating the time-honored equity maxim by saying "observance of the law is a cardinal principle which

is obligatory upon him who seeks judgment in equity" (p. 1177).

The statute in question provided:

> "The illuminating gas furnished by any such corporations, associaton, copartnership or person shall have an illuminating power of not less than twenty-two sperm candles, of six to a pound burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch nor more than two and one-half inches." (Chap. 125, Laws 1906, amended by Chap. 604, Laws of 1916.)

Chapter 735 of the Laws of 1905, which is still in force and effect and is known as section 522 of the Greater New York Charter of the City of New York, provided:

> "The said commissioner of water supply, gas and electricity shall appoint inspectors who shall inspect and test the illuminating gas manufactured within the city of New York or furnished or sold to the said city or to any consumer therein. The compensation of said inspectors shall be fixed by the board of estimate and apportionment and paid by the city. The gas manufactured, furnished or sold as aforesaid shall be tested with reference to illuminating power, pressure and

purity in a suitable manner and by proper apparatus at least once each day, and also be tested whenever the said commissioner shall direct. The inspectors shall report under oath the results of their tests to the said commissioner daily and the said commissioners shall file the said reports in his office and the same shall be public records."

Respondent alleged in its bill of complaint, in speaking of the provisions of chapter 604 of the Laws of 1916, which include the provisions of the act above quoted from

> "* * * The plaintiff is not under the duty of obedience to said statute." (Paragraph XXI, p. 9.)

The tests for candle-power were made by the city of New York pursuant to the provisions of law above quoted and show a continued, deliberate and flagrant violation of the statute. The tests made are not challenged and could not be, for they were accurately taken and made pursuant to law. They are found in complainant's exhibits Nos. 15 and 17 (p. 1037).

The master said in his opinion:

> "There is no question but that during the calendar year 1919 and the six months ending June 30, 1920, *complainant did not comply with the statute requiring it to furnish gas of a standard of 22 candle power.* The monthly average of the candle power of the gas produced by the complainant during the calendar year 1919 was as tested by the company, 19.40, and as tested by the city 16.10. During the six months ending June 30, 1920, the monthly average as tested by the com-

pany, was 16.97 and as stated by the city 13.99" (p. 47).

And again in his findings, the master found as follows:

"46. I find that the complainant company has not complied with the provisions of chapter 125 of the laws of 1906 with reference to candle-power (p. 41).

11. Since January 1, 1919, the gas manufactured by complainant averaged monthly in British Thermal Units and candle power as follows (p. 31):

		British thermal units	Tests by city	Candle power tested by company
1919.	January ..	581.42	14.96	18.09
	February..	589.75	15.16	20.80
	March	591.63	15.14	16.77
	April	587.83	14.11	16.41
	May	590.85	16.97	20.07
	June	592.08	17.96	20.44
	July	584.33	18.05	18.96
	August ...	588.21	16.29	20.57
	September..	594.14	16.34	20.13
	October ...	596.32	16.57	20.62
	November..	591.69	15.57	20.69
	December...	600.66	16.12	19.30
Monthly average		590.74	16.10	19.40
1920.	January...	595.15	17.72	19.86
	February..	591.57	14.81	19.01
	March	595.16	16.06	18.92
	April	593.42	15.66	18.24
	May	559.83	11.64	14.47
	June	524.07	8.04	11.20
Monthly average		576.36	13.99	16.97

Gas of a 22 candle power quality contains 620 British Thermal Units or more per cubic foot of gas.

12. On various days in June, 1920, the

candle power of the gas produced by the complainant as tested by the city was as follows :

June 2nd.....	3.59	June 8th.....	3.83
" 3rd.....	4.16	" 16th.....	7.92
" 4th.....	4.11	" 17th.....	6.99
" 5th.....	3.99	" 18th.....	6.70
" 7th.....	3.08	" 19th.....	5.85

Complainant received written notice from the city of New York of the test of its gas made by said city the day after the same was made." (p. 32).

The court said on this score, Judge Hough opinion (p. 71), " This plaintiff has (in the language of Judge Learned Hand's recent decision) *persistently and deliberately disregarded the candle-power requirement.*"

The tests made by the company for candle-power were made at its own plants while the tests made by the city of New York were made at a point removed from the plant in accordance with the provisions of the statute which provide that all tests be made " at least one mile from the distributing holder."

It is readily appreciated and was so found by the master that the candle-power at the works was higher than the candle-power at a mile from the works, where the statute provides the gas shall be of a 22 candle-power. We respectfully submit also that the findings of the master upon candle-power were extremely moderate and the court's attempt to excuse the company's transgressions, entirely unwarranted in view of the testimony, which shows that the respondent did

not even attempt to supply gas of a 22 candle-power from 1918 to date, that its violation of the statute was wilful and deliberate, flagrant and persistent.

The testimony of Mr. Ralph Elsman, then general manager, now the president of the company, is as follows:

> "Q. Do you keep a record of the quality of the gas made? A. We do.
>
> Q. And the exhibits that have been offered here and marked Exhibits 15, 16, 17 and 18, are the records kept at the works of the quality of the gas made in the years 1919 and 1920, showing the British Thermal Units and the candle-power? A. Yes.
>
> Q. What quality of the gas have you endeavored to make in this period? A. In the year 1919 we have endeavored to supply gas on a heat unit basis of 585 b. t. u.'s and we have endeavored to supply the same quality of gas in the year 1920.
>
> Q. How long have you been making b. t. u. gas? A. Since 1918.
>
> Q. You began that in 1918? A. Yes.
>
> Q. What did you make in 1917? A. We made candle-power gas.
>
> Q. At what standard did you attempt to maintain? A. 22 candle power we did maintain.
>
> Q. Did maintain a 22 candle power? A. Yes.
>
> Q. And prior to 1917, from the records of the company, do you know what it was making? A. It was 22 candle power.
>
> Q. Always prior to that? A. Yes.
>
> Q. And you were in charge of the company in 1918, when you changed from candle power to b. t. u. gas? A. I was" (p. 315).

Again:

> "The Witness: It will average between four and a quarter to 4.7 gallons per thousand cubic feet of gas made.
>
> Q. To produce 22 candle power? A. To produce 22 candle power gas. That has been our experience" (p. 317).

And again:

> Q. *Now, then, did you resume the 22 candle power after that? A. No, we did not.*
>
> Q. Well, was there some motive or reason for that? A. Yes, in cutting down — in getting away from the 22 candle power, we went into a heat unit gas (p. 318).

In regard to the amount of oil necessary to produce a 22 candle-power quality of gas, Complainant's Exhibits 6 and 13 (pp. 1033, 1037) disclose the fact that only 3.43 gallons of oil were used in 1919, and 3.6 gallons in 1920 per M cubic feet; *whereas, by the company's own admission it will "average between* 4.25 *to* 4.70 *gallons per M cubic feet" to produce* 22 *candle-power gas.* Does this not truthfully epitomize respondent's sorry attempts to explain away its failure to obey the provisions of the statute? It required too much oil to give the consumers gas of the quality the statute required, and the company therefore gave a poorer quality gas, charged 95 cents for it (statute fixed 80 cents) and then sought the aid of a court of equity, wherein it was denied relief on a previous occasion. The respondent is now charging $1.50 per M cubic feet for gas, or an increase of 87½ per cent above the statutory limit, and giving in return not even the quality of gas

provided for under the legislative 80-cent rate. This through the aid of a court of equity!

The respondent offered as an answer for a violation of the statute in the winter of 1917–1918 (which is covered by the prior adjudication referred to in the preceding point) the fact that New York harbor was frozen over a certain number of days, making the obtaining of oil at its docks difficult for that period. When that excuse was removed the then vice-president and general manager, Mr. Ellsman, undergoing examination says:

> "Q. Now then did you resume 22 candle power after that? A. *No, we did not*" (p. 318).

If the respondent desired to change the standard from candle-power to B. T. U.'s the way was open, because of the amendment to the Public Service Commissions Law, in effect May 14, 1913 (sec. 66, subd. 3).

No application for such an order was made by respondent. We have only to deal here with the 22 candle-power prescribed by the statute. That was the law which respondent was bound to obey. We submit respectfully that the courts may not condemn the wisdom of this 22 candle-power statute. It has been on the statute books since 1906, and until the legislature sees fit to change it the courts certainly are not concerned with its wisdom.

The respondent might readily have availed itself of the amendment to the Public Service Commissions Law above referred to if it desired to change to a British Thermal Unit Standard. But it did not, preferring to deliberately violate the

statute rather than take the simple procedure which the law supplied to change the standard of measurement. Can the respondent disregard with impunity the statute of the State enacted for the protection of the public, and yet be welcomed in a court of equity, as one who has performed in good faith its obligations of duty? If so, courts of equity have abandoned all distinction between a wrongdoer and one who has due regard for the law, in affording extra legal relief.

The legislature has created the respondent. It has a monopoly in the field which it serves in the sale of its product. The legislature, believing its monopolistic powers required scrutiny and curtailment, passed the statute fixing the rates and standards and created a Public Service Commission having regulatory authority and power over the respondent. The respondent arbitrarily and arrogantly set at naught the statute enacted for the protection of the public and declined the statutory invitation to submit its rights and equities with the rights of the consumers to the impartial commission created to change standards, if justice required a change.

The Public Service Commission would have granted it consideration to which it was entitled. The commission was created for that purpose. It was created so that corporations of the kind of the respondent should not take these matters entirely into their own hands. Respondent, by violating the law and refusing to seek the tribunal which could have granted it any relief to which it was entitled, failed in the interim between the judgment in the action in the State court and this action to cleanse its unclean hands; but, on the

contrary, it soiled them to greater extent. For the first eight days of June, 1920, the candle-power of the gas served by this company seeking the active aid of a court of equity *averaged* 3.89 *candle-power*, while the consumers were paying for and entitled under statutory mandate to a gas of 22 candle-power!

And despite all this it invokes the aid of a court of equity having been denied similar relief in a former action!

The question of *scienter* cannot enter into the discussion. The respondent received daily notice of the city's tests showing the continued and flagrant violations and never questioned either the accuracy of the tests or the results obtained.

The case comes within the rule set forth in *Pomeroy* in his excellent works on equity jurisprudence. (3rd ed. sec. 397, vol. 1.) This rule is stated in full in the case of *Michigan Pipe Co. et al.* v. *Fremont Ditch Pipe Line & Reservoir Co.*, 111 Fed. Rep. 284, p. 287:

> "One of the most salutary of these principles is expressed by the maxims, 'He who comes into a court of equity must come with clean hands' and 'He who has done iniquity cannot have equity.' A court of equity will leave to his remedy at law — will refuse to interfere to grant relief to — one who in the matter of transaction concerning which he seeks its aid, has been wanting in good faith, honesty or righteous dealing. While in a proper case it acts upon the conscience of a defendant to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud or any other unconscionable act in the transaction which

forms the basis of his suit. (1 Pomeroy, Eq. Jur. secs. 397, 398, 400; *Medicine Co.* v. *Wood*, 108 U. S. 218, 227, 2 Supt. Ct. 436, 27 L. Ed. 706; *Marble Co.* v. *Ripley*, 10 Wall, 339, 357, 10 L. Ed. 955)."

The equity maxim centuries old and invoked in hundreds of cases in our courts, was recently clearly stated in the Circuit Court in an opinion by Judge Rogers in the case of *Carmen* v. *Fox Film Co.*, 269 Fed. Rep. 928. Judge Rogers reviews the maxim at length and the many cases covering the point we are now respectfully urging and says (p. 932):

> "The maxim that one who comes into equity must come with clean hands expresses rather a principle of inaction than one of action. It means that equity will refuse its aid in any manner to one seeking its active interposition if he has been guilty, either of *unlawful* or inequitable conduct respecting the subject matter of the litigation."

It would be difficult to conceive of a more "unlawful" or "inequitable" course of conduct "respecting the subject-matter of the litigation" than that of the respondent in this case, and equally difficult to conceive of an application calling for a more potent "active interposition" of a court of equity.

Mr. Justice Greenbaum, in the course of his opinion in this case, in the State court, in speaking of this requirement of the statute said (pp. 1176, 1177)

> "that the quality of gas manufactured during 1918 was far below the candle power prescribed * * *.
>
> It was not denied that the plaintiff regularly received copies of the daily reports of

the official inspections and, moreover, the records of previous years show a substantial compliance with the requirements of law in respect of the candle power of gas sold by plaintiff. In view of these facts and in the absence of any explanation of this seemingly flagrant violation of law, the conclusion seems to be inevitable that the plaintiff's violation of law was deliberate.

The daily tests of gas made by the legal inspectors established that the average quality of gas supplied by the plaintiff during 1918 was an average of 13.57 candles instead of twenty-two candles, which is the minimum prescribed by law. It follows that the consumer was either compelled to consume a greater quantity of gas measured by the ratio of twenty-two to 13.57 at a correspondingly increased price to him or that he suffered from the loss of light in the ratio of 13.57 to twenty-two, for which he paid the price charged for gas of a twenty-two candle power standard.

How can one foretell how much increased business the plaintiff would have had if it had furnished the legal twenty-two candle power instead of the very considerably diminished candle power that it furnished in 1918? The use of gas has been largely extended during the past few years for cooking, heating water, house heating and other purposes. A standard quality of gas should insure a more extensive use of gas. At any rate a fair test under the law cannot be made except by compliance with the law which fixes the standard of quality.

Moreover, it may well be urged that if the plaintiff has knowingly violated the law by selling gas of a standard lower than that fixed by law, it is not entitled to equitable

relief. Observance of the law is a cardinal principle which is obligatory upon him who seeks judgment in equity." (Record, p. 1177.)

Judge Hand, in the *Consolidated Gas Co. of New York* v. *Newton, et al.* case, supra, said:

> " * * * it must, of course, be regarded as the duty imposed upon the complainant while it remains upon the statute book. A persistent and deliberate disregard for it might, I should think, bring this case within that somewhat indefinite rule which turns out of a court of equity a suitor who has himself been unjust in the very matter of which he complains " (267 Fed. Rep. 231, p. 243).

We have shown previously that, without a question of doubt, the disregard of the respondent for the 22-candle-power statute *was persistent and deliberate* within the language of Judge Hand in the above cited case. What could show a more persistent, deliberate and impudent disregard for the statutes of the State of New York than the candle power record for June, 1920? Respondent served its summons and complaint to have the 80 cent gas law declared unconstitutional on the first day of June, 1920, and on the following day, the second day of June, 1920, it supplied its consumers with gas of a candle power of 3.59, cheating its consumers by 18.41 candle power and charging 15 cents above the statutory rate therefor.

We have called the court's attention previously to the candle power of gas supplied on the succeeding days of the month of June. At the cost of repetition we shall submit them again:

June	3rd	4.16
"	4th	4.11
"	5th	3.99
"	7th	3.08
"	8th	3.83
"	16th	7.92
"	17th	6.99
"	18th	6.70
"	19th	5.85

(Complainant's Exhibit 17, p. 1036.)

We need go no further to point out to this court the respondent's utter disregard for the law at a time when, above all other times, it should have been anxious to observe the laws of the State.

The equity maxim of " clean hands " is so well settled and so free from indefiniteness that we shall refrain from any further citation of authorities upon it.

The statute here guaranteed the quality of gas the consumers were to receive. Respondent has more than 38,000 consumers. These consumers have been paying for 22 candle power gas but not receiving it; they were entitled to the quality of the gas prescribed by the statute. The courts surely will not uphold a violation of the law and go so far as to predicate equitable relief upon such a disregard for the law.

While we maintain the heating value is not an issue in the case because the statute makes no mention of it, still gas of 22 candle power has a B. T. U. standard of from 620 to 660 (p. 32). When the Public Service Commission in the district in which this respondent operates made an order permitting gas companies within its juris-

diction to adopt a British Thermal Unit Standard in an opinion by its chairman, Hon. Oscar Straus, fixed 650 B. T. U's as an equivalent of a 22 candle power as far as any equivalent could be fixed. Thus the gas furnished by respondent had neither the illuminating nor heating efficiency which would have resulted from a compliance with the statute.

We have already called the court's attention to the finding that respondent received written notice from the city, daily, of the tests of its gas. We have also called the court's attention to the bill of complaint wherein respondent alleged that it was not under the duty of obedience to said statute, and that the candle power furnished by respondent to its consumers, in June, after this suit was begun, was far below the legal standard and fell as low as 3.08 candle power.

We have also called the court's attention to the fact that the respondent made no attempt to comply with the statute. It also appears that respondent was able, by thus furnishing its consumers with a quality of gas inferior to that prescribed by the statute, to save a vast amount of money through diminution in the use of the oil alone. We submit that there is and there could be no more flagrant violation of the law than this. We have here an exhibition of disregard for the law, *amounting to utter lawlessness on the part of the respondent*. We fail to follow the reasoning of the learned Judge that the company by such conduct "has not thereby injured anyone." It was obtaining money from 40,000 consumers *illegally* and in *violation of law*, being paid for a certain quality of gas which it was knowingly

and deliberately failing to furnish. To use a harsh word its consumers were being "cheated." We earnestly believe that a great injury was done a great many people over a long continued period.

If it should be said that the Attorney-General or the Public Service Commission should have taken steps to stop the flagrant violation of the statute as to quality, we point out that in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, p. 53, this court held that while the 22 candle power provision was valid, the penalty imposed was unconstitutional.

Here is the place to mete out punishment for violation, on respondent's part, of the statute. It is a mild punishment indeed which simply denies respondent relief in the present suit.

POINT V

The consumer should not be charged with the unreasonable, excessive and unwarranted loss of gas allowed by the court and master as "unaccounted for" gas.

The master allowed 11 per cent of the total gas made as "unaccounted for" gas. (Opinion VI and Findings 17 and 19, p. 34.) The court increased this amount to 15 per cent (p. 75). Complainant's exhibit 6 (p. 1033) for the year 1919, shows 17.83 per cent of gas made to be "unaccounted for." All the witnesses on this question agreed that this item was excessive.

In view of the other evidence in this case showing gross inefficiency of the respondent's operations (Point X this brief), we believe that the same inefficiency is reflected in this item of excessive "unaccounted for."

It is conceded that in the operation of gas plants a certain amount of gas disappears and is called "unaccounted for gas." Various reasons are assigned for its loss, such as condensation, leaks, slow meters, and the like. The perplexing question is what percentage is reasonable in the case of each company. It is impossible to determine what the loss will be in advance of its disappearance. One year it may be surprisingly large, and the next comparatively small. There is no question, however, but that a cold severe winter, such as the winter of 1917-1918, affects the condensation of the gas and causes a greater loss than usual; and on the other hand, the mild winter of 1920-21, which we have just experienced, will undoubtedly result in a much smaller loss than usual.

Efficient management will reduce this loss; on the other hand, carelessness and inattention on the part of the company is a cause for increasing it.

Respondent has the largest percentage for unaccounted for gas of any company operating in the metropolitan district. Its alleged "unaccounted for" is twice as large as the company operated by respondent's own witness, John B. Klumpp in Syracuse.

A probable reason for the company's very excessive "unaccounted for" may be found in counsel's brief recently filed in the Appellate Court in the State court action. Inadvertently, perhaps, counsel said:

> "Street lamps are not equipped with meters, the amount consumed being esti-

> mated. In the witness's experience there has always been a material loss in street lamps, using more gas than is actually paid for." (Plaintiff's brief, p. 60.)

If it be true a certain amount of gas is actually delivered to the city but not paid for, and is made a part of unaccounted for gas and charged against the private consumers, then it is not just to the consumer, and in this case it would be improper to charge them with it.

The extreme cold winters of 1917-1918, and again in 1919-1920, were not fairly normal winters upon which to base "unaccounted for gas." On the contrary, they were very abnormal, one being the most severe in forty years. A cold, severe winter materially affects the operating expenses of a gas plant, in many ways, namely, increased unaccounted for gas, larger consumption of generator fuel, larger consumption of boiler fuel, increased repairs to mains, services, and meters, increased stable expense, attending to the unusual calls for assistance from consumers having trouble with appliances, and a lower efficiency of labor.

While all these occur to some extent during a normal winter, they are aggravated during such an abnormal winter as 1917-1918.

In the instant case, respondent made no attempt to explain the unusual loss called unaccounted for gas. It labored under the mistaken theory of law that a mere submission of figures showing the difference between its gas sold and gas paid for would affirmatively establish its "unaccounted." Such a theory is manifestly

erroneous, particularly when the difference is so excessive as to call for independent explanations as it was in the instant case. The burden of *proving* the act assailed as confiscatory is *always upon the one assailing the statute* to establish beyond a reasonable doubt and does not shift with a mere presentation of figures which upon their very face are unusual and contrary to the established experience of the gas business.

Judge Hough, in his opinion, considered 15 per cent loss as proper, basing his judgment upon such average loss as is experienced by suburban or small town companies.

The record in the case, however, has no proof that any such companies are comparable with the respondent, and consequently such a conclusion has no evidence to support it.

Considering the converse of the proposition, would it be fair and just to apply the enormous loss of unaccounted for gas of this respondent, with its conceded loss and leakage from street lamps, to suburban or small town companies? Certainly not, unless the companies have a large number of street lamps, the consumption per mile of main, soil, age and state of repair and location of distribution system, local temperatures and conditions, and many other factors are comparable with respondent.

The best evidence of what an efficient management can reasonably show in localities under conditions most nearly identical with those of the respondent would seem to be found in the showing of the Flatbush Gas Company, the Newtown Gas Company, the Woodhaven Gas Light Company, the Richmond Hill Gas Company, the

Queens Gas Light Company and the Jamaica Gas Light Company. The territories served by these companies are more sparsely populated, large customers more conspicuously absent, service pipes run greater distances and its consumers are of a class that require more excessive metering than in the case of the respondent company; yet these six companies each have reported to the Public Service Commission, First District, a yearly percentage for unaccounted for gas of 8 per cent for each of the years, 1917, 1918 and 1919. (Defts. Ex. D1, p. 1088.) These companies are near neighbors of the respondent, all being located on Long Island and have mains and services in practically the same kind of soil and serve similar residential districts.

Mr. Justice Greenbaum rightly decided that the respondent in the State court action failed to show that such enormous loss was reasonable or justifiable.

He said:

> "There is another matter which merits serious consideration and which applies not only to 1916, but also to 1917 and 1918. The gas manufactured in 1916 amounted to 1,070,266,000 cubic feet. The gas sold during the year was 934,406,000 cubic feet. It thus appears that at least 135,860,000 M cubic feet of gas are unaccounted for. At the rate of thirty-six cents per M cubic feet, which plaintiff itself assumes was the cost of gas to it during that year, this loss would represent nearly $50,000. The lost or unaccounted for gas in 1917 was about 185,322,000 M cubic feet, which, according to plaintiff's figure of thirty-seven cents a cubic foot during that

year would amount to $68,569.14. The gas unaccounted for in 1918, about 230,240,000 M cubic feet for that year, would represent $108,212,180. That ratio of loss for 1916 was 12.69 per cent; for 1917, 15.03 per cent, and for 1918 upwards of eighteen per cent.

"The only explanation for this unaccounted for gas was given by plaintiff's expert, who merely stated generally that a loss of gas is found in all gas plants and that it was due to various causes, such as errors in the station meter, defects in consumers' meters which average low, loss due to the contraction of the gas between the temperature at the station meter and the temperature where it is normally measured, stealing of gas, breaks in mains and leakages in connections. It may be assumed that a certain percentage of this unaccounted for gas is likely to exist in every gas factory, however efficiently managed, *but that does not explain whether such a large percentage of unaccounted for gas as is here shown is usual in well managed gas factories.* It was incumbent upon the plaintiff to establish that its business was conducted efficiently and with due regard to proper economies. The expert witness, however refrained from giving testimony as to what the percentage of unaccounted for gas was found to be in other gas-making concerns or whether there is a well recognized average percentage of loss of gas which is unavoidable, nor was he questioned on these points. *The plaintiff has therefore failed to meet the burden of showing that its percentage of unaccounted for gas is not excessive*" (pp. 1169, 1170).

The court, in the case of *Consolidated Gas Co.* v. *Newton, et al.*, 267 Fed. Rep. 231, discussed at

some length the principles as to unaccounted for gas. In that case the unaccounted for gas claimed by the company was reduced from 7 per cent to 4.1 per cent. The court said (p. 244):

> "Into all the calculations there must come the loss of gas occasioned by condensation, leakage, and perhaps other causes. It becomes necessary to know by how much the plaintiff's production must be taken to be larger than the sales passing through the customers' meters. While it is quite possible to tell this with accuracy for the whole system of which plaintiff is a part, it is impossible to do so for the plaintiff separately, owing to the interchangeable connections of the mains. The loss of the system as a whole has been reported yearly to the Public Service Commission, and represents the difference between the gas made and the sum of gas recorded by customers' and company's consuming meters. The years 1917 and 1918 were abnormally cold and showed an unusual loss of this kind. Obviously, they are not a fair specimen of the normal loss occurring from these causes. The average for the whole system over the period of 13 years during which the statistics were given to the authorities was 5.31 per cent., and, unless there are some disturbing factors, this is a valid starting point, which the company must accept. The only disturbing features suggested here are the poorer quality of coal and oil, and I take against the plaintiff any doubt which those factors may raise. I accept the average of 5.31 as a proper allowance for the system as a whole, at least in a rate case.
>
> The allowance to the company is certainly less than this figure, but how much must re-

main in doubt. The estimated average as reported by the plaintiff to the Public Service Commission for the years 1906–1918, inclusive, was 4.09, and there is a strong presumption that this is correct. Nearly the same result may be reached by another method. It appears to be accepted that 3 per cent. is the proper allowance for all waste but main leakage, which varies inversely with the density of the customers per main mile. Now, taken grossly, the company has about double the density per main mile of the other companies. We may then apportion the sum of 2.31 per cent. for main leakage correctly by dividing the main mileage of the company in half and using the resulting sum for the total mileage. Assuming the total output to be 33 billions, of which the company will furnish 20 billions, the system's loss from main leakage is 762.33 millions, of which the loss attributable to the company is 28 per cent. or over 223 millions. This is about 1.12 per cent., which, with 3 per cent. equals 4.12 per cent. of the gas made, which is surprisingly close to the average reported by the company itself. I shall therefore take 4.1 per cent. as the proper figure for gas unaccounted for" (pp. 244–245).

The unexplained and unusually large amount of unaccounted for gas should not be allowed in this case. It should be reduced to at least 8 per cent of the gas made. The difference between 8 per cent and 17.82 per cent claimed by the company, is 9.82 per cent of the total gas made for the year 1919, amounting to 153,999.53 cubic feet of gas which, multiplied by .4835 alleged cost of gas per thousand cubic feet for the year 1919

(complainant's exhibit 6, p. 1033) amounts to $74,558.77. This amount should be deducted from the cost of production in 1919. Similarly exhibit 13 (p. 1037) shows 14.83 per cent unaccounted for gas for the first six months of 1920. This is in excess of 6.83 per cent over the 8 per cent limit. This would give 64,840 cubic feet as the excess for unaccounted for gas over 8 per cent, which, multiplied by the .6028, the alleged cost of production in 1920, amounts to $39,063.68, which should be deducted from the cost of operation. The two items added together for the year 1919 and the first six months of 1920 amount to $100,622.45. This should be excluded from the cost of operation.

POINT VI

The " fair value " of respondent's property was fixed by stipulation between the parties at $3,300,000. This sum could not properly be augmented by the master for the future needs of the company.

The parties to this suit entered into a stipulation regarding the fair value of respondent's property invested in the gas business for 1919 and 1920. There is no ambiguity about this stipulation. It was clearly understood by the parties and the master. The stipulation is found in a discussion between the master and counsel, as follows:

> " The Master: Gentlemen, you have heard the instructions given me by Judge Knox. Pursuant to those instructions I am ready to receive from you any stipulation you may be prepared to enter into pursuant to the in-

structions received by me from the District Judge.

Mr. Moran: If the defendants' counsel will notify me what amount they will concede as the present fair value of plaintiff's plant and facilities used in the public service I am prepared to act.

Mr. Hill: The Attorney-General, with permission to withdraw the concession I am about to make in the event it is not accepted by the Attorney for the plaintiff, is willing to concede for the purpose of this trial only.

The Master: And pursuant, I understand, to the language of Judge Knox?

Mr. Hill: And pursuant to the language of Judge Knox, that the valuation of plaintiff's plant and facilities used in the public service at all times since January 1, 1919, was and is the sum of $3,300,000. This concession is made solely for the reason that we desire to expedite the trial and for the purpose of the present trial only. It is not to be binding upon any of the parties, particularly upon the Attorney-General except for the purpose of this trial.

The Master: And it is made subject to all of the conditions and provisions of Judge Knox's instructions to me?

Mr. Hill: I include the last suggestion of the Master in my reply.

Mr. Jackson: I will make the same concessions as stated by Judge Hill for the defendant represented by me, with the conditions that all the parties to this case request the court in answering the decree herein to insert therein any necessary or suitable provision protecting the parties from the further or other use or binding effect of this stipulation as to the value of

the plant and facilities in any other action or proceeding.

Mr. Moran: The plaintiff claims the present fair value of its plant and facilities used in the public service is in excess of the sum of $6,000,000, as alleged in its complaint; but in view of the necessities of the situation and the fact that a full valuation is perhaps not necessary or needed for a decision upon the legal questions involved, it accepts the concessions as to value in lieu of calling witnesses to establish the value, provided that it will be agreed here and now that if and when it may hereafter in this or any other cause, action or proceeding before this court or any other tribunal, board, commission or body, be necessary to determine the validity of chapter 604 of the laws of 1916, or any other statute, rule or regulation establishing or purporting to establish the rate or price of gas furnished or sold in the territory served by the plaintiff, the parties to this action and their successors shall be free to establish the value of the plant and property used in the public service in all respects as though this concession and acceptance had not been made" (p. 610).

In a few words this stipulation provided that for the purpose of this case the fair value of respondent's property used and useful in making and distributing gas is the sum of $3,300,000. By the making of the stipulation the door was closed in this case so far as any other valuation was concerned. There was no misunderstanding or ambiguity about this stipulation. It was thoroughly understood by the parties and the court. The master reiterated from time to time the substance of the stipulation.

"I am so determined to keep out of the findings of this case all consideration of capital investment, so that it cannot influence the court in any way except as it may be presented to it through the stipulation which you have entered into" (p. 742).

"You will remember that as soon as questions were asked respecting the capitalization and bonded indebtedness of this company, I at once stated that I wished further instructions from the District Court before going into that question, before permitting questions to be asked respecting them. The District Court instructed me that if a stipulation as to the rate base was presented, my duty was then to receive and ascertain the expenses of the company in the manufacture of gas and a fair rate of return on money borrowed, or a fair rate of return rather on the investment which was stipulated had been made in the company, and that if a rate base was not stipulated that I would then proceed with the case in the regular course" (p. 749).

The master recognized the binding effect of this stipulation in his opinion (p. 44). He says in subdivision II:

"The Rate Base.

The hearings were very much shortened by the stipulation entered into by complainant and the defendants Nixon and Newton that the valuation of complainant's plant and facilities used in the public service at all times since January 1, 1919, was and now is the sum of $3,300,000.

* * * * * * *

The rate base having been stipulated, I excluded such testimony as was offered relat-

> ing to the capital account of complainant except such as was directed to prove that items charged to expense should have been charged to capital" (p. 44).

Yet the master allowed $1,600,000, in addition to the stipulated sum of $3,300,000 as the "fair value" in finding 42 (p. 39), and in his opinion, subdivision X (p. 51).

The court properly excluded this additional sum commenting upon this item as follows (p. 72):

> "The master's finding here complained of is regarded as immaterial; yet for the sake or form the exception is sustained in so far as the master held that the sum of $1,600,000 'should be added to the stipulated value of complainant's plant used in the public service,— for the purposes of this case.' The stipulation was that the existing plant was worth at least a certain amount of money and it went no further. I do not think that it was necessary or proper for the master to add anything to or take away from this valuation which, however, seems to me to have no other function under the whole evidence than to put it beyond the bounds of present argument that plaintiff has an actually existing investment of at least $3,300,000, now worth that sum, and all engaged in making gas."

We think we have shown sufficient to establish that so far as this case is concerned the fair value of respondent's property was $3,300,000. The stipulation having been made, the master was without power to add to or detract from that sum. The amount which he has added — $1,600,000 — is not in being, had not been contracted for and if

the respondent undertook to erect the additional units in the future, the evidence shows that the work could not be completed in more than a year and a half. To charge the present consumers and the consumers of 1919 with this additional amount to the fair value of its property which had been agreed upon by the parties was clearly error on the part of the master. To show the vital effect of this additional property added to the stipulated amount by the master, the computation shows that it amounts to $0.1132 per M cubic feet, which the consumers of 1919 and about the same amount which the consumers of 1920 would have to pay for return upon the property which is not in being, and not even contracted for.

If the question was open — which it was not — the day the respondent erected this additional plant or incurred liability therefor, it would have additional consumers to serve and it would thereby have an increased return so that the unit cost would be cut down accordingly.

All this could have been readily shown had the question been in the case and had it been litigated, but we submit that it was extraneous to the question before the master and that he was without authority to deal with it in any phase whatever.

To substantiate the entire fairness of the stipulated figure of $3,300,000, we respectfully call the court's attention to the finding of Mr. Justice Greenbaum in *Kings County Lighting Co.* v. *Lewis*, *supra*, in this respect. He found the fair value of this company's property for the year 1916, to be $3,041,259, and for the year 1917, $3,100,000 (pp. 1145, 1149).

While the appellants appreciate that their ex-

ception to the $1,600,000 item was sustained, yet the court held that the master's finding in this respect was immaterial. It is because we feel that his findings were vitally material that we have raised the point in this brief. The master, in what is styled "Recapitulation" (p. 53) allowed $144,000 for the year 1919 as the cost of investment for extensions, improvements, etc., on this $1,600,000, and $72,000 for the first six months of 1920. If these costs, together with the others, set forth in this brief, are excluded, it will be found that the *statute assailed is in no wise confiscatory.*

POINT VII

The statute in question should not be declared confiscatory merely upon the financial returns obtained in one or two abnormal years disregarding profits in all prior years.

The respondent seeks to destroy the act of the legislature here in question by showing the financial results for the year 1919 and the first six months of 1920. This period was probably the most abnormal and characterized by the most unnatural and excessive price levels during the past generation. No more economically abnormal period could have been found had the respondent deliberately set out to seek the most extraordinary period of high prices in its entire corporate existence.

The appellants contend that in order to determine the validity of the statute a reasonable normal period should have been selected. The court should have had the benefit of the past experiences of the respondent during normal, stable conditions so that a fair judgment could be formed of the future. The period selected is no more an

indication of the possible future experiences of this company than was the war-time plight of battle-scarred France an indication of its future. The great war created most unusual and extraordinary conditions; but the war-time economic irregularities were as ephemeral as the actual physical destruction.

It is perhaps unnecessary to refer to events occurring in the year 1919 and beginning of 1920 to refresh the mind of the court upon the facts showing the abnormalities of the period following the World War and the economic exhaustion caused by it. Chaos existed everywhere, especially in our transportation and labor circles; enormous inflation; gross profiteering; labor disorders; numerous strikes; Government control of coal and other products and fixation of prices were orders of the day.

Prices soared to levels which were almost beyond belief. This was especially true during the year 1919 and the beginning of 1920. Prices then gradually started to decline and this court will surely take judicial notice of the fact that to-day the enormous war-time inflation has largely passed away and we are now approaching normalcy in prices of material and labor. Prices of all commodities that enter into the cost of making and distributing gas have had a severe decline. Gas oil which goes to make up over 50 per cent of the cost of making gas is now selling in New York City at 5–5½ cents a gallon as against 10–12¾ cents a gallon during the abnormal period selected by the respondent to test the constitutionality of the statute.

There is an abundance of evidence in our every

day life, aside from the sworn testimony, that commodity prices are on the downward trend and have been so since the fall of 1920, and as Judge Hand remarked in *Consolidated Gas Co.* v. *Newton et al., supra*:

> "Evidence is not necessary in the face of so patent and obtrusive a fact of daily life."

The price trend of the two well-known mercantile houses of world-wide reputation, Duns and Bradstreets, show in graphic form what every man learns when purchasing commodities for his home. A recent report establishes that the price levels of general commodities have declined 40.7 per cent from the high mark of February 1, 1920. The descent in prices, like their rise, has been the greatest, in the given time, that the world has ever known.

The appellants contend that an average must be taken over a long period of years of experimentation with the statutory rate, and when thus considered, mere temporary abnormal conditions will be found to be covered and taken care of by the rate. Where the abnormal period is prolonged and exists year after year but still bears evidence of not being permanent in character, inquiry should be made to determine what preparations the company has made to combat such an emergency before any relief is granted for the consumers in prior years may have sufficiently insured the company against the emergency.

The Wisconsin Railroad Commission, one of the foremost Public Service Commissions in this country, states the proposition with good reasoning

in the case of *Re Manitowoca Gas Co.*, 19 Wis. R. R. Rep. 832, is as follows:

> "In order to judge of the necessity of an emergency relief in a particular instance, it is necessary to consider what the experience of the utility has been at times when conditions have been normal, and how seriously the changed conditions have affected it. Where a utility has been able to accumulate a proper surplus after meeting the charges entering into the cost of service, including a fair return on the investment, consumers may have been said to have insured the utility against fluctuating conditions of a more or less temporary nature. In such cases, in order that emergency relief may reasonably be granted by the Commission, there would have to be a showing that the emergency alleged was of a more serious nature and the loss incident thereto greater in relation to the total business than would be required to constitute an emergency in the case of a utility which had been operating with little or no margin and above the actual cost of operating."

It is unjust to test the statute fixing gas rates by the operations of any one year, even though that year be a normal one, for many items such as repair to holders, mains, services, gas machines and buildings may be unduly large one year and the next year comparatively small. Some of the repair items are extraordinary and expensive and do not recur in many years.

Judge Trieber, in the case of *Boyle* v. *St. Louis R. R. Co.*, 222 Fed. Rep. 539, sanctions the view urged by us by saying:

> "By adopting the four year period for averaging the earnings and expenses, we are able to get a fairer result *than by merely selecting one year, which may be affected by peculiar conditions then prevailing.* A four year period, when the years are fairly normal, will reflect more accurately the traffic and cost" (p. 557).

If it is right and just to adopt a four-year period "when the years are fairly normal," it is plain that a much longer period must be considered where any of the years are for any reason abnormal, and not a short period during an unusual upheaval of prices.

In the case of *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, where the operations for one fiscal year were considered by the lower court, it was said (p. 15):

> "We think it was error to confine the investigation to, and base the judgment upon that year alone. The precise subject of inquiry was, what would be the effect of the ordinance in the future. *The operations of the preceding fiscal year or of any other past fiscal year, were valueless if the year was abnormal, and were only of significance so far as they foretold the future.*"

The rule thus seems settled that an abnormal period may be considered only for the purpose of signifying what the future is likely to be. It can not be seriously contended that the year 1919 and the beginning of 1920 was a period of any probative value in "foretelling the future."

Mr. Justice Greenbaum, in considering the abnormal year of 1918, followed the reasoning of

this court in the *Knoxville* case, and held that such an abnormal year was valueless upon which to base confiscation. As to its significance in determining the future, he says:

> "The operations of a fiscal year which was as abnormal as was the year 1918, lacked the value of the normal year in determining the future" (p. 1174).

The sudden and precipitous decline in prices show that Mr. Justice Greenbaum was right in concluding that the abnormal year of 1918 was no indication of the future.

Shortly before the decision in this case, the case of *Consolidated Gas Co.* v. *Newton et al*, 267 Fed. Rep. 231, came before Judge Learned Hand for review. He said:

> "The master has taken complete evidence over a period of twenty months, from January first, nineteen hundred and eighteen, to August thirty-first, nineteen hundred and nineteen. Since that time eleven months have passed, during which time there has been no fall in price levels. The record has some evidence of this down to a later day, but of course, not down to the date of this opinion. But evidence is not necessary in the face of so patent and obstrusive a fact of daily life, and it is quite fair to say that the condition which the master found as of August thirty-first, nineteen nineteen, has been aggravated during the succeeding year. The period, despite its unusual character, I find to be a sufficient basis for the calculation of the cost of production, and the 'ratebase' for a future time long enough to call for some judicial action" (p. 236).

The reason for adopting this period as a test of the statute is clearly set forth by the learned judge, for he states:

> "Either the evidence of the last three years is a sufficient basis for a *forecast*, or it is not. If not, ante bellum values should be used merely for lack of any better; if so, the average of the last three years is the proper basis" (p. 234).

Here we have an expression of opinion by the judge that an average over a period of three years is the proper test, where such a period indicates the future.

Again he says:

> "It is quite true that, if these prices could fairly be regarded as such temporary aberrations as the rate was meant to cover, this would not be so. Persons who embark their money in such enterprises must take the bitter with the sweet, and the lean years with the fat. Rates, when established, are not intended to make a nice adjustment, to all ensuing conditions; they are too long and costly to fix, especially in court" (p. 234).

It is clear from a careful reading of the decision that the learned judge had the impression, we had entered into a period of a permanent high level of prices, for he says:

> "Several reasons lead me to believe that present price levels are not merely transitory, though I recognize the danger of any prophecy" (p. 234).

Then he proceeds to point out certain reasons which, to his mind, justify his conclusions in this

regard. This decision of Judge Hand is the first in this judicial district where the abnormal years of 1918 and 1919 were taken into consideration in testing the validity of a like statute.

Mr. Justice Greenbaum, in January, 1920, concluded that the abnormal period lacked value for a *forecast;* while Judge Hand, in August of the same year, concluded that the price levels had existed a sufficient length of time for him to *forecast* and arrive at the conclusion that the price levels would continue for some time in the future.

Although this important decision was rendered but a short time ago, conditions to-day are entirely different from what Judge Hand supposed they would be, and entirely contrary to any *forecast* which he could have made from a study of the past.

While Judge Hand was writing his opinion and forecasting from a study of the period, prices had started on a precipitate decline, the equal of which the world has never known. The abnormal period considered by Judge Hand had no significance as to the future, and surely confiscation should not have been based on those years alone.

Had Judge Hand been aware of the impending rapid descent in prices, a different view would undoubtedly have been taken and expressed by him.

The fallaciousness of his prohecy has been established by later events. His decision has been brought before this court for review and the appellants are convinced that this court will have reversed Judge Hand's erroneous forecast before it arrives at a conclusion in the instant case.

The decision of Judge Hough in the instant

case is predicated upon the assumption that the respondent was suffering from capital losses during this short period.

We respectfully contend that the record does not support such a conclusion and that furthermore the company never operated under the statutory rate and could never, therefore, have experienced capital losses thereunder as pointed out previously in this brief. Whether the statute allows an inadequate return or no return whatsoever, we believe is immaterial upon the question of a fair test of the statute. The period of experimentation is not affected by this fact and the proper period is alike in both instances.

Imagine a test for a five-year period with an inadequate return on capital each year, and another five-year period with a deficit for two years, but an average of 8 per cent return for the full five-year period. The court would surely be more inclined to hold the rate confiscatory during the first case, than during the latter.

As Judge Cardoza remarks in the *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y., 89:

> "Fleeting losses may be suffered and yet the balance sheet may show a profit."

On the other hand, substantial profits may be made for a large part of any period and the balance sheet may show a slight deficit. Is it sound to hold that a dearth shown by a balance at the end of one year but not unreasonably prolonged, is confiscation?

Any inquiry covering one or two years is not only unfair, unjust and inadequate, but mani-

festly will lead to an action such as this for every temporary change in prices of labor, materials and supplies. The intent of the legislature was to fix permanent rates, never attempting to fix rates year by year. It did not reduce the rate for gas in the city of New York in the years prior to the World War when this company and the other New York companies were making large profits, or considerably more than a fair return.

Is it reasonable that the large profit in all prior years should be absolutely disregarded and that the legality or illegality of the act should hinge upon the return for 1919 and part of 1920 alone, particularly so when it clearly appears that these were abnormal, unnatural and unusual times.

If the court's finding be correct that the statute should be destroyed upon the returns made in a year or a part of a year during an abnormal period, it would seem that the legislature would be obliged to change the rate from year to year, in order to adjust that rate to the profits shown by the company. The results for any year would not be known to the legislature in time for action to be taken until another year had passed, and by that time the conditions might have been changed. Such a scheme of legislative control is highly impracticable under conditions such as exist in the city of New York. The theory of rate-fixing by the legislature is based on the assumption that a rate will be fixed which will be fair and reasonable under ordinary, natural conditions over a reasonable period. No attempt is made to have the rate meet "temporary abberrations" either upward or downward. The utility must be prepared to accept "the bitter with the sweet," "the lean with the fat."

In the case of *Lincoln Gas & Elec. Co.* v. *City of Lincoln* (decided June 2, 1919, 250 U. S., 256), it appeared that the action was instituted in 1906 before the $1 rate fixed by the city of Lincoln, had been tested. In the trial court the bill was dismissed without prejudice to the commencement of a new action. An appeal was taken to the United States Supreme Court where the decree was reversed and the cause remanded to the District Court with direction to refer it to a master with leave to submit additional evidence (223 U. S., 349). Accordingly, a master was appointed and he made a report in September, 1914, finding that the rate ordinance was not confiscatory. Upon the rehearing before the master he considered a period from 1906 to substantially the time of his report, which was in 1914, approximately eight years. Mr. Justice Pitney, in writing for the United States Supreme Court in that case said (p. 268):

> "Without going into details, we content ourselves with announcing our general conclusion that, having regard to the entire period under investigation, we are unable to say that the Master erred in holding that the ordinance was not shown to have been confiscatory in its effect. It is probable that in the years 1907 and 1912, the net return was close to the line, if not below it; but that in other years examined it was at least 7 per cent.; and there are too many doubtful items for us to adjudge the ordinance void, in the absence of an actual and timely test."

The United States Supreme Court dismissed the bill, but without prejudice to the commencement of a new action to restrain the enforcement of

the ordinance in question, if it should result after a practical test of $1 rate since May 1, 1915, that complainant did not obtain a return which was confiscatory.

In the case of *Darnell* v. *Edwards*, 244 U. S., 564, the Supreme Court had under consideration maximum rates on logs fixed by the Mississippi Railroad Commission. The attack upon rates fixed by the Commission was that they were so low as to be confiscatory. In the course of the opinion of the court, Mr. Justice Pitney said (p. 569):

> "It is well established that in a question of rate making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing. Besides this there was affirmative evidence before the District Court to the effect that the rates were reasonable, the evidence for the complainant tending to show that they were nonremunerative, while based upon actual experience in the operation of the road, *yet relates to only a brief period when conditions were abnormal.*"

And in concluding his opinion, he further said:

> "But it is sufficient for the present to say *that the experimental period was too brief* * * * * * *, and conditions during the entire period covered by the testimony have been too abnormal* to enable us to say that the Commission's rates are confiscatory."

The period under consideration in the above case was from September 10, 1913, to March 31, 1914 (18 months), the same as in the instant case.

In the case of *Steenerson* v. *Great Northern*

Railway Co., 72 N. W. Rep., 713, 721, the court said:

> "If the Great Northern Company has made such large profits in the past that it was able to pay over large dividends and still accumulate such large amounts of surplus to invest in its property or to carry along for several years, it should be content to go along with smaller profits in such time of financial stringency as existed in 1894."

Mr. Justice Greenbaum in the prior case (110 Misc., pp. 204, 242), clearly stated the principle for which we are contending (pp. 1173, 1174):

> "It is clear that confiscation may not be predicated upon the operation of the plaintiff for 1916 and 1917. As to the years of 1917 and 1918, it must at the outset be said that those years were abnormal, owing to the war conditions then existing. Notwithstanding this abnormality, the year of 1917 showed a fair return at an eighty-cent rate * * *.
>
> As to the year of 1918, the question that confronts one is whether confiscation should be based upon such a year, even if it be established with reasonable certainty that the plaintiff's income was thereby reduced to a point which concededly would not be ordinarily deemed an adequate return upon the capital invested * * *.
>
> *The operations of a fiscal year which was as abnormal as was the year of 1918, lacked the value of a normal year in determining the future.*
>
> In this connection it will be instructive to study the opinions of the court as to what is meant by fair return and what period of time should be taken into account in determining the fair return and to what extent abnormal conditions may affect the question of the inadequacy of return."

The learned judge then cites numerous cases tending to uphold his position that confiscation cannot be predicated upon a comparatively short abnormal period. If the year 1918 lacked value in determining the future, then certainly the following year, 1919, when price levels reached their peak, lacked such value, to foretell the future.

Professor Fairchild of Yale University, in "The Economic Principles Relating to the Determination of Reasonable Rates as Charged by Public Utilities," says:

> "A reasonable rate should tend normally in the long run to collect the cost of the service, cost being defined to include a fair return on the capital and a fair reward for the labor of the owner in directing the business. This follows from the principles governing competitive rates, which are normally fixed at cost by the action of natural economic laws, whose results must be admitted to be reasonable.
>
> *The foregoing principle holds only for normal conditions and in the long run.* From time to time a reasonable rate may give profits in excess of a normal return on the capital. This occurs in competitive private business and is likewise reasonable and necessary in the business of a public service monopoly, as a reward for assuming the hazards of the business and as an inducement to improvements, superior organization, special zeal on the part of the owner, from all of which the chief benefit ultimately goes to the consuming public. Conversely a reasonable rate may from time to time be temporarily insufficient to cover the cost of the service."

We submit that the period which should be considered here is from 1909 to the time of the trial, or 1909 to 1920.

The master excluded Exhibits D-23, D-23a, D-23b, D-23c, D-23d and D-24, in so far as they disclosed the financial history from and including 1909 (the date when reports began to be filed with the Public Service Commission), to and including 1916. This was error. From them it appears that respondent earned and paid dividends of $860,000 during such period ($120,000 in each of the years 1909 to 1912, both inclusive; $115,000 in 1913; $125,000 in 1914; $120,000 in 1915, and $20,000 in 1916; since that date they have paid no dividends); interest on funded debt from 1909 to 1920, inclusive, $1,733,924.22. Its surplus of $532,362.01 in 1909 has been reduced to $453,872.18 in 1920, such reduction being $78,489.83.

Thus, such exhibits show earnings of $860,000 and $1,733,924.22, less the reduction in surplus of $78,489.83, or $2,515,434.39, applicable to return on investment. The present value of property is stipulated at $3,300,000. This is larger than at any previous time of the history of the company.

A computation, using the above figures, will disclose a return of between *6 per cent and 7 per cent during the entire period from 1909 to 1920, both inclusive.*

This computation gives respondent the marked advantage of an assumption that the value of its property at all times from and including 1909, was the same as it is now. And further, we take

the records of the company for its earnings, including the expenditures which were customary in the years of large earnings. Many of its expenditures would necessarily have to be eliminated or reduced in fixing a fair return on its investment. Under the cases previously cited this Company cannot prevail in this action upon a showing of even a deficit (which we do not admit) during the short period considered, in view of its average return of 6%-7% from 1909–1920.

Moreover, it is pertinent to point out that respondent has been paying dividends during this period upon capital stock of $2,000,000 and interest on bonds amounting to $1,112,000, about which total amount of $3,112,000, Mr. Justice Greenbaum, in his opinion, stated:

> "On July 1, 1904, the plaintiff opened its books with a stated permanent investment of $4,484,936.37. But that figure obviously included the sum of $3,112,500 heretofore discussed made up of $2,000,000, the amount of its capital stock, plus the sum of $1,112,500, the amount of the bonds created at the time of the merger, *both of which represented water and nothing of value entering into the cost of the plant or land.* Deducting $3,112,500 from $4,484,936.37 we have $1,373,436.37, the apparent actual capital on July 1, 1904" (p. 1161).

Findings 1-25 and 31 and 52 of Mr. Justice Greenbaum's decision sustains the above quoted extract of the opinion, which decision, as part of the judgment roll in the prior action, is part of the record in this case (p. 1105).

It has been heretofore pointed out that since 1909 respondent earned and paid dividends of $860,000 and interest on funded debt of $1,733,924.22. It therefore appears that the amount paid in dividends was upon capital stock which was issued for nothing of value and that interest has also been paid upon $1,112,000 of bonds which the learned court, in the prior litigation also found were issued for no valuable consideration.

What a company is entitled to is a reasonable average return upon the fair value of its property dedicated to public use. Section 72 of the Public Service Commissions Law of the State of New York provides, in part, as follows:

> " * * * In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon the proper determination of the question although not set forth in the complaint, and not within the allegations contained therein, *with due regard among other things, to a reasonable average return upon capital actually expended*, and to the necessity of making reservation out of income for surplus and contingencies."

With earnings of at least between six and seven per cent for the period of 1909 to 1920, inclusive, upon the stipulated rate base of $3,300,000, it is submitted that the respondent has earned far more than the reasonable average return upon its capital actually expended and that the statute fixing the 80 cent rate should not be condemned as confiscatory because of one or one and one-half abnormal years.

POINT VIII

There is such a nonjoinder of parties defendant as to make a determination of the confiscatory character of the 1916 statute impossible of determination in this action.

The appellant Newton set up in the answer that the city of New York is a necessary party and this was urged as a ground for the dismissal of the complaint (paragraph XXIV, p. 17).

The legislature has fixed the rate at which respondent may sell gas by two statutes,—chapter 604 of the Laws of 1916 and chapter 736 of the Laws of 1905. One of the statutes is attacked as confiscatory, and the other is not. The two statutes together fix the price of gas sold by this respondent and each must be considered to determine the confiscatory nature of either. If there is a loss on gas sold to the city at 75 cents per M cubic feet under the latter statute, it cannot be considered in this case, for it is not fair to one class of consumers to raise its rates so high that gas may be sold to the city of New York at a rate less than cost. This would require the loss on the sales to the city to be borne by that portion of the residents of the city who are so unfortunate as to live within the area supplied by the respondent. The city of New York should have been made a party defendant and the two statutes aforementioned, the one covering the price to private consumers and the other the price to the City should have been considered together.

The failure to consider the matter in this manner constitutes such a non-joinder of parties defendant as to make a determination of the confiscatory character of the 1916 statute impossible of determination in this action, and should defeat the contention and prayer of the respondent.

POINT IX

The respondent did not sustain the burden of proving that the statute in question was confiscatory. The books of the company and tabulations compiled from them were improperly admitted and did not meet the requirements of proof cast upon the respondent.

The books of account of all descriptions containing the records of the respondent, together with tabulations and summaries prepared therefrom by the accountants of the company were admitted in evidence over the continued objections of the appellants (pp. 167-174, etc.). These summaries make up the basis of respondent's case.

Both the Master and Judge Hough relied upon the decision of Judge Hand in the case of *Consolidated Gas Co.* v. *Newton, et al.* (supra) for authority upon the admissibility and probative value of the books. This decision is now before this Court for review and we feel confident that the erroneous theory of the law relied upon will not meet with the approval of this court. It will not be our purpose in this brief to detail the authorities upon this point again. In our brief in the case of the *Consolidated Gas Company* v. *Newton, et al.* (supra), submitted to this court a short time ago, this question was thoroughly discussed. We shall, however, merely outline our reasons, together with the facts in the instant case upon which we rely.

The Court committed error in admitting respondent's books and tabulations therefrom, because

1. The books were not books of original entry.

2. The books were mere transcripts by clerks who did not make the original entries and who

had no personal knowledge of the facts stated in the original entries, data or reports.

3. The auditor Gonnoud through whom the books were introduced did not keep the books but supervised the bookkeepers, and the persons who kept the books were not produced (p. 234-236).

4. No witness was produced who made the original entries, data or reports from which the books were claimed to have been transcribed.

5. No witness was produced who had personal knowledge as to the facts set forth in the books (pp. 220-222).

6. There was no evidence that the original data or reports from which the book entries were claimed to have been transcribed were the genuine data or reports of the persons purported to have made them.

7. There was no evidence that the original data or reports from which the books were claimed to have been transcribed were true statements of fact.

8. There was no evidence that it was impossible or impracticable to produce as witnesses the persons who kept the books, or the persons who had personal knowledge of the facts set forth in the books, or the persons who made the original entries, data or reports from which the books were claimed to have been transcribed, or the persons who knew that such data or reports were genuine.

9. There is a fair inference to be drawn from all the evidence that the books were not kept in the ordinary course of business, but, on the con-

trary, were specially prepared for use upon the trial of the respondent's rate litigations.

10. When the entire fabric of the respondent's claim of right in this action was vitally challenged by the evidence, and the respondent could have produced an original record or report showing the truth or falsity of the challenge, the respondent deliberately failed and refused to produce that record or report; and thus the respondent evidenced the falsity of all its pretenses of candor and good faith; and evidenced its bad faith regarding its original data, records and reports, not only in this particular but also in regard to all of its original data, records and reports from which the books are claimed to have been transcribed; and thus any presumption of correct bookkeeping, of an efficient business management is destroyed (pp. 116–238).

Auditor Gonnoud could not testify *to the facts;* he had knowledge only *of the books.* Yet, the Special Master based his main findings of fact solely upon these books. Is it not apparent that he may understand perfectly the system and know every item of the books, and yet be totally ignorant of the facts? And is it not even more apparent that summaries such as respondent's exhibits which were shown to its experts as bases for their sworn opinions may hide the grossest extravagance and mismanagement? The testimony established that this was exactly the situation.

Underlying data of the books.

At the appellant's request (p. 675 plus) the respondent produced various forms of financial and accounting stationery and sta-

tistical record. The detailed explanation obtained by the cross examination of witness Gonnoud regarding the system and use of some of this data will show clearly the hiatus between the books and the underlying data; that the foundation was readily available and practicable to put in evidence; and that the respondent failed to produce the best evidence. (Deft's. Exhibits D-8 to D-18; p. 1097.)

Not one of the employees of respondent who had first-hand knowledge of the actual facts of the plant operations was produced to testify to the facts and to be subject to cross-examination, forcing any inquiry of the defense to stop at the books (pp. 799-814). The following person or persons could have been called to establish the book entries:

1. The clerk or the head of the department originally making out a requisition for material or supplies.

2. The person or persons in the purchasing department who obtained quotations upon material and supplies and ordered them.

3. The person or persons who saw that material and supplies were received and who checked and certified to the receipt, the storekeeper, the engineer at the works, or other responsible person having actual personal knowledge of the facts.

4. The person or persons who saw the material and supplies being put into use at the plant, and who counted, measured or weighed them, or who were in immediate superintendence of or originally responsible for that work—the storekeeper, the coal weigher, the oil measurer, the engineer at the works, the foreman, and especially the per-

sons who made the original allocations or divisions of the material and supplies between the capital account and the expense account.

5. The person or persons who had immediate charge of labor, the head of the employment bureau, the timekeepers, the paymaster, and especially the persons who made the original allocations or divisions of the time of the employees between the capital account and the expense account.

6. The person or persons who actually made and determined the inventories, monthly and yearly, which took the place of the actual weights, counts and measurements of all material and supplies, through which inventories shortages were made up on the books.

7. The meter readers or the person to whom they first make their reports.

8. The persons who made the original entries from which the books were transcribed.

9. The persons who actually transcribed the books.

The aggregate number of witnesses who thus would be called upon to testify would be much smaller than, at first glance might appear from the above specifications, as many of the functions mentioned are performed by one person.

The period covered was short and recent, 1919 and 1920, and there is no evidence but that all such persons were available.

If the action were between private individuals, there would be no question but a foundation would have to be laid for the books as above outlined.

The action being brought to declare a statute of the State unconstitutional, the result affecting

the whole people and especially a number of consumers equal to the population of a large city, shall the degree of proof required of a monopolistic corporation be relaxed?

The respondent relied for support of the books upon:

a. The check made by the Accountant Hopson, who was employed by the respondent to do that work, for the purpose of testifying upon this trial.

b. The supervisory powers conferred by law upon the defendant Public Service Commission.

The testimony of Mr. Hopson will show the nature of his work; that the check by an employee of the respondent of one month, for the purpose of testifying for it in this action, is absolutely insufficient as a check of a year; that any such check, even for the whole year, would not go far enough below the books to reach the facts as to the truth of the facts appearing upon the books, or as to the efficiency of operation; that such testimony is an insufficient substitute for the fundamental evidence which was available (pp. 238-267, 592-628).

As for the supervising power of the Public Service Commission, such authority does not in any wise lend probative value to any item in the respondent's books of account. Complainant's Ex. 1, (p. 952) "Uniform System of Accounts for Gas Operations," together with an order of the Commission, dated June 20, 1917, prescribes a uniform system or method of bookkeeping. The scope and purpose of this uniform system of ac-

counts is set forth clearly in the fourth paragraph of the aforesaid order, as follows:

> "In prescribing this uniform system or method of keeping accounts, records and books to be observed by such corporations, the Commission is not undertaking that *any item set out in any account will have the Commission's approval either as to amount or character in fixing a rate or authorizing an issue of securities.* The system or method of accounts prescribed is designed to set out the facts in connection with the income, outgo, etc., and the Commission will determine in any proceeding involving the fixing of a rate or authorizing an issue of securities just what consideration shall be given to items in the several accounts" (p. 1023).

There are under the jurisdiction of the Public Service Commission about 100 public utility corporations, all of them keeping complicated books of account.

To intimate that the Public Service Commission should have a staff sufficient to see to it that each one of these great corporations keeps its books in such a way as to accurately indicate its operation, is amazing. The Public Service Commission can prescribe forms of account. It can, to the extent of its appropriations, endeavor to see to it that these accounts are kept by the numerous companies. Even as to that, the failure of a company to keep accounts in the form prescribed would not be excused, by the fact that the Public Service Commission had failed to succeed in any of the penalty provisions of the Public Service Commissions Law, or the District Attorney had failed to put anyone in jail under the

criminal provisions of the law. Corporations do not become innocent because they are not punished for disregard of the law.

But beyond the manner or the form in which the books are to be kept, is the matter of the substance appearing in the books.

The question of the accuracy of the books as well as the question of the necessity of the payments recorded therein, depends upon the multitudinous matters which could not by any human possibility be checked by a regulating body. The honesty and accuracy of every clerk who makes an entry in any book will affect the total result. Can it be expected that the Public Service Commission, must at its peril have an inspector at the elbow of every bookkeeper in every public utility in this great city, to see that every entry he makes is accurately made? Can it be expected that the Public Service Commission must have sufficient men continuously working with the public utility companies, to see that the original entries made, are carried forward accruately in their many subsequent entries until they reach their final resting place, in the general books of account?

The appellants in order to establish this patent truth introduced the testimony of two employees of the Public Service Commission,— Mr. Mitchell, an engineer, and Mr. Howard, an accountant,— to the effect that the Commission had not ascertained, nor could they possibly ascertain nor check either the truth or falsity of the various books, items or the data underlying in these book entries (pp. 900-906, 923-937).

The case of *People ex rel. New York Railways*

Co. v. *Public Service Commission*, 223 N. Y. 373, judicially determines the purpose and scope of the Uniform System of Accounts. The court, by Judge Cuddeback, said (p. 377):

> "Section 52 provides that the public service commissions may establish a system of accounts to be used by railroad corporations or other common carriers, and prescribes the manner in which such accounts shall be kept, and may, after a hearing, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited. * * *
>
> Section 52, on which the commission relies, and which relates to the establishment of a system of accounts, *was plainly intended to make the method of accounting by these corporations uniform so that the accounts could be readily comprehended by those required to examine the same*. By establishing a system of accounts the corporations were required to show under particular heads what they had done. *It was not to regulate the management of their finances but to show what the management was*" (p. 378).

The books of the respondent were inadmissible under any rule of law nor does compliance with the Uniform System of Accounts lend any degree of sanctity to the entries therein. On this score we respectfully point out that the very uniform system which the respondent would use to verify its entries was only followed where it suited the convenience of the company. The Master so reports in his opinion as to "General Amortization" (pp. 46, 47), but attempts to excuse this dereliction by saying it was "a variation made

in good faith." By reason of this failure the court has no information as to the justice of repair accounts. The charge of "plant withdrawn from service" is put at one cent per M cubic feet, although there is no such account presented and there is no proof that any plant retired from service has not been charged to repair and maintenance accounts (p. 152).

The respondent was obligated to follow the accounting methods prescribed and not set up its judgment as against the Commission. We submit that its "good faith" in this respect was of the same character as its alleged "Good faith" in supplying a ridiculously low candle power gas and excusing itself with the explanation that it was giving something "just as good."

The trial court in the case of *Kings County Lighting Co.* v. *Newton, et al.* (supra), in the State court action adopted the correct rule, that is, that the burden of proving by clear and convincing evidence, that the statute is confiscatory is upon him who alleges it, and proof of the various book items shall be made from original sources, viz: vouchers, time sheets, daily and monthly work sheets and the other sources from which are taken the journal entries in the books of the company. This is the rule that should have been adopted in the instant case. Failure to compel the respondent to meet this burden of proof warrants, in itself, a reversal of the decree herein.

POINT X

The proof discloses that the respondent's plant was not operated in an efficient and economical manner and that gross inefficiency and mismanagement added greatly to the cost of making and distributing its gas.

The respondent is inadequately equipped and poorly designed. In many respects its equipment is antequated and the well recognized methods of efficient gas manufacture ignored. The record is replete with instances of inefficiency that borders upon deliberate neglect. The appellant Lewis in his brief submitted in the instant case has studiously analyzed the record and pointed out in Point V thereof many examples of such inefficiency and neglect.

Repairs to machinery (pp. 301, 879), use of residuals (p. 1033), improper and wasteful equipment (pp. 336, 341, 353), methods of manufacture that are extravagantly wasteful (pp. 855, 866), use of antequated hand-fired boilers (pp. 229, 289, 304-305), excessive cost of repairs (pp. 306, 307), freezing of water in the holder cups (pp. 308-309), lack of sufficient holder space for storage (p. 309), failure to properly cleanse machinery resulting in reduced production and "deferred maintenance" (p. 336), improper transmission mains, (pp. 340, 341), gas sent out of too high a temperature (p. 341), condensers, scrubbers, boilers and other auxiliary equipment below production capacity (pp. 405-410) are some of the examples of the respondent's inefficiency. We shall refrain from again analyzing the record in respect to these matters, but content ourselves with this query: Shall the respondent's items of cost, necessarily abnormally excessive under conditions of this kind, prevail to declare unconstitutional a legisla-

tive rate? The legislature had in mind, undoubtedly, a reasonably well managed and equipped plant. Are the consumers of this particular district of the city of New York to be deprived of this legislative protection because of the derelictions of the respondent company?

POINT XI

The Court and master erred in not deducting many improper items from respondent's alleged operating costs.

We shall point out seriatim many improper items that should have been excluded from operating costs by the Master and Court.

Coal Shortages — $3,956.88, *for* 1919
$687.13 *for six months*, 1929

The respondent's evidence showed that the coal used in all its operations was actually weighed by the respondent at its works; but that in entering the amounts used upon its books, the weights were disregarded, and so-called "adjustments" were made by which the amounts *as billed* were substituted upon the books for the amounts shown by the actual weights. The pretext for this substitution was a process called a "survey" or "inventory," by means of which fiction the net result at all times was to compute the amount billed as the amount actually used.

As to the item of coal, each of the years 1919 and 1920 showed that the aggregate amounts billed exceeded the amounts as weighed by very substantial amounts. The appellants contend that, in an action of this nature, the proper figures to be taken are those of the actual weights. The respondent tried to show, over the objection of the appellants, that there was a custom to ac-

cept the amounts billed as against the weights. We submit that the recognition of any such custom would open wide a door for fraudulent combination between the dealers in such commodities as coal and oil and gas companies.

The Master considered the aggregates of these shortages to be so small as to impel him, under the maxim *de minimis non curat lex* (Opinion, p. 49), to disregard them. That is to say: The amounts were too small to credit to consumers, but were not too small to credit to the gas company.

The aggregate shortages between the amounts billed and the amounts as weighed during the year 1919 were as follows (pp. 539, 540):

Boiler coal, 369 tons, at $5.034 per ton.	$1,857 55
Anthracite coal, 220.3 tons, at $8.407 per ton	1,852 87
Bituminous coal, 39.9 tons, at $6.177 per ton	246 46
Amount to be deducted	$3,956 88

The aggregate shortages between the amounts billed and the amounts weighed during 1920 were as follows (pp. 539,540):

Barley coal, 216,551 pounds = 96.67 tons, at $4.14	$400 21
Anthracite broken coal, 66,078 pounds = 29.5 tons, at $9.00	266 97
Bituminous, 6,624 pounds = 2.96 tons, at $6.74	19 95
Total amount to be deducted	$687 13

Excess of Boiler Fuel Coal —

$7,049.83 *for* 1919

$14,232.15 *for six months*, 1920

The evidence shows that the average figure for boiler fuel appearing upon Respondent's Exhibit 13 (p. 1037) for the year 1920 of $.0527 per M c. f. made, was excessive by $.015 per M c. f. made (p. 868).

Making this deduction for the year *1920*, would leave the proper figure for this item to be not more than $.0377 per M c. f. made. There is no evidence that the same results would not be equally applicable to the year *1919*.

In fact respondent's witness, Klumpp, admitted that 18.8 pounds of boiler fuel coal for 1919 was "high compared to what I would consider good efficient operations" (p. 353). But because of the addition of "boiler fuel water gas tar" the pounds of boiler fuel used in 1919 totaled 23 pounds, which Klumpp again stated was high (p. 356) although the latter tried to qualify his admissions. Taking, therefore, $.0377 as a fair cost in 1919 for boiler fuel per M c. f. made instead of $.0422, set forth on respondent's Exhibit 6, a difference of $.0045 per M c. f. made; and multiplying $.0045 by the total of M c. f. during 1919 — 1,566,628 M c. f. — amounts to $7,049.83, the amount to be deducted. In addition, a like deduction as in 1919 for boiler fuel of $.015 per M c. f. made (p. 869) Multiplying $.015 by 948,810,000 the total cubic feet made during first six months of 1920, gives *$14,232.15*, the amount to be deducted.

Oil Shortages — $2,313.78 *for* 1919

$902.92 *for six months of* 1920

Respondent's Exhibit 41 (p. 1079) shows an excess of oil billed over the amount delivered during the year 1919, aggregating 35,817 gallons. The appellants make the same contention regarding the oil shortages as we have made hereinbefore regarding the coal shortages. Complainant's Exhibit 6 (p. 1033) shows the average price of oil for the year 1919 to be $.0646 per gallon—which multiplied by 35,817 gallons gives $2,313.78, the amount to be deducted.

Complainant's Exhibit 41 (p. 1079) shows an excess of measurement over amount billed during this period, amounting to 11,329 gallons, so this item will be *credited*. Multiplying 11,329 gallons by $.0797, the average price shown on Complainant's Exhibit 13, will give $902.92, the amount to be deducted.

Excessive Repair Charges—

$33,960.54 *for* 1919

$38,980.51, *for six months*, 1920

Complainant's Exhibit 6, (p. 1033) for the year 1919, shows the item "Repair Labor and Material" to amount to $43,045.68. Page 2 of that Exhibit shows the items "Repair Mains," $3,559.11; "Repairs Services," $2,816.88; "Repairs Meters," $22,900.98; "Repairs Appliances," $227.10; "Repairs General Structures," $669.70; "Repairs Distribution Tools," $160.97—making an aggregate for the "Distribution Repairs" (on said page 2) of $30,334.74—which, added to the above item "Repair Labor and Material" (page 1, Ex. 6), $43,045.68, amounts to a total of repairs for the year 1919 of $73,380.42.

Respondent's Exhibit shows the like aggregate expenditure for repairs for the year *1918* to be $45,206.85, and for the year *1917* to be $37,991.68. Therefore, the figure for 1919 would exceed the figure for 1918 by $28,173.57, and would exceed the figure for the year 1917 by $36,378.74.

The appellants contend that this grossly excessive figure of $73,380.42 is manifestly not an average amount of yearly repairs, such as would be proper to be considered in an action of this nature, but is either deferred repairs or repairs anticipatory of future requirements; and, in either case, should be spread over an appropriate period of years so as to show an ordinary yearly average.

Respondent's witness Elsman told of extraordinary repairs made in 1919 which should have been made in prior years (pp. 306-308).

Defendant's Exhibit for identification D-24 (p. 1103), which the Master erroneously excluded, showed the yearly repairs for the years 1909-1918, both inclusive, and including the amount claimed by the respondent for the year 1919, the yearly average for the period 1909-1919, both inclusive, is *$39,119.88*. We believe that this latter average should be substituted for the extraordinary amount shown by the respondent for 1919, and the difference would leave *$33,960.54 to be deducted*.

The total 1920 repairs shown on Complainant's Exhibit is $60,462.29. For the reasons hereinbefore stated as to the 1919 repairs, we think the Court should take the average repairs for the period 1909 to June 30, 1920, which is $42,963.56

per year, or $21,481.78 for six months. Deducting this latter figure from $60,462.29, leaves $38,980.51 *the amount to be deducted.*

Excessive Unaccounted-for Gas

$74,558.77 for 1919.

$39,063.68 *for six months*, 1920.

This question was fully discussed in Point V of this brief. Any allowance in excess of 8% is unwarranted.

The difference between 17.82 per centum and 8 per centum or 9.83 per centum of the total make of 1,566,628 M. cubic feet of gas, is 153,999.53 M. cubic feet of gas; which multiplied by $.4835 (Respondent's Exhibit 6), cost per M. cubic feet, amounts to $74,558.77, *the amount to be deducted.*

Complainant's Exhibit 13 shows the "unaccounted for" at 14.83 per centum for first six months of 1920, which amount is 6.83% in excess of the 8% — the reasonable allowance for "unaccounted for" gas. Multiplying the figure of 6.83% by 948,810 M. cubic feet made during said six months gives 64,804 M. cubic feet as the excess of "unaccounted for" gas over 8%, which multiplied by $.6028 the cost of production in 1920 amounts to $39,063.68 as the amount deductible.

Auditing Expense — $6,000 *for* 1919.

$3,000 *for six months*, 1920.

Appellant's contend that the item of the yearly amount paid to the accountant or auditor, Mr. Freeman, should be deducted as an extraordinary and unnecessary expense, an expense incurred in preparation for this rate litigation, an expense that is for services in duplication of the services

performed by the regular accountant and auditor, Geunoud. The amount to be deducted was a part of the auditing expense excluded by Finding 59 of Justice Greenbaum upon the recent trial in the State Court, and is *$6,000*.

For the same reasons stated for eliminating Mr. Freeman's salary as auditor or accountant from the 1919 operating expenses, the amount of *$3,000* should be deducted from the 1920 operating expenses.

Loss in Street Lighting —

$6,458.42 *for* 1919.
$4,480.07 *for six months*, 1920

The item shown on respondent's Exhibit 6 (p. 1033) for "Municipal Street Lighting," 49,855,444 cubic feet of gas sold at 75 cents per M., amounting to $37,411.55, is charged to the City of New York upon the basis of 3,500 lamps burning 3,959 hours per lamp per year, and consuming at the rate of 3½ cubic feet of gas per lamp per hour.

This gas is not metered, and the respondent's engineers estimate that each lamp consumes 4½ cubic feet of gas per hour, instead of 3½ cubic feet. Therefore, the city is using 1 cubic foot per lamp per hour more than it pays for, and consequently the private consumers are charged with this excessive amount of the city's use (pp. 511-512). Witness Elsman, the general manager of the respondent, testified:

"Q. You think there is a loss of about a foot an hour?

A. Yes, sir, that is what my estimate is" (p. 762).

Multiplying 3,500 lamps by 3,950 hours burning, gives 13,825,000 lamp hours; which amount multiplied by 4½ cubic feet gives 62,212,500 cubic feet actually consumed by the city. Subtracting from the latter amount the 49,685,444 cubic feet billed to the city, leaves *12,527,006 cubic feet excess charged to private consumers.* Multiplying the said excess cubic feet by $.5235 (respondent's alleged cost of production and distribution per M. gas made in 1919 — respondent's Exhibit 6) gives *the amount to be deducted $6,558.42.*

We have heretofore shown that the company estimates that the city is using 1 cubic foot per lamp per hour more than it pays for, the cost of which excess should not be borne by the private consumers. For the first six months of 1920 the loss on this item would amount to *$1,480.07*, the figure to be deducted.

Uncollectible Bills —

$10,816.48 *for* 1919.

$5,542.13 *for six months*, 1920.

Complainant's Exhibit 6 (p. 1033) sets forth this item at $10,816.48. We submit that this item should have been disallowed in its entirety.

The Transportation Corporations Law of New York State (Section 63) authorizes respondent to require:

> " * * * every person to whom such corporation shall supply gas * * * for lighting any building, room or premises, to deposit with such corporation a reasonable sum of money according to the number and size of lights used or required or proposed to be used, for two calendar months by such

> person and the quantity of gas * * * necessary to supply the same, as security for the payment of the gas * * * or compensation for gas consumed * * * to become due to the corporation, * * * ”

The respondent, unless the deposit was made as required by the above section, might cut off the supply of gas to the consumer, or refuse to serve him.

> Section 65 of the Transportation Corporations Law.

The New York courts have even gone so far as to hold that a gas company may cut off the supply of gas to a consumer who neglects to pay, although he may have made a deposit as security.

> *Hewsey* v. *Queens Borough Gas Co. & Elec. Co.*, 47 Misc. 375.

Here the company is authorized by statute to obtain in advance a deposit to cover gas to be thereafter sold to the consumer. In other words, it may have its money in advance. It is a protection not ordinarily afforded other business. At least with this safeguard the burden was upon respondent of showing that it used more than ordinary diligence in its effort to collect its gas bills, and this ought to appear before any allowance is made for such item.

All that we have here is the inclusion of a sum for uncollectible bills without any competent proof showing diligence on the part of the respondent to collect the amount from its consumers. There is a lack of proof sufficient to warrant the Court in allowing any sum for this item. While, on the contrary, we think, in view of the

statute quoted, and the safeguards surrounding respondent in the sale of its gas, there ought not to be any allowance in a confiscation case for uncollectible gas bills.

Respondent has something better than a cash business. It may obtain its cash in advance and place it on deposit to await the day when it furnishes gas. It may then reimburse itself out of the consumers' money. There ought not to be any loss to the company by failure of a consumer to pay.

The amount to be deducted under this item is therefore $10,816.18. Similarly this item for the first six months of 1920 is $5,542.13 which should be deducted.

Strike-towage — $1,844.37 *for six months*, 1920.

A labor strike in March, 1920, caused respondent to pay a premium on towage for coal, amounting to $1 per ton, or an aggregate amount of $1,844.37, as shown by complainant's Exhibit 27 (p. 1045). That amount should be deducted as entirely unusual expense and disallowable for rate making purposes.

Water gas tar lost — $12,120 *for six months*, 1920.

It was the bookkeeping custom of the respondent to estimate that a given number of gallons of oil would yield a certain amount of tar as a residual. This residual tar was burned as a fuel and credited at the price of gas oil. The heavier oil received at the plant during the early part of 1920 was claimed to have clogged the pipe connections, etc., with an "emulsion," or "sludge" differing from the usual residual of tar, and which

the respondent claims to have thrown away as of no value. The amount of this "sludge" was not measured, but was merely "estimated" by the respondent's engineers who were not produced as witnesses. This "estimate" of 150,000 gallons was deducted upon the books from an amount already entered there in the credit account of the residual tar, the account being called "Residuals Produced — Credit" (pp. 217, 218, 228).

The appellants contend that the evidence regarding this item is very indefinite and uncertain, it being an arbitrary deduction of 150,000 gallons from an entry already established, upon a basis for which no original record or report appeared to have been made, nor any actual measurement taken, nor any evidence thereof by the person or persons who actually estimated that amount.

The great probability was that this residual or "sludge" was far less in amount than 150,000 gallons. When one makes a simple computation, reducing 150,000 gallons to cubic feet, by estimating 1 gallon = 231 cubic inches; 1 cubic foot = 1,728 cubic inches; 7½ gallons = 1 cubic foot; and thereupon computes the cubic space that would be occupied by 150,000 gallons, a clearer idea will be formed of the extreme improbability of any such large amount.

While this material was claimed to have been thrown away at respondent's plant as worthless, respondent's expert witness Klumpp said that he believed it would burn (p. 463).

The 150,000 gallons was deducted from the total residual credit at the aggregate amount of *$12,120*

(p. 217), which amount appellants contend should be also deducted from cost of production in 1920.

Excessive Use of Gas Oil —

$75,000 *for* 1919.

$37,500 *for six months*, 1920.

Witness Merrifield, a gas engineer of 29 years experience, testified that he was the chief gas engineer of the Public Service Commission for the First District. He was at one time plant superintendent for the Consolidated Gas Co. and the Brooklyn Union Gas Co., the two largest companies in the City of New York (pp. 855, 856).

The impartiality of his testimony is readily discernible from a reading of his expert opinion upon various matters he was called on to pass upon (pp. 856–865).

When asked whether the amount of oil used 3.6 gallons per M. cu. ft. was excessive for the quality of the gas manufactured by the respondent company his reply was that "they should have been able to produce a gas of that 535 B. T. U's in approximately *one gallon of oil less per M.*" (p. 867).

Respondent claims to have supplied a gas of 19.40 candle-power and 590.74 B. T. U.'s *tested at the works* in 1919 and 16.97 candle-power and 576.36 B. T. U.'s *tested at the works* for the first six months of 1920. The Master found that a 22 candle-power gas contains *620 B. T. U.'s or more* (p. 32). The statute provides that all tests shall be made one mile from the distributing holder. The Master found that

> "The average of the tests at the works will be higher than the average of the tests more than a mile from the works" (p. 32).

This is very evident. While no B. T. U. tests were made by the city one mile from the holders, yet the difference in the candle-power tests 19.40 at the works — 16.10 one mile distant in 1919, and 16.97 at the works — 13.99 one mile distant in 1920 (p. 32) justifies the conclusion that B. T. U. standard was correspondingly less one mile from the distributing holder and it is entirely fair to assume that the B. T. U.'s therefore did not exceed the 535 figure that Merrifield testified to should have been produced with 2.6 gallons of oil. Computing the saving upon the 3.6 gallons actually used, the conclusion is inevitable that between $75,000-$100,000 was wasted in excessive use of oil for the kind of gas made. The faulty machinery, the inefficiency of the plant, etc., discussed in Point X of this brief probably account for this loss. Correspondingly there was a loss of $37,500 — $50,000 for the first six months of 1920.

We submit a table with the foregoing deductions made from the respondent's own figures on operating expenses for 1919 and the first six months of 1920. The total cost per M of gas to this respondent was, we contend, *only $.7047 for the year 1919 and $.7897 for the first six months of 1920* and the rate of return upon the stipulated rate base of $3,300,000 for *1919 was 9.77%* and for the first six months of 1920 was 4.12%. This is neither confiscation nor capital consumption.

SUMMARY OF OPERATING COSTS WITH DEDUCTIONS CLAIMED BY DEFENDANTS FOR 1919

Calendar year 1919.

Total operating expenses, Taxes and Uncollectible bills.....	$1,121,967 53
Less cost of municipal sales..	37,618 16
Gross cost of gas supplied to commercial consumers	$1,084,349 37

Items appliable as deductions from above costs.

Shortage in delivery of coal...	$3,956 88
Excess of boiler fuel coal used over 3.77 cents per M. cubic feet made	7,049 83
Shortage in delivery of oil.....	2,313 78
Excess over average repairs...	33,960 54
Unaccounted gas above 8%	74,558 77
Auditing expenses	6,000 00
Loss sustained in Municipal street lighting of 1 cu. ft. per hour, per lamp.....	6,458 42
Uncollectible gas bills.....	10,816 48
Excessive use of oils.....	75,000 00
Total deductions	$220,114 70
Net cost of gas supplied to commercial consumers	$864,234 67
Same per M. cu. ft. sold.....	.7047

Operating revenue (Deft. Ex. 23, p. 1104)	$1,186,650 28
Adjusted net profit	$322,415 61
Rate of return on stipulated rate base of $3,300,000 with appellant's earnings as shown above	9.77%

SUMMARY OF OPERATING COSTS WITH DEDUCTIONS CLAIMED BY DEFENDANTS FOR SIX MONTHS ENDED JUNE 30, 1920

Six months ended June 30, 1920

Total operating expenses, Taxes and Uncollectible bills	$795,139 84
Less cost of Municipal sales	22,216 22
Gross cost of sales supplied to commercial consumers	$772,923 62

Items applicable as deductions from above costs.

Shortage in delivery of coal	$687 13
Coal tonnage paid on account of Harbor strike, 1920	1,844 37
Excess of boiler fuel used over 3.77 cents per M. cu. ft. made	14,232 15
Shortage in delivery of oil	902 92
Excess over average repairs	38,980 51
Water gas Tar lost, 150,000 gallons	12,120 00
Unaccounted gas above 8%	39,063 68

Auditing expenses	3,000 0
Loss sustained in Municipal St. Lighting of 1 cu. ft. per hour	4,480 0
Uncollectible bills (gas).....	5,542 1
Excessive use of oil	37,500 0
Total deductions	$158,352 9
Net cost of gas supplied to commercial consumers	$614,570 9
Same per M. cu. ft. sold.....	.789
Operating revenue (Defts. Ex. 23, p. 1104)	$750,729 4
Adjusted on stipulated rate base of $3,300,000 with appellant's earnings as shown above	4.12

This showing takes no acount of the additiona reductions in coal, labor and other material tha would have resulted from an efficient operatio of a well-equipped plant.

The gross mismanagement of the responden in unnecessarily running its machines from Jun 1919 to June 1920 without the well-recognize proper cleaning would result, according to all test mony of respondent's and appellant's witnesse in greatly increasing the amounts of such mai items as coal and oil, so that the summaries o averages shown by respondent and calle "reasonable" by the experts, are unquestion ably excessive by such amounts.

There is no reason we know of why respon ent could not have saved a substantial sum b

the use of coke for generator fuel, for in 1919 it used 22,594.80 tons of generator fuel (Complt's Ex. 6, p. 1033), and any amount at which it could have purchased coke less than $8.40 a ton paid for coal (p. 156, Ex. 2, p. 1030) would have been a substantial saving.

Then there ought to have been a saving on account of drip oil, for in respondent's Ex. 6, (p. 1033), there is set forth an item of "condensation," 279,274,156 cubic feet of gas for 1919. There should naturally have been a large number of gallons of drip oil from this gas and a corresponding credit.

The amounts of excess are indefinite and uncertain, but the burden of proof is upon the respondent, and the appellants believe that the elimination of such excesses, that is, a showing of honest and efficient management, would result in figures for both 1919 and 1920 well under the annexed figures. At least the proof offered by respondent fell far short of proving that the statute is confiscatory.

POINT XII

Reversible errors were committed in the admission and exclusion of evidence.

The most serious errors committed by the Master and not corrected by the Court below, in the admission and exclusion of evidence are:

(1) The admission of respondent's books of account and the summaries and tabulations prepared therefrom which we have discussed in Point IX of this brief.

(2) Refusal to admit in evidence the proof sustaining the findings of Mr. Justice Greenbaum in the State Court action, numbered 1 to 25, inclusive, and 31 to 52, and excluded by the Master (pp. 741 749).

(3) The entire correspondence of the respondent (through its officer Elsman) with oil companies, regarding the respondent's oil supply for the years 1919 and 1920, excluded by the Master, being Defendants' Exhibits 25 to 34, for identification, offered by appellants, to rebut the respondent's claim that it was making an honest effort to get oil at the cheapest price (p. 1104).

(4) Defendants' Exhibit D24 for identification showing respondent's (1) comparative general balance sheet for the years ending December 31, 1904, to 1916, inclusive, (2) comparative statement of operating revenues and expenses, income and surplus for the years ending December 31, 1904, to 1916, inclusive, (3) disposition of gross corporate income for the years ending December 31, 1909, to 1916, (4) detail of operating expenses for the years 1909 to 1916, inclusive, (5) tax charges and payments for the years ended December 31, 1912, to 1916, inclusive, and (6) significant operating data for the years ended December 31, 1907, to 1916, inclusive (p. 1303).

(5) Testimony offered by appellants through the witness Howard and the witness Mitchell that the appellants had not been able properly to examine the accounts and records of respondent for the purposes of the trial.

(1) The question of the admissibility of respondent's books, summaries and tabulations we have discussed fully in this brief and in our brief

in the case of *Newton et al.* v. *Consolidated Gas Co.*, now before this Court.

(2) The refusal to admit in evidence proof to sustain the findings of Mr. Justice Greenbaum in the prior suit was prejudicial error (pp. 741–739). Although the judgment roll, with the decision and findings incorporated therein, in the respondent's former litigation is part of the record in this case, it was deemed advisable, to establish in this case, by independent proof, the most important points relating particularly to the financial history of plaintiff and its predecessor company. The respondent's counsel objected to such testimony and the Master upheld him upon the ground that, as the rate base was stipulated, testimony tending to show the history and capitalization of plaintiff or its predecessor company was irrelevant and immaterial (pp. 741 749). We submit that the Master's ruling in this respect was error. The Master has allowed the respondent to show its capitalization and also received testimony to the effect that in order that the company might borrow money it would be necessary to show it had earnings at least equal to twice its bonded indebtedness (witness Gardner, pp. 628-672; witness Hopson, pp. 238 267). As long as respondent was allowed to introduce testimony of the aforesaid character, appellants surely should have been allowed to offer testimony tending to show that part at least of the bonded indebtedness of this company did not represent any additions to its fixed capital; that, in view of the stipulated valuation of respondent's property now being

$3,300,000, and the outstanding bonds now aggregating $3,178,000, the respondent would be earning twice the interest of its bonds under the statutory rate, if its bonds had been restricted in issue to one-half the value of its property; and that the amounts paid in interest and dividends upon excessive bond and stock issues in the past should be viewed and considered by the Court in determining whether or not the statutory rate should be deemed confiscatory.

(3) Upon the question of the oil correspondence, Mr. Elsman produced four contracts under which the company procured its oil during 1919 and 1920, complainant's exhibits 19, 20, 21, and 22 (pp. 1038-1042). The witness was permitted to expatiate broadly upon his efforts to obtain oil at the best price (pp. 268-273). The appellants were undoubtedly entitled to rebut this testimony by whatever competent evidence they had available and manifestly they were entitled to such rebuttal as might appear in the written correspondence of Mr. Elsman which furnished *the only records* of his endeavors regarding other bidders. It is contended by the appellants that *the whole* of that correspondence indicates that his efforts were *pro forma* and a pretense; that the propositions he made therein were conditioned unnecessarily so as to prevent or discourage acceptance; and that the replies he received indicated that the respondent either could have obtained oil at more favorable prices, or, at least, that the sole dependence was not upon the tender mercies of the Standard Oil Company.

These perfunctory and feeble activities are to be viewed also in the light of the situation of the

rate-litigation of the respondent then pending and of the present litigation.

And as against the respondent's contention that the present oil prices may continue or may increase, that correspondence — every word of every page of it — together with all the other evidence of the management or mismanagement of the plant and business are highly important as bearing upon the appellants' contention that the respondent has not established beyond a fair or reasonable doubt, that, *under efficient and economical management*, as well as owing to the general trend of prices upon a declining abnormal period, the future prices will not, or cannot with ordinary diligence and prudence be made to progressively decrease.

The effort of the appellants to put that correspondence in evidence involved a discussion with the Special Master of much greater space upon the record, and of course, of much greater time, than the correspondence would have taken as an exhibit. The Court's attention is called respectfully to this discussion and to the manner in which the Special Master finally allowed some letters in evidence and then practically destroyed the whole effect and value thereof by insisting that the other letters should be lumped or summarized (pp. 814-825, 917-923).

(4) Defendants' Exhibit D24 (p. 1103) fully described above was clearly admissible to show the past experiences of the respondent and it was reversible error to exclude it. Likewise the testimony of witnesses Howard and Mitchell upon the question of the respondent's opportunity to examine the accounts and records of the respondent

was admissible. Such an examination is the *sine qua non* of appellants' defense in this action. If they were deprived of this privilege, they did not receive a fair trial. Testimony on this point was vital.

CONCLUSION

The decree herein should be reversed and the complaint dismissed with costs to the appellants because:

(a) A prior determination of the issues, denying the respondent equitable relief, under identical conditions, was *res adjudicata.*

(b) The respondent failed to establish beyond a doubt the unconstitutionality of the statute assailed.

(c) The respondent never experimented with the rate complained of, because an injunction was obtained restraining its enforcement before it was actually put into operation.

(d) The respondent came into equity with "unclean hands." It had persistently, flagrantly and deliberately violated the statute it asked to have declared unconstitutional.

(e) The Court and Master allowed excessive amounts for "unaccounted for gas."

(f) An item of $1,600,000 added by the Master to the stipulated rate base of $3,300,000 was declared by the Court to be "immaterial."

(g) The statute should not be declared confiscatory upon the financial showing obtained in an abnormal, post wartime period of one year and six months, disregarding profits in all prior years and what the experience of the respondent would be during a natural, normal future.

(h) There is such a nonjoinder of parties defendant as to make a determination of the confiscatory character of the statute impossible of determination.

(i) The books of the respondent and the tabulations compiled from them were improperly admitted in evidence.

(j) The respondent's plant was not operated in an efficient and economical manner. Gross inefficiency and mismanagement added greatly to the fair and reasonable cost of making and distributing gas.

(k) The Court and Master failed to deduct many improper items from the respondent's alleged operating costs. If these deductions had been made the 80-cent rate could not have been found confiscatory, even during the abnormal period taken.

(l) Reversible errors were committed in the admission and exclusion of evidence.

Dated, October 10, 1921.

Respectfully submitted,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.
No. 295.

CHARLES D. NEWTON, as Attorney General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District,

Appellants,

against

KINGS COUNTY LIGHTING COMPANY,

Appellee.

Direct Appeal from the United States District Court for the Southern District of New York.

BRIEF AND ARGUMENT FOR APPELLEE.

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of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1921.

No. 295.

CHARLES D. NEWTON, as Attorney General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District,

Appellants,

against

KINGS COUNTY LIGHTING COMPANY,

Appellee.

Direct appeal from the United States District Court for the Southern District of New York.

BRIEF AND ARGUMENT FOR APPELLEE.

Harry E. Lewis, as District Attorney of the County of Kings, was made a party defendant in this cause. He defaulted in appearance and pleading (p. 24) and is not an appellant (pp. 78-92). Nevertheless the Corporation Counsel of the City of New York has filed a brief on this appeal for said Harry E. Lewis, as District Attorney, urging that the decree herein be reversed. The appellee objects to the court's considering said brief or permitting counsel for said Lewis to be heard upon the argument of this appeal (*Supreme Court Rules* 21, 35; *The Gray Jacket*, 5 Wall. 370; *Northern Securities Co.* v. *U. S.*, 191 U. S. 555).

Alfred M. Barrett, constituting the Public Service Commission of the State of New York for the First District, duly appealed from the decree. The Public Service Commission of the State of New York for the First District was abolished by chapter 134 of the laws of 1921, which became a law March 30, 1921, and the jurisdiction theretofore exercised by said Public Service Commission for the First District was conferred by said chapter upon the Public Service Commission of the State of New York composed of five commissioners subsequently appointed by the Governor. The new Public Service Commission has not been substituted as appellant in place of said Barrett, and Charles D. Newton, as Attorney General of the State of New York, remains the sole appellant.

The brief filed by counsel for the appellant Newton does not contain a specification of the errors relied upon, stating as particularly as may be in what the decree is alleged to be erroneous, as required by Rule 21, and in consequence counsel for said appellant will not be heard except at the request of the court, and the court in any event can only notice a "plain error" if any such exists (*Supreme Court Rules* 21, 35; *Portland Co. v. U. S.*, 15 Wall 1; *Milwaukee v. S. & S. Co.*, 91 Fed. 858; *Columbia Heights Realty Co. v. Rudolph*, 217 U. S. 547; *Briscoe v. District of Columbia*, 221 U. S. 547; *Stevenson v. Barbour*, 140 U. S. 48).

Statement of Case.

The appellee is obliged to make a statement of the case since the brief filed by counsel for the appellant Newton does not contain a statement thereof, as required by Rule 21.

This is an appeal by a defendant below from the District Court for the Southern District of New York direct to this court under section 238 of the Act of March 3, 1911, (ch. 231, The Judicial Code) to correct and reverse a decree of that court filed October 28th,

1920. The decree declares unconstitutional and void, and restrains the enforcement of, chapter 125 of the laws of 1906 and chapter 604 of the laws of 1916 of the State of New York in so far as said statutes, or either of them, prescribe a rate or price to be charged by appellee, plaintiff below, for gas furnished by it, with the usual provision for a modification or vacation of the injunction on the application of the defendants, if it can be shown that by change in conditions the statutory rate is no longer confiscatory.

Chapter 125 of the laws of 1906 (the full text of which is printed in the appendix hereto) fixed the maximum price of illuminating gas in the thirtieth ward and after January 1st, 1910, in the thirty-first ward of the borough of Brooklyn, city of New York, at $1. per one thousand cubic feet. This act was so amended by chapter 604 of the laws of 1916 (the full text of which is also printed in the appendix hereto) as to fix the maximum price of gas in said wards from and after July 1st, 1916, at 80 cents per thousand cubic feet. Appellee supplies gas for public and private use in the thirtieth ward, and to a small extent in the thirty-first ward, of said borough of Brooklyn. Appellee brought this suit in May, 1920, against the officers charged with the enforcement of the statutes alleging that the maximum rate so prescribed was confiscatory and the statutes in contravention of the Fourteenth Amendment to the Constitution of the United States. The testimony was taken before a special master upon whose report and the testimony so taken the decree appealed from was made.

Property used in the public service

Appellee manufactures carburetted water gas and is the owner of a manufacturing works with five gas-making machines of a rated capacity of 9,600,000 cubic feet of gas per day, and whose actual working capacity under normal conditions is about 7,250,000 cubic feet

per day. Its gas holders, having a storage capacity of 2,500,000 cubic feet, are connected with its works by a twenty inch high pressure transmission main, one and one-half miles in length. Appellee has approximately 200 miles of gas mains laid in the streets of the territory, and on July 1st, 1920, had installed on the premises of consumers 38,956 meters, connected with its mains by approximately 20,200 service pipes. Its mains were also connected with approximately 3,500 street lamps maintained by the city of New York, to which appellee furnished gas for street lighting. The territory served by appellee is a suburban community still in the process of development for residential purposes, with a present population of approximately 250,000. Appellee alleged that the fair value of its said plant and property employed in the public service was at least $6,000,000. No proof of value was given at the trial, but the defendants conceded that the fair value of the plant and property for the purpose of the case was at least $3,300,000 (pp. 605-611).

Cost of producing and distributing gas

To show the confiscatory character of the statute, appellee proved the expense or cost of manufacturing and distributing gas in the calendar year 1919 and the first six months of 1920. The proof showed that it had cost the appellee 86.01 cents per one thousand cubic feet for the gas manufactured and sold in 1919 (plaintiff's exhibits 2 and 6, pp. 1029-1033), and 97.3 cents per thousand cubic feet for the gas manufactured and sold in the six months ended June 30th, 1920 (plaintiff's exhibits 12 and 13, pp. 1034-1037). The Master found that the quantities of material used and the prices paid by appellee were reasonable and necessary, and the court found that "it cost plaintiff and would have cost any other well operated maker of gas oil gas at least 84 cents to furnish one thousand cubic feet of gas in the year 1919, and at least 96 cents to do the same

thing in 1920" (p. 74), and the Master's report as confirmed by the court contains the additional finding:

> "38. The evidence adduced before me affords no reasonable grounds for expecting that the price of materials or the wages paid to labor in connection with the production and distribution of gas will be reduced during the last few months of 1920 or during the year 1921. On the contrary, the evidence shows that the complainant during at least the second half of the calendar year 1920 will be required to pay substantially higher prices for the materials used in the production and distribution of gas than during the calendar year 1919 or the six months ending June 30, 1920, and that its labor costs for the second half of the calendar year 1920 will be somewhat higher than they were during the calendar year 1919 and the six months ending June 30, 1920."

ARGUMENT.

In this case appellee availed itself of its constitutional right, now established by a long line of decisions, to test as a judicial question the repugnancy of the statutory rate to the constitution. The proof showed that the bare operating costs were in excess of the statutory rate at the date of the decree and had been for a period of more than eighteen months. It was unnecessary to establish the full value of the plant and property used in the public service, appellee accepting for the purposes of the case a valuation of at least $3,300,000, conceded by the defendants. In the circumstances the court would not even pass upon the question as to what was a reasonable rate of return. Few of the questions ordinarily arising in a case of this character are present in this case and appellee is not called upon to review the authorities in the entire field of rate regulation. Our purpose will be to present in the points following as succinctly as possible appellee's answers to the contentions of appellant.

POINTS.

I.

The cost of manufacturing and distributing gas was established by competent evidence.

The appellee is a public service corporation and is under the jurisdiction of the Public Service Commission created by chapter 429 of the laws of 1907 now chapter 48 of the Consolidated Laws of the State of New York (chap. 480, laws 1910). The commission is authorized to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations (subd. 4, §66). The commission on December 8, 1908, made an order promulgating a uniform system of accounts for gas corporations, the requirements of which have the force of law, as determined by the state courts (*People ex rel. Kings County Lighting Co.* v. *Straus*, 178 App. Div. 840, 842) The uniform system of accounts promulgated by the Public Service Commission was received in evidence in this cause (plaintiff's exhibit 1) and is printed in full in the record (pp. 952 *et seq.*). The order of the commission promulgating the system reads:

> "On and after January 1, 1909, every gas corporation shall keep upon its books the accounts prescribed or defined in the hereto annexed schedules, marked 'Schedule A' and 'Schedule B' so far as the said accounts are pertinent to the facts and circumstances of said corporation."

Schedule B provides for five general expense accounts, as follows: production expenses, distribution expenses, street lighting expenses, commercial expenses and general and miscellaneous expenses. Under each of these heads are a number of sub-accounts wherein the expenses are to be classified in detail. Schedule A pro-

vides for a floating capital account for materials and supplies. A gas corporation is obliged to charge to this account the cost of all materials and supplies purchased. When materials are taken out of the materials and supplies account, they are credited thereto at cost and charged to the appropriate expense account. In this way the cost to the company of the material used in each department of its business appears with uniformity each year not only for a particular company, but for all companies maintaining the uniform system of accounts, under the appropriate head in the expense account. Every gas corporation is required to render an annual report to the Public Service Commission showing, among other things, its receipts and expenses during the year (subd. 6, §66).

The object and purpose of the uniform system of accounts authorized by the Public Service Commissions Law of New York and prescribed by the Public Service Commission was the same as that authorized by section 20 of the Act to Regulate Commerce and prescribed by the Interstate Commerce Commission, viz., to furnish full and accurate information as to the expenditures and business methods of the corporations subject to the act,—to display the pertinent financial operations of the company and throw light upon its present condition. (*Kansas City Ry. Co.* v. *U. S.*, 231 U. S. 423, 440; *Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 211; *People ex rel. N. Y. R. Co.* v. *Pub. Ser. Comm.* 223 N. Y. 373, 378). Appellee established by the testimony of its auditor, who had been in charge of the books for the period in question, that its books had been kept according to the uniform system of accounts and the books so kept were received in evidence (pp. 117-174). The auditor described in minute detail the method of operation and the manner in which the facts appearing in the books were obtained and the entries made. The contents of the books so far as they show the operating expenses for the year 1919 were correctly transcribed by the auditor and appear upon exhibit 2 (p. 154). The

same information for the same year is classified in a slightly different form on plaintiff's exhibit 6 (pp. 154-155, 191). A similar statement taken from the books for the first six months of 1920 was received (plaintiff's exhibit No. 12). These expenses are likewise shown in a slightly different form on plaintiff's exhibit 13 (p. 196).

In addition to the testimony of its auditor, appellee established the correctness of its books by the testimony of Howard C. Hobson, certified public accountant, who made an audit of the books for the years 1919 and 1920. The witness testified that the books had been kept according to the system promulgated by the Public Service Commission and that the transcripts showing the operating expenses for 1919 and 1920 contained in plaintiff's exhibits 2, 6, 12 and 13 were correct (pp. 238, 244). The witness was peculiarly qualified as he had been an accountant in the employ of the Public Service Commission for a number of years, and his testimony reveals the merit of the uniform system of accounts and the necessity of keeping accounts in the way provided in order properly to show the expenses incurred by a gas corporation in the supply of gas.

The books so received in evidence showed in terms of dollars and cents the amounts expended by the appellee in the production and distribution of gas. The books of themselves might not be competent to establish the reasonableness of the prices paid, but they certainly were competent evidence to show the expenditures made by the appellee, based upon the prices of materials for the quantities used, and the amounts paid for labor and services according to the salary and wages paid for the respective periods of employment. Appellee supplied proof as to the reasonableness of prices paid for material and wages for labor and service independently of the books. It also established that the quantities of material used and the time of labor and other employees were reasonable and necessary. Mr. Elsman, vice-presi-

dent of the company, was in charge of the purchase of material and the employment of labor. Gas oil, the principal material used, was purchased in the open market upon the solicitation of bids from all dealers in the commodity and the contracts made were the best obtainable (pp. 268-273). Likewise, generator coal and boiler fuel were purchased by Mr. Elsman in the open market and contracts made only after inviting bids from all responsible dealers (pp. 274-292). Mr. Elsman supervised the employment of labor and the company paid not more than the prevailing rate of wages in the community (pp. 293-299). The witness is experienced in the management of gas plants, and he testified that the business of the company was carried on with the smallest possible number of employees.

Appellee called to the stand three competent witnesses, qualified by long experience in the management of gas corporations, who were familiar with prices of materials and labor and expenses necessarily incurred in the manufacture and distribution of gas. It submitted to each of these three witnesses while on the witness stand statements of its expenses in the years 1919 and 1920 in the manufacture and distribution of gas, and each one of them testified that the expenses so appearing were reasonable and necessary in the manufacture and distribution of gas of the quality supplied by appellee. One of the witnesses, John B. Klumpp, for many years engaged in supervising the operations of thirty gas plants operated in forty cities (p. 234) testified that the quantities of coal and oil used by appellee were reasonable and necessary (p. 352) and that all the expenses were reasonable and in keeping with similar expenses incurred in plants operated by the witness (p. 355). Alton S. Miller, another witness, who had over thirty years' experience in the management and operation of gas plants (pp. 370-1), testified that the quantities of coal and oil used by the company in the eighteen months ended June 30, 1920, were low;

that the results of operations were very good; and that the expenses taken as a whole were very low (pp. 381, 2). Robert M. Searle, who had been engaged in the gas business since 1886, testified that the quantities of material used in 1919 and 1920 showed excellent management, and that the expenses were reasonable in amount and necessary, in his opinion (pp. 428-9).

The defendants did not controvert the testimony adduced by the appellee with respect to the reasonableness of the expenses incurred by it. On the contrary, Mr. Merrifield, the chief gas engineer in the employ of the defendant, Public Service Commission, gave testimony to the effect that appellee's expenditures as they appear upon the exhibits in evidence were reasonable and necessary. He testified that the quantities of generator coal and boiler fuel were reasonable and necessary (pp. 857-9); also that the quantity of oil used per one thousand cubic feet of gas made was reasonable and what he would expect (pp. 866, 7, 8). The amount expended for repairs in the opinion of the witness was reasonable (p. 861). The expenditures for gas-making labor he pronounced reasonable and necessary (pp. 859-60, 869, 870).

We submit that the appellee proved the cost of manufacturing and distributing gas in the only way that such cost could reasonably be established. The books were used to establish the actual expenditures of appellee. The reasonableness of the prices paid was established independently of the books and by competent oral testimony of qualified witnesses. Gas has been manufactured for approximately one hundred years, and carburetted water gas, like that manufactured by appellee, for more than thirty years. The experience gained in the industry has enabled those familiar with it to state the number of gallons of oil and the pounds of fuel that are reasonably necessary to produce a thousand cubic feet of gas. This experience has also enabled those familiar with the industry to state the number of la-

borers and the hours of labor that are necessary in the production of gas. Thus, when appellee established that the quantities used by it of material and the number of days of labor employed were what would reasonably be expected, and that the prices paid for material were the lowest that could be obtained, and the wages paid to labor was the prevailing rate, it established the fact in issue, to-wit, the cost per one thousand cubic feet of manufacturing and distributing gas.

The law required appellee to keep the books in question and to keep them fairly and accurately, and in the absence of evidence to the contrary, it must be presumed that they were so kept.

II.

There were no improper items included in appellee's operating expenses, and appellant's claims that deductions should be made from such operating expenses are not supported by the evidence.

Appellant takes up, under point XI of his brief, various items which he claims were improperly included in appellee's operating expenses and which he contends should have been disallowed by the court. In calling attention to the fact, as appellee has done under the previous point, that all the witnesses examined testified that the quantities of material used and the amount of labor employed were reasonably necessary in the production and distribution of the gas furnished by it, appellee has perhaps made sufficient answer to the various claims made by appellant with respect to alleged improper items included in operating expenses. Nevertheless, appellee will here answer *seriatim* the several claims made by appellant under said point XI (appellant's brief, pages 79-95).

Coal and oil shortages: Appellee's expenditures for generator coal, boiler fuel and gas oil in 1919 and the first six months of 1920 were (plaintiff's exhibits 6 and 13):

1919, generator coal and boiler fuel ...	$304,711.76
1920, " " " " " ...	193,345.48
1919, gas oil	347,171.13
1920, "	273,668.40
Total	$1,118,896.77

Appellant contends that these expenditures should be reduced by sums aggregating $7,860.71, on the claim that appellee accepted and charged into operating expenses

the quantities of coal and oil according to the weights and measurements of the sellers, and not according to its own weights and measurements (appellant's brief, pp. 79-82). It will be observed that the variation is negligible, amounting to about three-fourths of one per cent in terms of money. It is a fact that appellee accepted the railroad weights of coal and the dealers' measurements of oil. The oil contracts (plaintiff's exhibits 19, 20, 21 and 22) provided that the loading of the oil was to be certified to by a representative of the New York Produce Exchange, and the coal contracts (plaintiff's exhibits 23 et seq.) provided that the railroad scales weights shall govern all line deliveries, and loading port weights taken by railroad scales govern in case of delivery by water. Nevertheless, on receipt appellee weighed the coal in three ton lots and measured the oil in the storage tanks (pp. 539, 546). The variation in coal weights might well be accounted for by the fact that in one instance the coal was weighed in 50-ton car-load lots and in the other in lots of three tons. The variation in the measurements in the oil tanks might well be due to the variation in temperature, causing an expansion or contraction in quantity. In any event the variation was so slight as not to warrant a claim for adjustment. Every purchaser of coal in car-load lots agrees to accept railroad weights. In the case of oil the reliability of measurement was assured by the fact that the loading and measurement was certified to by an independent party, the New York Produce Exchange.

Boiler coal: Appellant contends that there was an excessive use of boiler coal and that $7,049.83 should be deducted from the operating expenses for 1919 and $14,232.15 from the expenses for six months ended June 30, 1920(appellant's brief pp.81-83). Boiler coal cost appellee 4.22 cents per thousand cubic feet of gas made in 1919 and 5.27 cents in 1920. (plaintiff's exhibits 6 and 13). It is contended that the cost in each period should have been 3.77

cents per thousand cubic feet of gas made. The only basis for this claimed deduction is that defendant's witness Merrifield expressed the opinion that the unit cost of 5.27 cents in 1920 was high by 1.5 cents per thousand (p. 869). He said, however, that the price of $4.84 per ton paid by appellee indicated to him that the coal was not of good quality. In expressing his opinion that the cost per unit was high, the witness admitted that he failed to take into consideration the fact that the manufacturing facilities in 1920 were overtaxed, due to an excessive demand for gas, and that the machines could not be operated under those conditions as efficiently as otherwise. The witness did not take into account that plaintiff's boiler fuel was required to produce the steam power necessary to send the gas at high pressure to the holders located 1 1/2 miles from the manufacturing works, which is not ordinarily the case (pp. 875-6). The defendants' witness gave no testimony whatsoever that the cost of 4.22 cents in 1919 was excessive, but appellant argues nevertheless that the cost should be reduced by 0.45 cents per thousand cubic feet. Appellee's three witnesses all testified, as pointed out elsewhere in this brief, that the quantity of boiler fuel was reasonable in both 1919 and 1920. Mr. Klumpp, appellee's witness, (pp. 353-6) explains the reason for a greater quantity of boiler fuel being used in 1920, due to the fact that the capacity of the plant was taxed and the gas had to be pumped to outlying holders. Appellant seems to consider that the operating expenses should be reduced to correspond with the opinion of defendant's witness expressed on direct examination, without regard to the qualifications made by him in his cross-examination and without any regard at all being paid to the overwhelming weight of evidence as to the reasonableness of these quantities, as testified to by appellee's three witnesses.

Repair expenses: Appellee's total expense for repair labor and material in 1919 was $73,380.42 and for the first six months of 1920, $60,462.29. Appellant contends that the repair expense in 1919 was excessive by $33,960.54 and in 1920, by $38,980.51, but points to no testimony supporting this claim (appellant's brief pp. 82-84). All the witnesses testified that the expense for repairs for the respective periods was reasonable and necessary. Appellant has taken the aggregate of the expenses for repairs in the 10 year period 1909 to 1918, which shows that the average was $39,492.88 per year, and he would have the court accept this yearly average as the proper amount for repairs in 1919. There are several answers to this, the most obvious of which is that in the period appellee's plant had trebled in size. In 1909 its sales of gas amounted to 520,671,000 cubic feet (defendant's exhibit D 24); in 1919 to 1,279,845,244 cubic feet (plaintiff's exhibit 6); and for the first six months of 1920 to 808,087,058 cubic feet (plaintiff's exhibit 13). Another answer is that the cost of repair material and labor in 1919 was much higher than in prior years. The very basis of the action was that a new level of costs had been reached, making it impossible to manufacture gas for 80 cents per thousand cubic feet. Appellant's contentions with respect to repair expenses, cannot be reconciled with the argument made elsewhere in his brief, where he points out that costs in 1919 and 1920 soared to levels never before reached (appellant's brief pp. 50, 51). Appellant seeks to have the repair expenses for 1920 reduced to the average of the 11-year period preceding, and appellee makes the same answer to this contention as to the like contention for 1919.

Unaccounted for gas: The court held that 15 per cent of the registered make for "unaccounted for" was not excessive. Appellant contends for 8 per cent for "unaccounted for" and asks that the operating expenses be reduced accordingly. Plaintiff's exhibit 52, (p. 1087), shows the "unaccounted for" of fifteen gas companies operating in the state of New York in the years 1918 and

1919. The "unaccounted for" of these companies ranged from 10.7 per cent to 32.5 per cent. Defendant's exhibit D-1 (p. 1088) shows the "unaccounted for" of various gas companies operating in the city of New York in the years 1917, 1918 and 1919. There are four companies listed—Newtown Gas Company, Woodhaven Gas Light Company, Richmond Hill and Queens County Gas Company and Jamaica Gas Light Company—each of whose "unaccounted for" is stated at 8 per cent in each of the three years. This uniformity is of itself significant. Appellant argues that the 8 per cent of these four companies is controlling and should be used in this case. (appellant's brief, pp. 39-40). Appellant, we fear purposely, omits to mention that when exhibit D-1, showing said 8 percent for the four companies in the three years, was received in evidence, a concession was made by the defendants that that percentage was arbitrary and represented nothing so far as actual "unaccounted for" was concerned. The record shows (pp. 599-600):

> "Mr. Moran (plaintiff's counsel): "But I want the further admission from the defendants that in the case of Newtown Gas Company, Woodhaven Gas Light Company, Richmond Hill and Queens County Gas Company and Jamaica Gas Light Company, which report 8 per cent, each one of them in each of the three years,—just exactly 8 per cent of every item—that that is simply an arbitrary figure and does not represent any actual unaccounted for."
>
> Mr. Hill (defendants' counsel): The representative of the attorney general so concedes.
>
> Mr. Moran: Those companies being subsidiaries of the Brooklyn Union Gas Company, and that figure is simply adopted to get at their accountings between the companies of the gas being manufactured and supplied by the parent

company to these subsidiary companies, and that is the figure they used for the purpose."

Four witnesses testified on the subject of "unaccounted for"—three called by appellee and one by the defendants. Mr. Klumpp's testimony on the subject will be found at pages 360-365. He said that there was no standard by which to determine the unavoidable amount of "unaccounted for" of any company (p. 363). He said that if "unaccounted for" exceeded 15% it would be cause for investigation but he would not say that it could be corrected (pp. 364-5).

Mr. Miller, who had over thirty years' experience in the gas business covered the subject exhaustively (pp. 383-395). He said that appellee's "unaccounted for" did not indicate negligence or inefficiency in management (pp. 393 and 394).

Mr. Searle, who had over twenty-five years' experience, likewise testified upon the subject (pp. 429-432). He said that percentages were unreliable in that one company's percentage might be low due to having a few large consumers (p. 429). He gave various causes of "unaccounted for" and said that appellee's "unaccounted for" was not attributable to negligence or inefficiency (p. 431).

More important still is the testimony given by Mr. Merrifield, chief gas engineer of the defendant, Public Service Commission. Mr. Merrifield said that if he were in charge of the company and its "unaccounted for" exceeded 12 per cent, he would not feel comfortable (p. 885). When asked on cross-examination what he would do if it were above 12 per cent, he said he would search for leaks, test his meters, and generally examine the situation. When asked what he would do if it were still over 12 per cent he said he would "think up some other scheme." (p. 889).

The testimony of the several witnesses shows that "unaccounted for" is due to the following causes:

slow registration of consumers' meters; condensation of vapors in the gas due to falling temperature; leakage in the mains and services; contraction in volume due to the differences between the temperature of the gas as it is measured at the station meters and at the consumers' meters, and inaccuracy of estimate of the amount used in street lamps. The percentage of gas "unaccounted for" through the several causes is greater where the mileage of mains is greater in relation to consumption; it is greater when the meters are located in cold cellars of private houses: the percentage will be greater where all the gas is transmitted under high pressure, which tends to increase the condensation. "Unaccounted for" is also dependent upon soil conditions. The sandy soil of the district served by appellee tends to permit gas to escape freely from leaks in the mains and services, which does not occur in the more compact soil of a clay formation. Depending upon so many varying factors which change with different conditions surrounding the distribution of gas in the different localities, it is plain to see that there can be no standard by which to measure the unavoidable amount of "unaccounted for" gas of any company.

Unless appellee's "unaccounted for" is due to inefficiency or bad management amounting to negligence, it cannot be termed excessive or unreasonable. There is not one scintilla of evidence in the record that the "unaccounted for" is due to negligence or inefficiency, and there is no basis whatsoever for the claims made by appellant.

Defendant's witness, as before pointed out, admitted that 12 per cent "unaccounted for" was to be expected and even when it went beyond that he was not sure that it could be avoided.

Auditing expense: Appellee expended yearly $6000 for the services of a supervising auditor and appellant contends that this was not warranted. Appellee does a

gross business of over $1,000,000 per year. Its revenues and expenditures are handled by a multitude of employees. Common, ordinary prudence requires that an independent auditor check these expenditures annually (p. 219). No reason is given for excluding the item, except the mere assertion of appellant's counsel.

Street lighting: Appellee furnishes gas to 3,500 street lamps maintained by the city. Gas so supplied is not metered, but the amount furnished is estimated on the basis that each lamp consumes 3½ cubic feet of gas per hour. The city will not contract on any other basis. It is believed that in the course of a year, these street lamps will consume more than 3½ cubic feet per hour, possibly 4 and in some cases 4½ cubic feet per hour. Appellant contends that this is a loss which should not be absorbed in operating expenses. Appellee's answer is that it is an incident of the business that appellee furnish gas to the city of New York at 75 cents per thousand cubic feet, pursuant to chapter 736 of the laws of 1905. It is impracticable to meter the gas furnished to street lamps. The burden of the loss must be absorbed in the general business.

Uncollectible bills: Appellee's operating expenses are burdened with less than 1 cent per thousand cubic feet of gas sold, for uncollectible bills. It is argued by appellant that there should be no uncollectible bills inasmuch as appellee may require from each consumer a deposit as security for the payment of the bill. In the conduct of a business, even under a statute permitting a deposit as security for payment, it has been found that there is a loss due to uncollectible bills. The great expense of requiring a deposit from each consumer would more than offset the trivial losses sustained. When consumers establish a credit with appellee gas is furnished without the security of a deposit. Some consume gas in excess of the amount deposited. With 40,000 consumers, it is not practicable to discontinue ser-

vice the instant the bill exceeds the amount of the deposit, nor is it practicable to require a deposit from every person. It is submitted that a gas business of the magnitude of that conducted by appellee cannot be carried on with losses for uncollectible bills amounting to less than 1 cent per one thousand cubic feet of gas sold.

Strike towage: Appellee was obliged to pay $1,844.37 in 1920 to secure towage of coal on account of a labor strike. Appellant argues that this was an unusual expense and should be disallowed. It was unusual in the sense that under ordinary circumstances it would not be incurred, but there was a labor strike and appellee found it necessary to pay a premium amounting to $1. per ton in order to get its coal delivered to its plant. If not chargeable to operating expenses, we inquire, how would the expense be met?

Water-gas tar: Appellant contends that $12,120. should be deducted from appellee's operating expenses for 1920 on account of the loss of water-gas tar. In the manufacture of gas there is a residual known as water-gas tar. This water-gas tar is collected and burned under the boilers and takes the place of boiler fuel. In order to show the cost of making gas there is credited to the general production expenses the estimated value of the water-gas tar, and the same is charged to boiler fuel. Due to the inferior grade of gas-oil delivered to appellee in 1920, it was found that the residual was not entirely water-gas tar. A considerable portion of it turned out to be "sludge" and not usable for boiler fuel. The production expenses therefore could not be credited with the same amount for water-gas tar as when a good quality of gas-oil was delivered, and by the same token, boiler fuel could not be charged with as much for water-gas tar. There was less water-gas tar both as a residual and for boiler fuel purposes. Appellee accordingly reduced the credit to production

scribed by calling it mud than calling it oil." He further testified:

> "Q. What do you say as to whether they should have used 3.6 gallons of the kind of oil which they had there for April, May and June?
>
> A. Now, the oil that they used subsequent to April, I don't know what its b. t. u. value is or was. But on the assumption that the— if they had continued using the oil that they had in the early months of the year they should have been able to produce a gas of that 535 b. t. u.'s on approximately one gallon of oil less per M. I don't know either by analysis or by experience what the b. t. u. content of this oil was, or whether 2.6 gallons would produce a gas of this kind." (pp. 866, 867).

As pointed out in the previous point, the four experts, including Mr. Merrifield, testified that the quantity of oil used by appellee in the manufacture of gas in 1919 and 1920 was reasonable and what would be expected.

Appellant makes the general charge that appellee's plant is inadequately equipped and poorly designed; that the management has been inefficient and wasteful (appellant's brief, p. 78). The testimony does not sustain the charge but on the contrary the experts all testified that appellee's plant was properly designed and was adequate for its purposes, except that due to the unprecedented increase in the consumption of gas in the winter of 1919-20, its capacity was overtaxed. (pp. 404-5, 415, 481). A severe winter coupled with the high price of coal and the difficulties obtaining in securing deliveries of coal for domestic uses, caused appellee's consumers to use an unprecedented quantity of gas. The demand on appellee's plant increased more than 35% in a single year (p. 302). Appellee had been unable to finance additions and extensions to its plant on account of the confiscatory rate to which

and reduced the charge to boiler fuel by the amount of "sludge" that developed. There was no increase in expenses or loss in the sense attempted to be contended by appellant. The inferior gas oil received did not produce as much water-gas tar residual for fuel purposes as a good quality of oil would have produced. The result is reflected in appellee's operating expenses of course. The oil dealer did not guarantee the quality of the oil at this period. It was a matter of common knowledge that the oil delivered was of poor quality and appellee was satisfied to get any oil to keep its plant going.

The quantities of gas-oil used: Appellant contends (appellant's brief, pages 90-91), that there should be a deduction from the operating expenses in 1919 of $75,000 and for the first six months of 1920 of $37,500. This claim is predicated upon the assumption that appellee used one gallon of oil more per thousand cubic feet than was necessary to manufacture gas. Appellee used an average of 3.43 gallons per thousand cubic feet of gas made in 1919 (plaintiff's exhibit 6) and 3.6 gallons in 1920 (plaintiff's exhibit 13). Appellant cites the testimony of Mr. Merrifield, Chief Gas Engineer for the Public Service Commission at page 867, in support of his claim that 2.6 gallons were sufficient to manufacture one thousand cubic feet of gas of the quality manufactured by appellee. The testimony does not support the contention. He testified that 3.6 gallons was the quantity necessary to produce the quality of gas made by the appellee in 1919 and in the first four months of 1920 (p. 866). In 1919 and the first four months of 1920 appellee produced gas having upwards of 585 British thermal units per cubic foot (plaintiff's exhibits 17 and 18). In May and June, due to the inferior quality of oil, the gas produced was in the neighborhood of 535 British thermal units. The witness said that a gas of 535 british thermal units could be produced with 2.6 gallons of *good oil*. He said the oil used in May and June was not good oil, might "better be de-

it was subjected by the legislature. The result was that it found its plant overtaxed. It was obliged to operate its gas-making machines for excessive periods without overhauling and its boiler capacity was insufficient (pp. 305-307). Due to lack of plant capacity appellee was unable to accept applications from new consumers, with the result that in September, 1920, there were over 2,000 unfilled applications for service. The public service commission recognized the inadequacy of the equipment and facilities and directed appellee to make changes, alterations, additions and improvements which the Master found would cost $1,740,000. (Master's report, par. 41).

III.

The Fourteenth Amendment to the Constitution of the United States is not suspended during "abnormal times," and under it appellee was entitled to have the enforcement of the statute enjoined until such time as the rate therein prescribed would afford an adequate return.

Appellant contends that the statute should not be declared confiscatory merely upon the financial return obtained in one or two abnormal years. The proof covered the period from January 1st, 1919, to June 30th, 1920. It was found, however, that the appellee would be required to pay substantially higher prices for materials for the second half of the calendar year 1920, than the average prices of the six months ended June 30th, 1920, and its labor costs would also be higher (Master's report, pars. 29 and 38). Thus we have it that the court has found that the cost of manufacture and distribution, without any return upon capital, was in excess of the statutory rate for a period of two years. This was the condition at the date of the decree, to wit, that the statutory rate did not provide for the cost of manufacture and distribution, to say nothing of paying a return upon capital employed. The decree did not irrevocably annul the statute, but granted leave to the defendants to move at the foot thereof to vacate the same whenever conditions changed. A year has since passed and the defendants have not availed themselves of the privilege, presumably because the conditions remain the same. This court has taken judicial notice of price levels (*Lincoln* v. *Lincoln Gas Company*, 250 U. S. 256), and may in this case take judicial notice of the fact that there has been no substantial recession in costs. As the case now stands, there is not one year, but three years, during which the statute did not provide a reasonable or fair price for gas. The Fourteenth Amendment to the Constitution of the United

States stands in all its virility, even though the times be "abnormal", as contended by the appellant.

The argument made loses its force entirely when it is considered that confiscation was shown for the whole period covered by the evidence and was present at the date of the decree, and the decree may be vacated whenever operating expenses recede to the point where the statutory rate will afford an adequate return.

It is one thing to say that an abnormal fiscal year is valueless or of little value when operations for such years are in evidence only as a forecast of the future, and the proof of confiscation is close and doubtful, as this court has said in the cases cited by appellant, and a very different thing to say, as appellant says, that appellee is not entitled to relief from proved present confiscation because present times are abnormal. Past abnormal times may lack value as evidence of future confiscation but it has never been held that present abnormal times excuse present confiscation.

Appellee through the decree before the court on review did not escape regulation as to the rates chargeable by it for gas. Notwithstanding that the legislature of the State of New York by chapter 125 of the laws of 1906, and chapter 604 of the laws of 1916, prescribed a maximum rate of 80 cents per thousand cubic feet for gas supplied in the city of New York, there was also a public service commission, created by chapter 480 of the laws of 1910, with power and authority to fix a maximum price for gas, with the single qualification that the rate fixed by the commission should not exceed that fixed by statute (Public Service Commissions Law, section 72). It was ruled by the Court of Appeals that the commission had no power to fix a rate higher than the statutory rate, even though the statutory rate were confiscatory (*People ex rel. Municipal Gas Company* v. *Public Service Commission*, 224 N. Y. 156). But it has since been held that when the statute is declared confiscatory and unenforceable by a court of competent

jurisdiction, as in this case, this limitation on the power of the commission is removed and it may prescribe a maximum price for gas even though higher than the statutory rate (*Morrell* v. *Brooklyn Borough Gas Company*, 231 N. Y. 398, 404).

Further than this, the legislature by amendment to the Public Service Commissions Law, chapter 134 of the laws of 1921, has conferred upon the commission power to fix a reasonable and proper maximum price for gas notwithstanding that a higher or lower rate has been prescribed by statute. Thus appellee's rate is subject to regulation by the Public Service Commission, and we might urge here that the questions argued by appellant are academic. Even if there were at this time no decree of any court declaring void and unenforceable the statute here in question, the rate for gas furnished by appellee is subject to the regulation of the Public Service Commission despite the statutory rate.

IV.

Appellee's right to relief in this suit is not affected by the fact that through necessity it has furnished a heating quality gas instead of a candle power gas.

By chapter 125 of the laws of 1906 it is provided that *illuminating* gas furnished in the city of New York shall have an illuminating power of not less than twenty-two sperm candles under the penalty of $1,000. for each violation. The Public Service Commissions Law authorized the commission having jurisdiction in the City of New York to fix standards for the measurement of the illuminating and heating power of gas, notwithstanding that another standard may have been fixed by statute (Public Service Commissions Law, section 66, subdivision 3, being chapter 48 of the Consolidated Laws). The commission in October, 1917, issued an order making it optional with gas companies to furnish heating quality gas instead of twenty-two candle power gas for the duration of the war and for three months thereafter, provided the price to the public was reduced according to a schedule stated in the order (plaintiff's exhibit 38, pp. 1061-1065). Appellee did not avail itself of the immunity thus conditioned as it was unable to reduce its price.

Until 1918 appellee supplied twenty-two candle power gas. Since 1918 it has been obliged to furnish heating quality gas, which requires less oil in its manufacture. The reasons for so doing are fully given in the testimony of Mr. Elsman, vice-president (p. 315). Harbor conditions were such in the winter of 1917-18 that the required quantity of oil could not be delivered. Appellee had available to meet its expenses but 80 cents per thousand cubic feet of gas sold and the costs of operation were such that it could not thereafter purchase the required quantity of oil to make twenty-two candle power gas. It continued to supply heating quality gas

from necessity and not from choice. The gas supplied by appellee is used almost exclusively for heating purposes. Heating quality gas is furnished nearly everywhere in this country except in the city of New York (p. 379). The candle power standard has become obsolete and has practically been abandoned. Candle power affects only the illumination furnished by an open flame burner, of which the number in use at the present time is negligible. The principal use to which gas is now put by consumers generally is for heating and cooking and where it is used for lighting it is almost invariably done by means of an incandescent burner, which requires heating and not illuminating power in the gas.

Three witnesses testified with respect to the comparative merits of candle power and heating quality gas. Appellee's witness Mr. Klumpp has made an extended study of the subject and covered it exhaustively in his testimony in this case (pp. 325-335). Heating quality gas is supplied throughout the whole United States except in the city of New York (pp. 326-328). He testified that in order to get efficient service from gas it should be supplied at a uniform heating quality, which is practicable in a heat unit gas, but not in a high candle power gas. Twenty-two candle power gas will vary from 580 to 700 heat units per cubic foot (p. 367). Mr Klumpp testified that the heating quality gas supplied by the appellee was superior to twenty-two candle power gas (pp. 334, 335). Twenty-two candle power gas requires the use of from 4 to 4¼ gallons of oil per thousand cubic feet made (p. 353), while appellee used 3.6 gallons in furnishing heating quality gas.

Appellee's witness Mr. Miller also testified on the same subject and to the same effect (pp. 378-381) and said that the heating quality gas supplied by appellee was more efficient than twenty-two candle power gas.

Mr. Searle likewise testified that the gas supplied by appellee was more efficient than twenty-two candle

power gas and that a heating quality gas was more serviceable for general domestic purposes (pp. 432-435).

The Master on the testimony so given by appellee's witnesses, the defendants in no way disputing it, found the heating quality of gas is more nearly a direct measure of its quality and usefulness, particularly as represents the community served by the appellee; that the heating value standard tends to increase efficiency in consumption by insuring uniformity of quality. He also found that the gas supplied by the appellee was of uniform heating quality, calculated to render to the consumers a service efficient and well adapted to their requirements. (Master's report, pp. 33, 47). Due to the inferior grade of gas-oil supplied to the appellee at times in 1920, it was unable to furnish a uniform quality of gas (Master's report, par. 14 and 15, pp. 33, 47).

In his opinion the Master finds that the reasons for the appellee's varying from the statutory requirement of twenty-two candle power were two fold: (1) its desire to save money by using the smallest possible quantity of gas-oil; (2) the honest belief that gas containing approximately 585 british thermal units per cubic foot was as well, if not better, adapted to the use made by its consumers of the gas purchased from it.

On appellee's motion for an interlocutory injunction made at the inception of this suit heard before a court composed of three judges (Ward, Mayer and Knox), as required by section 266 of the Judicial Code, the court ruled:

> "The failure of the plaintiff to furnish gas of the statutory candle power, or its failure to conform to the requirements of the judgment of the state court, are not reasons for denying it relief against a present rate which is confiscatory. The maxims relied on that he who asks equity must do equity and that he who comes into equity must come in with clean hands, do not apply. They contemplate leaving such a

> plaintiff to its remedy at law, but we know of no remedy at law whereby this plaintiff can recover either from its consumers or from the state of New York any losses which it may sustain by the enforcement of the statutory rate pending final hearing. Against confiscation there must be a remedy somewhere."

In passing upon the exceptions to the Master's report in respect to non-observance of the candle power requirement, Judge Hough said:

> "This plaintiff has (in the language of Judge Learned Hand's recent decision) persistently and deliberately disregarded the candle-power requirement. I think it is proven that it has done so of necessity and has not thereby injured anyone; but that is, after all, beside the point if there be anything in the argument.
>
> But I think there is nothing in the argument unless a plaintiff manufacturer who cannot pay the bills incurred in making his regulated article (without speaking of profit or return) is obliged to cease operations rather than to give the public something, even though that something be not statutory.
>
> This manufacturer might have based its suit on the allegation that the 22-candle-power requirement was in itself confiscatory:—having regard to the admittedly greater expense of complying with the standard of illumination. Both upon reason and authority the exceptions based upon the foregoing argument are overruled."

The candle power requirement is established by the same statute which fixed the 80 cent rate. To fix a rate for illuminating gas without defining the quality would not establish a price. A rate must be for a commodity of a specified quality. Thus, if the rate fixed is not an adequate price for the quality specified, the entire regu-

lation is abortive. In other words, unless the rate is adequate for the quality prescribed, no duty is imposed upon the utility to observe either. When the appellee establishes as it does in this case, that it is unable to make gas of twenty-two candle power for 80 cents per thousand cubic feet, then neither the quality prescribed nor the rate fixed is obligatory. In this connection we wish to point out that there is nothing injurious to the public welfare, the morals or safety of the people in supplying gas of other than twenty-two candle power. There can, therefore, be absolutely no justification for the fixing of a twenty-two candle power standard by statute other than the declaration of the legislature that 80 cents is the maximum price to be charged for gas of that quality. The regulation fixing a candle power requirement has no other basis for its support than the exercise of the police power of the state in fixing and establishing fair and reasonable rates for gas of that quality.

It seems fairly obvious that the standards of illuminating power and of pressure in the statute are regulations of the same category and are defined by the act merely as incidents of the rate fixed thereby. They are thus dependent parts of the main or rate enactment and cannot be separately sustained. While it is possible in a proper case that the rate requirement might be sustained and the pressure requirement condemned, as was done by this court in the *Willcox* case (212 U. S. 19, 53), the rate requirement could not be condemned and the pressure or candle power requirements sustained, for the latter requirements are but incidents of the former. But whether this is so or not, it has been held by this court that the pressure requirement cannot be sustained when compliance therewith would increase the corporation's expenditures to a point where no return could be obtained at the statutory rate. In such an event it was held in the *Willcox* case (*supra*) that the pressure requirement was void. In the case at bar, it clearly appears that compliance with the candle power requirement would have in-

creased the cost of producing gas from 6 to 10 cents per thousand cubic feet, by reason of the additional gas-oil required to make 22-candle power gas. When it was costing from 84 cents to 96 cents to make the less expensive heating quality gas, it could only have added to the cost and so to the confiscation, to have complied with the candle power requirement. As the pressure requirement was void under such circumstances, so the candle power requirement was void.

While it was held in the *Willcox* case, that the candle power requirement was not void, it was not shown in that case, as it was shown here, that compliance with it made the rate confiscatory or added to the confiscation already present without such compliance. When it was costing more than 80 cents to make heating quality gas it was surely incompetent for the legislature to require appellee to make a more expensive gas for 80 cents.

The statute (chapter 125 of the laws of 1906) fixes its own penalties which are exclusive. The public authorities have been aware at all times of appellee's practice in this regard, and were at liberty to institute penalty proceedings. They acquiesced in the furnishing of the heating quality gas knowing the necessity for its service and thereby ratified and directly approved appellee's acts, and may not now be heard to condemn them (*People* v. *Stephens*, 71 N. Y. 527, 551-2).

In any event, equity will not assist in the recovery of a penalty (*Livingston* v. *Tompkins*, 4 Johns. Ch. 415, 431, 432), and could not well deny the relief here sought because penalties collectible elsewhere had accrued against appellee.

Assuming that appellee was guilty of the contumacious conduct with which it is charged by counsel for appellant, it was in no worse plight than if it had been adjudged in contempt. Indeed, that, or near that, is apparently what counsel conceives was the case, yet a court of equity may not refuse relief even to one in contempt (*Hoxen* v. *Elliott*, 167 U. S. 409).

The maxim that "he who comes into equity must come with clean hands", has no application to appellee here. That principle assumes that a suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence,—that he has violated conscience and good faith in regard to or connected with the matter in litigation (Pomeroy, 2nd ed. section 397). Appellee has not violated conscience or good faith. On the contrary, it has furnished gas suitable to the needs of its consumers and of more value to them than the 22-candle power gas required by the statute. For it, under the circumstances and in the face of the great scarcity and high cost of gas-oil, to have insisted upon furnishing and charging the cost of 22-candle power gas to its consumers would have violated conscience and good faith. Conscience and good faith required it to meet the emergency confronting it and its consumers, as it did meet it, namely, by conserving its own and its consumers funds by substituting the less expensive but more useful heating quality gas for the expensive and wasteful 22-candle power gas.

The doctrine of unclean hands cannot apply to a case where a party seeks relief from an unconstitutional statute. The appellee appeals to the court for the protection of its property and legal rights and the question whether or not it shall be relieved by the court is one to be determined upon legal principles and not upon equitable considerations. It insists that it shows a strict legal right to be relieved from the operation of the statute and it comes into equity only because it is in that forum alone that adequate relief can be afforded and thereby a multiplicity of suits and the general disorder and confusion which result therefrom avoided (*Missouri* v. *Chicago, Burlington and Quincy R. R. Co.*, 241 U. S. 533. *Ohio Valley Water Co.* v. *Ben Avon Borough* 253 U. S. 287).

The doctrine of unclean hands implies fraud and deceit on the part of a suitor seeking equity but there has been no fraud or deceit on the part of the appellee. Openly and from necessity it has furnished the heating quality gas. It would have been to its advantage to furnish the twenty-two candle power gas, thus increasing its expenses by approximately 6 cents for each one thousand cubic feet of gas sold in 1919, and by approximately 10 cents in 1920, and making a stronger case of confiscation. What it has done has not been to its own advantage but rather to the advantage of the consumers and without the slightest degree of prejudice or injury to them. The gas they received under the proof was more efficient than a twenty-two candle power gas.

Appellee's utility is an instrumentality for the purpose of supplying the public with a necessary commodity and appellee is incompetent to do any act which will render it impossible to perform its public functions. If the rate prescribed by the statute is so inadequate as to render it impossible for appellee to supply gas, appellee must apply to the court to have the statute condemned and its enforcement suspended. There is no other avenue of relief and the relief is necessary. Nothing that the appellee could do could incapacitate it to so apply to the court. The appellee is not competent to surrender any right or by any act to deprive the court of the power it has under the constitution to condemn any and every statute which is in violation of that instrument.

Appellee has so far met the argument of the appellant on the assumption that the twenty-two candle power requirement is applicable to the gas furnished by appellee. It will be observed, however, that chapter 125 of the laws of 1906 deals exclusively with *illuminating* gas. The act is entitled "An Act in relation to illuminating gas." The prices fixed are prices to be charged by "a corporation, association, copartnership or person engaged in the business of manufacturing, furnishing

or selling *illuminating* gas." Section 2 reads: "The *illuminating* gas furnished by any such corporation, association, copartnership or person shall have an *illuminating* power of not less than twenty-two sperm candles." The appellee since January 1, 1918, has not manufactured, furnished or sold "*illuminating* gas." The gas manufactured and sold was *heating quality* gas. It was not furnished for *illuminating* purposes but for *heat producing* purposes and was so used by appellee's consumers according to the uncontradicted testimony. Even the gas used in the mantle burners of appellee's consumers was used for heat producing purposes, that is, to heat to incandescence the mantle which shed the illumination. The statute does not prevent the furnishing of heating quality gas and fixes only the quality and price of illuminating gas when furnished by corporations, associations, copartnerships or persons engaged in the business of manufacturing and furnishing such. As the appellee was not engaged in the business of furnishing illuminating gas, the requirements of the act as to quality of illuminating gas do not apply to it. By this legislation, neither a price nor a standard of quality is established for the gas furnished by the appellee.

V.

The adjudication and judgment in the state court did not preclude appellee from commencing and maintaining this action.

In June, 1916, the appellee commenced an action in the Supreme Court of the State of New York to enjoin the enforcement of the acts of 1906 and 1916, here involved, on the ground that said acts were or would become confiscatory upon the taking effect of the act of 1916 on July 1, 1916. That action was tried and resulted in a judgment entered March 29th, 1920 dismissing appellee's complaint upon the merits, "without prejudice to the commencement of a new action, if, in the future, after an adequate experimentation under an 80 cent rate, it believes it can prove that the rate is confiscatory as to it." (p. 1150).

The taking of testimony in that case was concluded in April, 1919, but the opinion of the court was not handed down until January 27th, 1920. Before the decision was signed or judgment entered therein appellee moved to reopen the cause to enable it to put in evidence proof of the expense of making and distributing gas for the year 1919, which proof had not been available to it at the conclusion of the trial in April, 1919. This motion was denied, the court holding in its opinion filed (copy of which is appended hereto) that, "a denial of such motion does not preclude the plaintiff from bringing an action for the years not embraced within the decision of this case."

Appellee's appeal from the judgment so entered has been argued but has not yet been decided.

During the pendency of that action, appellee under an injunction order made *pendente lite*, collected 95 cents per thousand cubic feet, 15 cents of which was impounded to await the outcome of the action. The injunction *pendente lite* terminated on the entry of final

judgment March 29th, 1920, and after that date no part of the charges made and collected was impounded (pp. 38, 1105 et seq.).

In considering the questions involved in the state court action, the learned court erroneously confined itself to the three years 1916, 1917 and 1918, concerning which definite proof of costs of operation were introduced. It was the duty of that court to take into consideration the costs of operation, not only as they stood at the time of its decree, but as they were likely to continue thereafter (*Lincoln Gas Company* v. *Lincoln*, 250 U. S. 256). It was believed that the testimony before the court in that case sufficiently advised it of the trend of costs which were higher than at the conclusion of the testimony in April, 1919, if the court was not obliged to take judicial notice of such costs as this court did in the *Lincoln* case (supra).

However, the judgment of the state court while it remains unreversed is no doubt conclusive that the money so impounded belongs to appellee's consumers from whom it was collected.

> *Missouri* v. *C. B. & Q. R. Co.*, 241 U. S. 533;
> *Minneapolis etc. Ry. Co.* v. *Merrick Co.*, 254 U. S. 376.

But such judgment is not *res adjudicata* of the issues in this case. The averments of the complaint in that action were held unsustained by the proof, and nothing more was decided. The judgment was not, and there is no finding, that the acts of 1906 and 1916 were compensatory, valid or constitutional, but the findings were that it was not shown by the proof made that they were confiscatory and invalid, and the complaint was dismissed without prejudice. That is, without preclusion of the right to show them invalid when attempted to be enforced at a subsequent period.

> *Vandalia R. R. Co.* v. *Schnull*, 255 U. S. 113, 123.

This action was commenced in May, 1920, and the question presented in this case was not whether the statutory rate was confiscatory in 1919, but whether it was confiscatory at the date the decree was made, to wit, October 19, 1920. The object of the appellee's seeking a decree was not to recoup past losses, but to protect itself against present and future confiscation. To establish the fact of present and probable future confiscation it was obliged to show what was the cost of manufacturing and distributing gas and what return it was entitled to under the constitution upon the property employed in the service. To do this it proved the cost of manufacturing and distributing gas in the calendar year 1919 and the first six months of 1920, which were the costs available at the time of trial in August and September, 1920. It also showed, and the court found, that costs had increased at the time of the trial above what they were during the eighteen months concerning which specific and definite proof was offered. The court also found that the level of costs was likely to continue in the future. On this showing and upon these facts, the appellee was entitled to a decree and there was nothing in the judgment in the state court in the nature of *res adjudicata* that prevented the District Court from awarding the decree as it did.

The phrase added to the clause dismissing the complaint without prejudice to the commencement of a new action, viz. "if in the future, after an adequate experimentation under an 80-cent rate it believes it can prove that the rate is confiscatory as to it", cannot operate to prevent the commencement and maintenance of this action, though it had been found here that the appellee has not actually experimented under an 80-cent rate. It was not competent for the state court to require appellee actually to experiment under an 80-cent rate as a condition precedent to its right to commence a new action restraining the future enforcement of the statutes. The court had no jurisdiction and no

power to impose such a rule upon appellee. No such issue was tendered or tried in the case, nor had the appellee any hearing thereon. As to the power of the court to make such a rule, the Court of Appeals of New York has said:

> "Our opinion is, that the right to prosecute, or to plead in or defend an action, may not be taken away without a hearing, and that neither a general rule nor an anticipatory order, will stand in the place of notice and opportunity to be heard". (*Rice* v. *Ehele*, 55 N. Y. 518, 524).

Such a rule or order is equivalent to a pronouncement that appellee can prove confiscation under the acts of 1906 and 1916 only by proof of adequate experimentation under the rate established by those acts; in other words, only by subjecting its property to actual confiscation. The acts do not so provide; nor would it have been competent for the legislature of New York to have so provided. Under both the State and Federal Constitutions the rate established must be compensatory, and whether it is or not, is a judicial and not a legislative question.

> *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327;
> *Chicago etc. Ry. Co.* v. *Minnesota*, 134 U. S. 418;
> *Missouri* v. *C. B. & Q. R. R. Co.*, 241 U. S. 533;
> *Oklahoma Operating Company* v. *Love*, 252 U. S. 331;
> *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U. S. 287;
> *Municipal Gas Company* v. *Public Service Commission*, 225 N. Y. 89.

The legislature could not thus prescribe rules of decision to the courts (*United States* v. *Klein*, 80 U. S. 128,

146), and one court may not thus anticipate and dictate the decision of another court.

If the legislature could not constitutionally limit appellee's right to a judicial inquiry into the adequacy of the rate to proof of actual experimentation under the rate, how can a court do it? As this court said in *Horen v. Elliott*, (167 U. S. 409, 417):

> "If the legislative department of the Government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent."

No matter what form judicial proceedings may assume, there is a principle which no proceeding entitled to respect as being judicial can transcend, that "the *allegata* and *probata* must reciprocally meet and conform to each other", and the judgment must respond to the issue made and proved (*White v. Ward*, 157 Ala. 345; 47 So. Rep. 166).

> "A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determina-

tion of his rights and is not entitled to respect in any other tribunal" (*Windsor* v. *McVeigh*, 93 U. S. 274, 277).

The period covered by the hearing and proof and concluded by the decree, antedated the decree. (*Missouri* v. *C. B. & Q. R. R. Co.*, 241 U. S. 533, 539). There was no issue and no hearing in the state court upon the right of the appellee to commence actions in the future to protect its property from the future operation of the acts in question. The language incorporated into the decree limiting appellee's right to commence actions in the future affecting the future operations of the acts, was, in the words of this court, but an "arbitrary edict, clothed in the form of a judicial sentence" (93 U. S. 278).

It is no answer to say that the state court had jurisdiction of the cause, of the subject matter, and of the parties, because it was still limited in its modes of procedure and in the extent and character of its judgment to the issues arising in that cause. It must act judicially in all things and could not transcend the power of that jurisdiction. The judgment of a court transcending the limits of its authority is absolutely void (*Windsor* v. *McVeigh*, 93 U. S. 274, 282). The principle that a judgment must be responsive to the issues presented underlies all litigation. The inquiry is always open as to whether the judgment rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it (*Reynolds* v. *Stockton*, 140 U. S. 254, 264, 268). In that case this court quoted and approved the opinion in *Munday* v. *Vail*, (34 N. J. L. 418) as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*, where it was said:

> "'A defect in a judgment arising from the fact that the matter decided was not embraced

> within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in question, that a power of judicial decision arises.' And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard.' "

As the Court of Appeals of New York has said, the statutes were of continuing operation, but upon the implied condition that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return. When the return falls below that level the regulation is suspended. When the level is again attained the duty of obedience revives (*Municipal Gas Company* v. *Public Service Commission*, 225 N. Y. 89, 96). The controversy is as continuing as the act which breeds it and no more ceases to be justiciable because once adjudicated than it ceases to be justiciable when confiscation is postponed. Justiciable controversy inheres in and runs with the act, and the appellee had the constitutional and historic right at any time after the judgment of the state court was entered, when confiscation was again threatened, to the judgment of the courts, and the facts and issues then and there to be presented could not be prejudged by the prior decree

In the *Municipal Gas Company* case at page 96 Judge Cordozo said:

> "A statute prescribing rates is one of continuing operation. It is an attempt by the legislature to predict for future years the charges that will yield a fair return. The prediction must square with the facts, or be cast aside as worthless. * * * It must square with them in one year as in another, at the beginning but equally at the end. In all such legislation, from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon prophesy; the coming years must tell whether the prophesy is true or false. * * * Into every statute of this kind we are to read, therefore, an implied condition. The condition is that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended. When the level is again attained the duty of obedience revives. There would be no obscurity about this if the condition were expressed. It is no less binding because it is implied. The Constitution is the supreme law; and statutes are written and enforced in submission to its commands."

It is thus beyond the power of any court by its judgment to foreclose a party from seeking relief thereafter if confiscation can be established by competent evidence. On the facts in this case the cost of making gas had increased over 30 cents per thousand cubic feet between 1918, the last year considered by the state court in making its decision, and the time the decree was rendered in this case. Such costs even had greatly increased between the 29th day of March, 1920, the date the state

judgment was rendered, and the 19th day of October, 1920, the date the decree in this case was made. The decree in this case affords the appellee no relief prior to the date of its entry, except to relieve it from prosecution for penalties for charging more than 80 cents subsequent to March 29th, 1920. Up to that date the decree of the state court is conclusive and the appellee must get its protection for everything prior thereto from that decree.

It is unnecessary for a court in dismissing a complaint to provide that its judgment shall be without prejudice to another action when circumstances warrant another action, for such is the legal effect in any event. (*Lincoln Gas Company* v. *Lincoln*, supra, p. 268).

It is now the settled law that from the power to fix rates results the duty to provide the opportunity of testing their repugnancy as a unit to the Constitution in case confiscation is charged.

> *Chicago &c. Co.* v. *Minnesota*, 134 U. S. 418;
> *Missouri* v. *C. B. & Q. R. R. Co.*, 241 U. S. 533;
> *Oklahoma Operating Company* v. *Love*, 252 U. S. 331;
> *Ohio Valley Water Company* v. *Ben Avon Borough* 253 U. S. 287;
> *Municipal Gas Company* v. *Public Service Commission*, 225 N. Y. 89, 101, 102.

A party producing competent evidence establishing the fact of confiscation is entitled to relief. To require the party challenging the statute to establish confiscation by showing actual losses while experimenting with the rate is to deny due process of law. The District Court had before it sufficient competent evidence to support the finding of confiscation. The Supreme Court of New York was wholly without power to decree or determine the quality of evidence or the competency of evidence that might be used by the District Court in de-

termining the issue presented to it; nor was it competent for the state court to prescribe a condition precedent to the institution of a subsequent action by the appellee to secure relief from confiscation, if confiscation could be established by competent evidence. Such was not the intention of the state court, for in denying the motion to reopen the case, it ruled that such denial "does not preclude the plaintiff from bringing an action for the years not embraced within the decision of this case." This action is brought "for years not embraced" within the decision in the state court. As we have seen, and as the authorities cited clearly hold, the decision in that case is limited to and is conclusive upon all parties as to the period from the institution of the action to the date of the rendition of the judgment, to wit, March 29th, 1920, while the decree in this suit granted relief from present and further confiscation.

But if the decree of the state court does prescribe as a condition precedent to the bringing of another action that appellee show confiscation through adequate experimentation, our reply is that appellee has alleged and proved performance of the condition. It is conceded by the defendants that at all times since January 1st, 1919, appellee had a plant and property employed in the public service of the value of at least $3,300,000. The court has found that the actual operating costs per thousand cubic feet were at least 84 cents in 1919, and at least 96 cents in the first six months of 1920, and were higher at the date of the decree. Thus the revenue from the sales of gas at the statutory rate of 80 cents was not sufficient since January 1, 1919, to meet the actual cost of manufacture and distribution, without any return upon capital. In 1920, the revenue from sales at the 95 cent rate was not sufficient to meet the cost of manufacture and distribution, without any return upon capital. At no time since January 1, 1919, was the revenue at the 95 cent rate sufficient to meet the costs of operation and pay a fair return upon the

conceded value of the property. Appellee, therefore, has demonstrated by actual experimentation that a 95 cent rate has been inadequate and confiscatory since January 1, 1919. The demonstration by actual experimentation that a 95 cent rate is inadequate is a demonstration that any rate lower than 95 cents is inadequate and confiscatory. (*Louisiana R. R. Comm.* v. *Telephone Co.*, 212 U. S. 414, 423, 426).

In cases where the inadequacy of the return afforded by a statutory rate was in doubt, this court has frequently refused to enjoin the rate in the absence of experimentation under it, but it has never held as the state court held that experimentation under the rate was an essential prerequisite to relief from its operation. On the contrary, this court has affirmed judgments restraining the enforcement of such rates where there had been no experimentation and where the proof was even less conclusive than it is in the case at bar (*Smyth* v. *Ames*, 169 U. S. 466, 528; *Louisiana R. R. Comm.* v. *Telephone Co.*, 212 U. S. 414; *Denver* v. *Denver Water Company*, 246 U. S. 178). We submit, therefore, that the prior adjudication was not a bar to the commencement of this action.

VI.

There was no error in the admission or exclusion of evidence.

Under his point XII appellant enumerates five matters of evidence that he claims were improperly dealt with at the hearing.

(1) It is contended by appellant that appellee's books of account were improperly received in evidence. We have discussed the competency of the books in our point I. The books were competent for the purposes for which they were used.

(2) The Master excluded evidence which was offered by defendants in support of the findings and judgment made in the state court action. The conclusiveness of the state court judgment would be the same whatever the character of the evidence taken upon that trial. Under no possible theory was it error to exclude the evidence offered.

(3) The Master excluded certain correspondence between appellee and the various dealers in gas-oil relating to possible purchases of oil. Appellant argues that the correspondence so excluded would show that appellee's efforts to obtain oil contracts were merely perfunctory and not in good faith. Appellant has not seen fit, however to have the excluded correspondence printed in the record and we cannot perceive how this court can determine the competency of the evidence not knowing its character. Whether appellee made an effort to secure gas-oil at the best possible prices is of no consequence if the oil contracts made were the best that could be obtained. Notwithstanding the exclusion of the correspondence in question, defendants were at liberty to call witnesses on the subject of oil prices to show that appellee paid more for oil than necessary. This the defendants failed to do and there was, therefore, before the court

no issue of fact with respect to what were reasonable and necessary prices for oil. Appellant cannot complain because evidence was excluded on a matter over which he did not controvert the oral testimony of appellee's witnesses.

(4) The Master excluded defendant's exhibit D 24 for identification. This exhibit showed appellee's financial transactions in the period 1904 to 1916. What possible relevancy appellee's revenues and expenses in a period antedating the enactment of the statute fixing 80 cents for gas had, is not apparent, and appellant fails to indicate in any way how the defendants' case was prejudiced by the exclusion of the evidence. During all the period appellee's rates were fixed by statute and it is not to be presumed that such rates were excessive. Past profits cannot be drawn upon to make present confiscation lawful.

(5) We do not understand what point appellant attempts to make by calling attention to defendants' effort through the witnesses Howard and Mitchell to prove that the Public Service Commission was not able properly to examine the accounts and records of appellee which were open to inspection and examination. The Public Service Commission is charged with the duty of supervising the business of appellee, and for that purpose is given authority by the several provisions of the Public Service Commissions law to examine its books of account and other records. The failure of the commission, through want of funds or otherwise, properly to discharge its duties does not justify confiscation.

VII.

The decree appealed from should be affirmed.

Respectfully submitted,

INGRAHAM, SHEEHAN & MORAN

Solicitors for Appellee.

SAMUEL F. MORAN,
JOHN D. MONROE,
of Counsel.

New York, November 9th, 1921.

APPENDIX A:

Chapter 125 of the Laws of 1906, of the State of New York.

AN ACT in relation to illuminating gas in the city of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation.

Became a law, April 3, 1906, with the approval of the Governor. Passed, three fifths being present. Accepted by the city.

The People of the State of New York represented in Senate and Assembly, do enact as follows:

Section 1. A corporation, association, copartnership or person engaged in the business of manufacturing, furnishing or selling illuminating gas in the city of New York, except in the fifth ward of the borough of Queens and in that portion of the borough of the Bronx formerly contained in the towns of Eastchester and Pelham, shall not charge or receive for gas manufactured, furnished or sold in said city a sum per one thousand cubic feet in excess of the following rates:

1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brooklyn except the thirtieth and thirty-first wards thereof, and in the borough of the Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, eighty cents.

2. In the second and fourth wards of the borough of Queens, and in the thirtieth ward of the borough of Brooklyn, one dollar.

3. In the third ward of the borough of Queens, in the thirty-first ward of the borough of

Brooklyn, and in the borough of Richmond, one dollar and twenty-five cents for the remainder of the year nineteen hundred and six; one dollar and twenty cents during the year nineteen hundred and seven; one dollar and fifteen cents during the year nineteen hudred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter.

4. In that portion of the borough of the Bronx formerly contained in the town of Westchester, outside of the villages of Wakefield and Williamsbridge, one dollar and fifteen cents during the years nineteen hundred and six, nineteen hundred and seven and nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents, during the year nineteen hundred and ten; and one dollar thereafter.

§2. The illuminating gas furnished by any such corporation, association, copartnership or person shall have an illuminating power of not less than twenty-two sperm candles of six to a pound, burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch, nor more than two and one-half inches.

§3. Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to the people of the state.

§4. This act shall not apply to gas furnished or sold to the city of New York.

§5. Chapter three hundred and eighty five of the laws of eighteen hundred and ninety-seven, entitled "An act to regulate the price of illuminating gas in cities of fifteen hundred thousand inhabitants," and all other acts or parts of acts inconsistent herewith are hereby repealed.

§6. This act shall take effect on the first day of May, nineteen hundred and six.

Appendix A:

Chapter 604 of the Laws of 1916, of the State of New York.

AN ACT to amend chapter one hundred and twenty-five of the laws of nineteen hundred and six, entitled "An act in relation to illuminating gas in the city of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penality for violation," in relation to price of gas to consumers in such city.

Became a law May 19, 1916, with the approval of the Governor. Passed, three-fifths being present. Accepted by the City.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions one, two and three of section one of chapter one hundred and twenty-five of the laws of nineteen hundred and six, entitled "An act in relation to illuminating gas in the city of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation," are hereby amended to read, respectively, as follows:

1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brooklyn and in the borough of the Bronx, exthat portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, eighty cents.

2. In the second, third and fourth wards of the borough of Queens, and the borough of Richmond, one dollar.

§2. This act shall take effect July first, nineteen hundred and sixteen.

APPENDIX B:

Opinion of State Court filed in denying motion for leave to put in evidence expenses for 1919.

GREENBAUM, *J.*

Plaintiff moves for leave "to put in evidence all its expenses for manufacturing and distributing gas in 1919 and all relevant facts with respect to the present and future cost to plaintiff of manufacturing and distributing gas in the territory served by it." Defendants have interposed counter-affidavits in which many of the material allegations of the plaintiff are controverted. The Court is of the opinion that its discretion should not be exercised in favor of the plaintiff upon this somewhat unusual motion. It is evident that the granting of this motion, which is not based upon the ground of newly discovered evidence, nor of any alleged error upon the trial would indirectly result in the retrial of the action.

There is another serious objection to granting this motion. The Court has decided that plaintiff has failed to comply with the Statute requiring it to furnish gas in accordance with the statutory standard of 22 candle power and has also failed to experiment under the 1916 Act, which established the 80 cent rate and which would require a denial of the relief sought in this action.

Another result of the granting of the motion would be an interminable prolongation of the trial, which was unduly protracted and which has long since been disposed of.

Moreover, the granting of this motion would result in the practical nullification of the decision heretofore made. With the view of possibly according relief to plaintiff for the years 1919 and 1920, the Court invited the respective parties to its Chambers. The differences between the parties were absolutely irreconcilable and

the attempt of the Court to compose these differences proved abortive. There is no alternative but to dispose of this motion, which must be denied. The denial of the motion does not preclude plaintiff from bringing an action for the years not embraced within the decision of this case. The motion is denied.

Supreme Court, U. S.
FILED
NOV 14 1921
WM. R. STANSBURY
Clerk

Supreme Court of the United States

October Term—1921

No. 295

CHARLES D. NEWTON, as Attorney-General of the State of New York; LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District; and HARRY E. LEWIS, as District Attorney of Kings County,

Appellants,

against

KINGS COUNTY LIGHTING COMPANY, *Respondent.*

REPLY BRIEF ON BEHALF OF APPELLANT NEWTON, AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK.

CHARLES D. NEWTON,
Attorney-General of the State of New York, Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
Solicitor for Appellant Attorney-General, Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
CHARLES E. BUCHNER,
of Counsel.

(38567) M. B. Brown Printing & Binding Co., New York

Supreme Court of the United States.

CHARLES D. NEWTON, as Attorney-General of the State of New York; LEWIS NIXON, constituting the Public Service Commission of the State of New York, for the First District; and HARRY E. LEWIS, District Attorney of Kings County,

Appellants,

vs.

KINGS COUNTY LIGHTING COMPANY,

Respondent.

Reply brief on behalf of Newton as Attorney-General of the State of New York.

The brief of the appellee (pp. 2 and 3) assumes that it is necessary to make a statement of the case since "the brief filed by counsel for the appellant Newton does not contain a statement thereof." This Court is respectfully referred to pages 1-7 of appellant Newton's brief wherein is contained a full and complete statement of the case in accordance with Rule 21. It is substantially the same as appellee's "Statement of Case" but given with greater detail and accuracy. Appellee's apprehension in this respect is entirely unfounded.

The appellee raises the objection that the appellant's brief "does not contain a specification

or errors" in accordance with Rule 21 of this Court. This is an appeal from the District Court direct to this Court and the appellant has followed the procedure set forth in Rule 35 for such cases provided. It filed with the clerk of the Court below an assignment of errors "which set out separately and particularly each error asserted and intended to be urged." The assignments were made "part of the transcript of the record" and were printed with it (Rule 35). These assignments are found on pages 80-92 of the record filed with this Court and set forth with particularity and in detail the errors to be relied upon. There are 57 such assignments of error covering 12 printed pages of the record. The appellant did not re-print these assignments in its brief and does not consider that the rules of this Court so provide. Such a procedure would be a useless duplication of matter before the Court in the transcript of the record on appeal.

Under the caption "Cost of Producing and Distributing Gas" (appellee's brief, p. 4, 5) the Master's prophecy concerning the expectancy of continued high price levels for materials and labor used in the gas business is referred to. The fallacy of such a prediction was pointed out in appellants' main brief, pp. 51-59. This Court will undoubtedly take judicial notice of the very patent fact of daily life that prices generally have fallen considerably during this current year. This is particularly so, as pointed out in our main brief, in regard to gas oil which goes to make up about 50% of the cost of making gas. During the instant litigation gas oil was selling in New York City at 10-12¾ cents a gallon, while today the gas companies in the City of New York have contracted

for the purchase of gas oil at prices ranging from 5-6 cents a gallon. Price levels of general commodities, according to reports of such mercantile agencies as Dun's and Bradstreet's, have fallen over 40% since the high mark of February, 1920. The test of time, infallible and convincing, has shown beyond argument that *at least the prophecy* of the Master upon the question of continuing high costs was erroneous.

Answering Appellee's Point upon Failure to Obey the Candle-power Statute.

Appellee attempts to justify what Judge Hough styled its "persistent and deliberate disregard of the candle-power requirement" (p. 71) by extraordinary sophistry. It is argued:

Firstly: That the candle-power statute was obsolete and therefore this appellee, setting its judgment above that of the law-making body of the State of New York, ignored the requirements of the law and set up another and different standard of gas measurement. It neglects to state that it could have legally and lawfully changed its standard of gas measurement by (1) during the war period taking advantage of the order of the Public Service Commission permitting a change to the British Thermal Unit Standard or (2) after the war taking advantage of the amendment of the Public Service Commission's Law (Section 66, Subdivision 3) effective May 14, 1913. But the appellee preferred to disregard the law although the way was clearly open at all times to change to a heating standard if it honestly and in good faith desired to do so. But possibly supplying gas of a candle-power of from 3 to 8 units as it did in the

month of June, 1921, and charging 95c per thousand cubic feet for it (15 cents above the statutory maximum) was more profitable than a lawful change of standard which might have fixed certain limitations and safeguards as did the order of the Public Service Commission of 1917 (p. 1061, Plaintiff's Ex. 38). The Kings County Lighting Company chose "the easier way," the way of the lawbreaker, and cannot complain if a Court of Equity will not now intervene in its behalf.

Secondly: It is argued that something just "as good" was supplied as 22 candle-power gas. The appellee had no right to substitute under the law, but granting, for a moment, for the sake of argument, that it had, its contention that a gas equally useful was supplied is not in accordance with the record facts. The master found that a gas of a 22 candle-power contained 620 B. T. U's or more. The order of the Public Service Commission of 1917 and the opinion of the Chairman of the Commission, the Hon. Oscar S. Straus, found that the equivalent of a 22 candle-power gas was a gas of 650 B. T. U's.

> "This Commission hereby fixes a monthly average total heating power of not less than 650 British Thermal Units" (p. 1063).
>
> * * * * * * * *
>
> "Each test to determine the heating quality of gas shall be made * * * not less than one-half mile distant in an air line from any manufacturing or distributing station of the gas corporation" (p. 1063).
>
> "Any company may, * * * have the option to adopt * * * a thermal content of 650 B. T. U.'s per cubic foot to be furnished at statutory rate. *This, in the opinion of the Commission, * * * represents as nearly as can now be determined, the thermal content*

of gas now furnished under the legal requirement of 22 candlepower" (p. 1076).

The appellee never served gas of such a thermal content. The Company's own tests and figures as found by the Master (p. 31) shows a very substantial variance from this B. T. U. Standard and these were tests *taken at the works* by the Company. At one-half mile from the works, as provided for by the Public Service Commission, the tests would have shown results substantially lower. The appellee's attempt to induce this Court to believe that "something just as good" was supplied fails as utterly at variance with the facts.

Thirdly: It is argued that the maxim of "clean hands" does not apply because appellee "has not violated conscience and good faith in regard to or connected with the matter in litigation." The appellant vehemently contended in its main brief and still urges that the appellee did "violate conscience" did evidence a gross and flagrant lack of "good faith." Perhaps conclusions as to conscience and business morality are better left to this Court to determine upon the record. The appellant is willing that this should be done, positive beyond a fear that this Court will judge appellee's conduct firmly and resolutely.

These matters are more minutely discussed in appellant's brief, p. 21-36.

Fourthly: It is argued that the 22 candle-power statute is not applicable to the appellee, because the Act is entitled "An Act in relation to illuminating gas," and applies only to companies supplying "illuminating gas"; that the plaintiff since January 1, 1918, has not been supplying "illuminating gas" (Appellee's brief, p.

14). This is something entirely novel in this litigation; in fact, an entirely new thought in all the gas litigation of numerous companies in the City of New York which has been engaging both the State and Federal Courts for almost three years.

The appellee is a gas company, supplying gas which lights the homes of 40,000 consumers in the Borough of Brooklyn. Its name is the Kings County Lighting Company. Its predecessor company was the Kings County Gas and Illuminating Company (p. 103, Appellee's complaint). It contracted to furnish a fixed or "permanent *illuminating gas* of such quality" etc. The predecessor company was authorized to supply "light by gas" to the old township of New Utrecht (p. 1130) and first began to furnish light to customers on September 2, 1891 (p. 1131) and has continued through the present company to supply light to 40,000 consumers to the present day, in addition to lighting 3,500 street lamps of the City of New York "to which plaintiff furnished gas for street lighting" (appellee's brief, p. 3). And yet it is claimed this Company does not suply "illuminating gas." Judge Greenbaum continually referred to this appellee as "the illuminating company" in his opinion 110 Misc., 204, in the prior case. With a naiveté that is astounding the appellee, apparently with some degree of sincerity, urges this Court that it is not a corporation supplying "illuminating gas" within the intent of Chapter 125 of the Laws of 1906, because by its own mandate and in violation of law, it has been supplying what it chooses to call a "heat producing gas" it frees itself from the burdensome provisions of the law. This indeed is a novel, if somewhat crude, manner of construing a statute and straining language and logic beyond all semblance of recognition.

Answering Appellee's Point that the Prior Suit is not Res Adjudicata.

We respectfully refer to our main brief pages 7-13 where we believe the points raised by the appellee under this point are fully met. It is not the contention of the appellant that the prior adjudication is a bar to the instant case *if the appellee had come into court having remedied the defects which prompted the Court in the prior case to dismiss the complaint, to wit—a failure to observe the requirements of the candle-power statute and a failure to experiment with the statutory rate.* The point raised by the appellant is that with these fatal faults remaining unchanged the appellee's right to equitable relief *was res adjudicata* by the prior Court. Between these parties the Court had determined that a substantial observance of the candle-power statute and an experimentation with the rate were conditions precedent to granting equitable relief. The pleading and the testimony showed that these conditions had not been overcome. Within the ruling of this Court in

Missouri *v.* Chicago B. & Q. R. Co., 241 U. S., 533;
Southern Pacific R. Co. *v.* U. S., 168 U. S. 1, and
Washington Packet Co. *v.* Sickels, 24 How. 333;

these matters had been adjudged by a court of competent jurisdiction and, as a guarantee of the efficacy of the prior judgment, should have been held *res adjudicata*. Appellee's brief is not in point upon these matters.

Answering Appellee's Point that the Cost of Manufacturing and Distributing Gas was Established by Competent Evidence.

The appellant takes direct issue with the appellee's contentions upon this point. With the burden of proof upon the complainant to establish beyond "reasonable" and "rational," "just" or "fair" doubt the unconstitutionality of the statute (appellant's main brief pp. 13, 14, 15), that burden was *not* met by introducing into evidence the books of the appellee company; and the fact that the appellee's books were kept in accordance with a certain Uniform System of Accounts did not lend them that additional probative value which our courts have universally demanded before judicially determining that a statute is unconstitutional. Our reasons and argument upon this point are fully set forth in the brief in main pp. 68-77. As was said by the Court of Appeals of the State of New York in interpreting the scope and meaning of the law creating the Uniform System of Accounts,

> "the establishment of a system of accounts was plainly intended to make *the method* of accounting by these corporations uniform so that the accounts could be readily comprehended by those required to examine the same. * * * *It was not to regulate the management of their finances but to show what the management was*" People ex rel. N. Y. R. Co. *vs.* Public Service Commission, 223 N. Y. 373, at page 378.

The trial court in the case of Kings County Lighting Co. *v.* Newton in the state court actions reported in 110 Misc. p. 201 (New York State reports) adopted the proper rule, calling upon the complainant in that action to prove various book

items in the usual way, by the data underlying the entries in the books, by witnesses who could be produced with a personal knowledge of the matters recorded in books and by the other time honored methods of proof which our English System of jurisprudence have established.

Answering Appellee's point that the statute should be declared unconstitutional upon a showing of eighteen (18) months.

Appellee, probably realizing the necessity of the matter, attempts to extend the period in question in this case which *is* 18 *months* to three years. First by extending the period to include the date of final decree and then asking this Court to take judicial notice of the year following the final decree. The *proof* was upon the period from Jan. 1, 1919 to June 30, 1920, and this is all this Court should consider. If, however, the Court will, as appellee argues, take judicial notice of price levels in 1921, this case must be reversed. For, as we have already pointed out, the cost of manufacturing gas has been very materially and substantially decreased by the drop in gas oil prices in and about New York City from 12-3/4 cents a gallon to about 5-1/2 cents a gallon, during the latter part of 1920 and this current year. Every cent decrease in the price of gas oil means a corresponding saving of about four cents in the price of gas per thousand cubic feet. Such a reduction in the price of oil will alone account for a saving of at least 25 cents per thousand cubic feet, enough to make the statute constitutional beyond a question of doubt upon the most favorable basis that the appellee can possibly advance.

The question of the necessary period to be con-

sidered and the impotency of using a grossly abnormal period, during which prices were excessively unnatural, is discussed in our main brief pages 50-67.

We desire to correct a typographical error at page 50 of our brief. The period in the Darnell case should be six months instead of eighteen months, as therein printed.

Answering Appellee's Point That There Were No Improper Items Included in Appellee's Operating Expenses.

Coal and Oil Shortages.

The appellee does not deny that shortages claimed by the appellant existed but merely contends that the amounts were comparatively small.

Boiler Fuel Coal.

The excessive and unreasonable amount of boiler fuel used by the appellee company was based upon the testimony of the appellant's expert witnesses and admitted by the witnesses of the company. On this score, we respectfully quote from the testimony of appellee's own witness, Klumpp:

> "Q. Have you looked over the other items here—boiler fuel?
>
> "A. Yes, *boiler fuel is high compared to what I would consider good efficient operations*" (p. 353).

If the court has any doubt upon this question we respectfully refer to pages 354, 355 and 356 of the record wherein this witness Klumpp explains why he considered 18.8 pounds of boiler fuel coal excessive.

In answer to a question by counsel for appellee, witness Klumpp again said, on page 354:

> "Why if we get a good grade boiler fuel *I figure on* 12 *to* 14 *pounds of boiler fuel.*"

This was upon direct examination. Appellee's brief (p. 7) speaks of this witness as having made "an extended study of the subject," and (p. 29) "for many years engaged in supervising the operations of 30 gas plants operated in 40 cities." With the witness of appellant corroborated and entirely substantiated by appellee's own expert in this manner we feel that the deductions made in our main brief for boiler fuel (p. 81) fully justified.

Repair Expenses.

These repairs for 1919 and 1920 were unduly excessive, about 80% greater in 1919 than the average yearly repair expense for the period 1909-1919, inclusive, and for the six months of 1920 were about 150% greater than the yearly average. Appellants are justifed in asking the court to look with some degree of scrutiny upon such excessive amounts. The courts in rate cases have universally looked for some stable, average figure for operating expense items rather than accept a figure which, upon its very face, is unduly excessive, and in the light of the past experience of the company, patently exorbitant. In addition to this, the company's own President, Elsman, testified that the repairs in 1919 were extraordinary (p. 306-308).

> "A. We required in the period from October, 1918, to down until November, 1919,—we ran our Cox stoker boiler continuously. Up to that time the company was dependent entirely

upon hand fired boilers, the eight hand fired boilers, including the two tar burning boilers. Those boilers were in operation continuously from the time I went in with the company in 1917. It was not until the year of 1919 we were able to take those hand fired boilers out of operation to overhaul them and thoroughly repair them, and that we were enabled to do by the installation of our Cox boilers, when the installation of our Cox boilers was complete; and in the year of 1919, we took down and overhauled and rebricked and relined and retubed our entire installation of hand fired boilers. *All those repairs were made in the year of* 1919.

"Q. And in a word, you were enabled to do that because you had put in the new equipment and was able to put those on the idle shelf for the time?

"A. Yes.

"Q. Prior to that time you were short of boiler capacity and had to use them to intensify?

"A. Those were the only boilers we had.

"Q. And you had to use them to capacity?

"A. Yes, absolutely.

"Q. If you had had sufficient boiler capacity in 1918, probably some of those repairs would have been made in 1918, and would have been reflected in that year?

"A. Had we been able to take those boilers out of operation long enough to repair them, *they would have been repaired the previous year.*

"Q. Comment was also made referring to the other repairs about the works in 1919.

"A. 1919 or 1920?

"Q. Well, both. Is there any—

"A. Why, yes, you will find that in 1920,—*you will find a great increase in the cost of the repairs* of our water gas sets and accessories. That is due to the fact that it was necessary for us to run these machines for periods as long

as 5,000 hours before we could take them out of service; and on account of the demand for gas by the consumers, after we took those machines out of operation, instead of just finding it necessary to rechecker and rebrick them, we found many instances that we had to practically rebuild our entire machine, put in new doors where they were burned in, and hot spots in the lining, and the walls and everything had entirely gone. And instead of getting a machine back in operation in a normal period of 24 hours to three days, it has taken us as long as six weeks or two months to get a machine back in service again."

Such extraordinary repairs should be spread over a period and not confined to a single year which is chosen by the appellee, for the purpose of establishing the unconstitutionality of a legislative rate. The courts have, without exception, followed such a rule in all rate litigation.

Unaccounted for gas.

This question is fully discussed in the main brief (pp. 36-44), and needs no further comment except to reiterate that the "unaccounted for gas" of New York City companies has never gone beyond 8%. Judge Hand reduced the 7% claimed by the Consolidated Gas Company to 4.1%. The Brooklyn Union Gas Company charges its subsidiary companies located in territory similar to the territory served by the appellee, 8% for "unaccounted for." It is most unlikely and contrary to all business experience that the Brooklyn Union Gas Company would charge its subsidiaries a lesser amount than the experience of the past indicated was a fair amount. If the company were to err, in a matter of this kind, the error would lean, in

all probability, towards a slightly excessive figure, rather than one which was insufficient to meet the actual conditions; any other policy would be poor financial management.

Counsel for appellant conceded at the trial that the 8% charged by the Brooklyn Union Gas Company to its subsidiaries did "not represent any actual unaccounted for"; that is, it was conceded that the 8% was not an *actual mathematical measurement* of the unaccounted for gas. It was not conceded, however, and never was it intended to concede that the 8% was not at least a fair approximation of the gas lost. The directors of the Brooklyn Union Company, with the experience of the past to judge by, fixed this figure and it is more than likely that it represents the *maximum amount* of gas actually lost. In the trial of the Newtown case (one of the subsidiaries of the Brooklyn Union) before Special Master Graham, appointed by the Federal Court for the Southern District of New York, recently tried, the master held that the Newtown company was bound by this figure of 8% for unaccounted for, having been fixed by the Board of Directors of the parent concern. 8%, we urge, is a very liberal figure to allow for the appellee.

Auditing expense.

Appellants' reasons for asking for a disallowance of this item are given on p. 84 of the main brief appellee's brief to the contrary notwithstanding.

Street Lighting.

The appellee does not deny the loss occasioned in municipal lighting. It contends that it is "an incident of the business." Appellant again urges that the consumers should not be charged with

any such loss and also urges the point set forth in Point VIII of our main brief (pp. 67, 68) that by reason of the duplicate character of appellee's business (a) Service to private consumers, (b) Service to the municipality, there was such a non-joinder of parties as to make the determination of the confiscatory character of the statute impossible of determination. This point is not answered by appellee's brief.

Uncollectible Bills.

Appellant's main brief, (pages 86, 87 & 88) covers this topic sufficiently. The appellee seems to argue that since this amount is less than 1 cent per thousand cubic feet of gas sold, it should be ignored.

Strike—towage.

Appellant contends that such an unusual and infrequent expense should be disallowed in a rate case for the same reasons advanced under the caption "repair expense." Appellee confuses actual operating expenses and operating expenses allowed in a rate case. Unusual and extraordinary expenses are perhaps chargeable to operating expense, but in the trial of rate cases the courts are seeking to obtain the usual, ordinary, year-after-year expenses of a company in order to determine what the future experience of the company will be. Prophecy is not best predicated upon accidents of the past. Courts attempt to fix a company's future operating expense upon *the usual and normal expenses* of the past.

Water—Gas Tar, and Quantities of Gas Oil Used.

Upon these matters we respectfully refer to our main brief (pp. 88, 89 and 90.)

The appellant received a page-proof copy of part of appellee's brief on the 7th of November, and a typewritten copy of part of the brief on the 9th of November. In this brief time we have attempted to reply to the points raised by the appellee in its brief as we received it.

AS URGED IN OUR MAIN BRIEF, THE DECREE HEREIN SHOULD BE REVERSED AND THE COMPLAINT DISMISSED.

Respectfully submitted,

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NEWTON, ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL. *v.* KINGS COUNTY LIGHTING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 295. Argued January 5, 6, 1922.—Decided March 6, 1922.

Approving the conclusion of the master and of the District Court, that the gas rate imposed on appellee under New York Laws, 1906, c. 125; 1916, c. 604, had become confiscatory.
268 Fed. 143, affirmed.

APPEAL from a decree enjoining enforcement of a statutory gas rate as confiscatory. See also the preceding cases, *ante*, 165, 178.

Mr. Wilber W. Chambers, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, and *Mr. Charles E. Buchner* were on the briefs, for Newton, Attorney General.

Mr. Samuel F. Moran, with whom *Mr. John D. Monroe* was on the brief, for appellee.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the court.

This is an appeal from a final decree entered October 19, 1920, which enjoined the enforcement of c. 125, Laws of New York of 1906, and also the Act of New York Legislature approved May 9, 1916, c. 604, Laws of 1916. 268 Fed. 143. The first of these statutes fixed the price which appellee might charge for gas distributed in New York City at $1.00 per thousand cubic feet, and the second amended the earlier one by reducing the maximum price to eighty cents.

180. Syllabus.

The original bill filed in May, 1920, alleges that the actual cost to appellee of manufacturing and distributing gas during 1919 and the first three months of 1920 had exceeded eighty cents per thousand cubic feet; that such cost would not be less than $1.00 for an indefinite period thereafter; and that the statutory rate was confiscatory.

The matter was referred to a Master who took proof and made a report which supported appellee's claim. With some unimportant modifications this was confirmed by the court. An appropriate decree followed which we are asked to reverse for sundry specified reasons commented upon orally and in the brief.

We are satisfied that the court below reached a correct conclusion and that none of the points relied upon for reversal are adequate to justify such action. So far as substantial all were adequately disposed of by the opinion of the trial court, and we need not comment further upon them.

The judgment below is

Affirmed.